

Euring v Palmer

2010 NY Slip Op 31245(U)

May 20, 2010

Supreme Court, Suffolk County

Docket Number: 08-24650

Judge: Patrick A. Sweeney

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SHORT FORM ORDER

INDEX No. 08-24650

CAL. No. 09-01429-MV

5-20-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. PATRICK A. SWEENEY
Justice of the Supreme Court

MOTION DATE 10-30-09

ADJ. DATE 1-7-10

Mot. Seq. # 002 - MD

CAROL A. EURING,
Plaintiff,
- against -
CHRISTOPHER PALMER,
Defendant.

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 10 - 13; Replying Affidavits and supporting papers 14 - 15; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Christopher Palmer seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Carol Euring as a result of a motor vehicle accident that occurred at the intersection of Main Street and Route 105 on December 5, 2006. The accident allegedly occurred when defendant Christopher Palmer struck the rear of plaintiff's vehicle while it was stopped at a red light. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including spondylotic degenerative changes associated with neural foraminal narrowing of the cervical spine; aggravation of pre-existing condition of degenerative arthritis with mild straightening of the cervical spine; disc bulges at levels C3-C4 through C6-C7; a disc herniation at level L5-S1; radiculopathy of the lumbar spine; and anterolisthesis of the lumbar spine. Plaintiff also alleges that she was confined to her bed and her home for approximately 16 days as a result of the subject accident. Plaintiff further alleges that she was incapacitated from her employment as a principal account clerk at Eastern Suffolk BOCES for approximately 16 days following the accident.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of

Dr. Vartkes Khachadurian and Dr. Mathew Chacko. Dr. Khachadurian performed an independent orthopedic examination of plaintiff at defendant's request on April 17, 2009. Dr. Chacko performed an independent neurological examination of plaintiff at defendant's request on April 17, 2009. Plaintiff opposes the instant motion on the ground that defendant failed to prove prima facie that she did not sustain a "serious injury" as required by Insurance Law § 5102(d). Alternatively, plaintiff asserts that the evidence submitted in opposition establishes that there are material issues of fact whether she sustained a "serious injury" under Insurance Law § 5102(d). In opposition to the motion, plaintiff submits her affidavit, and the sworn medical report of Dr. Norman Pflaster.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (*Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Moreover, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the “permanent loss of use” category, (see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, *supra* at 798; see *Toure v Avis Rent A Car Sys.*, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the “permanent consequential limitation of use of a body organ or member” or the “significant limitation of use of a body function or system” category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (see *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2005]). A sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

Further, a plaintiff must also present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement based on a recent examination (see *Laruffa v Yui Ming Lau*, *supra*; *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [1999]). Where a defendant in an action seeking damages for a “serious injury” presents evidence that a plaintiff’s alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (*Pommells v Perez*, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; see *Ciardia v Luchian*, 54 AD3d 708, 864 NYS2d 74 [2008]; *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2007]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]). For a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (see *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2006]; *Foley v Karvelis*, 276 AD2d 666, 714 NYS2d 337 [2000]). Furthermore, a plaintiff alleging injury within the “limitation of use” categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; see *Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2008]).

Dr. Khachadurian’s report states, in relevant part, that an examination of plaintiff lumbar spine reveals that she exhibits forward flexion of 70 degrees, with 90 degrees being normal; backward extension of 30 degrees, with 30 degrees being normal; side to side tilt of 30 degrees, with 30 degrees being normal; and side to side rotation of 45 degrees, with 45 degrees being normal. The report states that the examination of plaintiff showed no evidence of radicular pain or antalgia or limp on ambulation, that she is able to stand on her toes and heels without difficulty; and that she has normal lordosis without any evidence

of spasm or shift of the lumbar spine. The report also states that an examination of plaintiff's cervical spine reveals that she exhibits forward flexion of 70 degree, with 70 degrees being normal; backward extension of 50 degrees, with 50 degrees being normal; right and left tilt of 30 degrees, with 30 degrees being normal; and right and left rotation of 45 degrees, with 45 degrees being normal. It states that plaintiff's straight leg test was negative, that she has normal reflexes at the knees and ankles, and that she has no evidence of atrophies of the hands or upper extremities. Dr. Khachadurian opines that plaintiff's cervical and lumbar sprains have resolved with no evidence of neuromotor deficits, and that there is no evidence of herniated discs, radiculitis or radiculopathy superimposed on underlying degenerative disease and spondylosis. The report concludes that plaintiff does not require any additional orthopedic treatment or physical therapy and that plaintiff does not have an ongoing orthopedic disability related to the subject accident.

Likewise, Dr. Chacko's report states, in pertinent part, that an examination of plaintiff's lumbar spine reveals that she exhibits flexion of 40 degrees, with 60 degrees being normal; lateral flexion of 15 degrees, with 25 degrees being normal; and extension of 1 degree, with 25 degrees being normal. The report states that plaintiff's gait is normal with no sign of cerebellar dysfunction. It states that there is tenderness upon palpation, but that no muscle spasm is felt upon palpation of the cervical, thoracic, or lumbar areas. The report also states that an examination of plaintiff's cervical spine reveals that she exhibits flexion of 50 degrees, with 50 degrees being normal; extension of 60 degrees, with 60 degrees being normal; bilateral lateral rotation of 60 degrees, with 80 degrees being normal; and right and left lateral flexion of 30 degrees, with 45 degrees being normal. It states that plaintiff's motor strength and tone are normal, and that plaintiff's straight leg raising is 60 degrees on the left and 90 degrees on the right, with 90 degrees being normal. The report states that there was diminished sensation of the left lateral foreleg, but that there were no other focal sensory abnormalities. Dr. Chacko opines that plaintiff's cervical and lumbar strains have resolved and that there are no neurological deficits. The report concludes that plaintiff is not disabled and is capable of performing her daily living activities.

Here, defendant has failed to establish his prima facie burden entitling him to judgment as a matter of law that plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102(d) as a result of the subject accident (*see Pommells v Perez, supra; Toure v Avis Rent A Car Sys., supra; Gaddy v Eycler, supra; McFadden v Barry*, 63 AD3d 1120, 883 NYS2d 83 [2009]; *Hurtte v Budget Roadside Care*, 54 AD3d 362, 861 NYS2d 949 [2008]). Although, defendant's examining orthopedist, Dr. Khachadurian, set forth plaintiff's active ranges of motion for her cervical and lumbar spines and compared them to the normal ranges of motion, he failed to specify the range of motion testing performed during his examination of plaintiff, which led him to conclude that plaintiff did not sustain any limitation to her ranges of motion in her cervical and lumbar regions (*see Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 [2007]; *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 [2001]; *Junco v Ranzi*, 288 AD2d 440, 733 NYS2d 897 [2001]; *Papadonikolakis v First Fid. Leasing Group, Inc.*, 283 AD2d 470, 724 NYS2d 635 [2001]). Additionally, despite the fact that the range of motion tests conducted by Dr. Khachadurian on plaintiff's lumbar spine revealed a significant limitation, Dr. Khachadurian failed to establish any basis upon which it might be concluded that such limitations were not causally related to or exacerbated by the subject accident (*see Joissaint v Starrett-1 Inc.*, 46 AD3d 622, 848 NYS2d 259 [2007]; *Sullivan v Johnson*, 40 AD3d 624, 835 NYS2d 367 [2007]; *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2007]).

Similarly, defendant's examining neurologist, Dr. Chacko, found significant range of motion limitations in plaintiff's lumbar and cervical spines (*see Bentivegna v Stein*, 42 AD3d 555, 841 NYS2d 316

[2007]; *Wade v Allied Bldg. Products Corp.*, 41 AD3d 466, 837 NYS2d 302 [2007]; *Cassandra v Dumond*, 31 AD3d 476 [2006]; *Tchjevaskaia v Chase*, 15 AD3d 389, 790 NYS2d 175 [2005]). As a consequence, the limitations found in plaintiff's cervical and lumbar regions by Dr. Chacko belie his conclusion that her cervical and lumbar sprains have resolved without evidence of any neuromotor deficiency (see *Landman v Sarcona*, 63 AD3d 690, 880 NYS2d 168 [2009]; *Jenkins v Miled Hacking Corp.*, 43 AD3d 393, 841 NYS2d 317 [2007]; *Bentivegna v Stein*, 42 AD3d 555, 841 NYS2d 316 [2007]; *Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 930 [2007]). In addition, Dr. Chacko failed to explain how the tenderness observed in plaintiff's spine, and the diminished sensation in plaintiff's left lateral foreleg were not causally related to the subject accident (see *Shamsodeen v Kibong*, 41 AD3d 577, 839 NYS2d 765 [2007]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]).

Furthermore, the reports prepared by defendant's experts each cite different and contradictory numbers for what is considered normal ranges of motion findings for the cervical and lumbar spines of a person of plaintiff's age, height, and weight. Indeed, their ranges of motion measurements of plaintiff differed from each other by as much as between 10 degrees to 35 degrees. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; see *LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [2008]; *Reynolds v Burghezi*, 227 AD2d 941, 643 NYS2d 248 [1996]). Therefore, these discrepancies between defendant's experts create an issue of fact for the jury to determine (see *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 851 NYS2d 306 [2008]; *Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [2003]; *Velasquez v Quijada*, 269 AD2d 592, 703 NYS2d 518 [2000]; *Jackson v United Parcel Serv.*, 204 AD2d 605, 612 NYS2d 186 (1996)). In addition, both Dr. Khachadurian and Dr. Chacko reports failed to demonstrate that plaintiff's alleged pre-existing degenerative changes of the cervical spine were not exacerbated by the subject accident (see *Scarano v Wehrens*, 46 AD3d 797, 847 NYS2d 644 [2007]; *Gentile v Snook*, 20 AD3d 399, 799 NYS2d 230 [2005]).

Consequently, the proof submitted by defendant failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her cervical and lumbar regions as a result of the subject accident (see *Fudol v Sullivan*, 38 AD3d 593, 831 NYS2d 504 [2007]; *Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2006]). Inasmuch as defendant has failed to establish his entitlement to judgment as a matter of law, the sufficiency of plaintiff's papers in opposition to the instant motion need not be considered (see *Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 [1993]; *Joissaint v Starrett-1 Inc.*, *supra*; *Cedillo v Rivera*, 39 AD3d 453, 835 NYS2d 238 [2007]; *Doggett v Kelly*, 294 AD2d 464, 742 NYS2d 557 [2002]; *Chapin v Taylor*, 273 AD2d 188, 708 NYS2d 465 [2000]). Accordingly, defendant's motion for summary judgment is denied.

Dated: 5-20-10



J.S.C.