Navaro v Marino
2010 NY Slip Op 31301(U)
May 24, 2010
Sup Ct, Richmond County
Docket Number: 100241/09
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:100241/09
Motion No.:001,002

SMADAR NAVARO, an infant over the age of 14 years by her mother ORLY NAVARO, and ORLY NAVARO, Individually,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

VICTORIA F. MARINO, JOSEPH J. MARINO, and DAVID J. NAVARO,

Defendants

The following items were considered in the review of the following motions for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move and cross-move for summary judgment dismissing the plaintiffs complaint on the basis that the infant-plaintiff, Smadar Navaro, did not sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), pursuant to CPLR § 3212. The defendants' motion and cross motion are granted to the extent that the plaintiff's claim pursuant to 90/180 is dismissed, but denied on all other grounds.

Facts

Smadar Navaro is suing through her mother, Orly Navaro, for alleged personal injuries sustained as a result of an automobile accident that occurred on July 19, 2007. Smadar Navaro

was allegedly injured while she was a passenger in a car operated by her father, that was struck by an automobile operated by Victoria Marino and owned by Joseph Marino. Smadar Navaro began treatment with David N. Lifschutz, M.D. a neurologist at Integrated Neurological Associates, PLLC on August 2, 2007. Smadar Navaro received treatment from Dr. Lifschutz through approximately the end of October 2007. Concurrently, Smadar Navaro received acupuncture therapy from her mother, an acupuncturist, from the date of the accident until approximately January 2008. It is asserted that the plaintiff ceased treatment when her no fault benefits expired. In her affidavit the plaintiff states that she was unable to afford the continued medical treatment.

The plaintiff's bill of particulars states that the Smadar Navaro sustained and suffered a "serious injury" as that term is defined in Insurance Law § 5102(d) in that she sustained: permanent consequential limitation of use of a body organ; and/or a significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing all of the material acts which constitute such persons usual and customary daily activities for not less than 90 out of the first 180 days immediately following the occurrence of the injury or impairment.

The defendants submit the medical report of Joseph C. Elfenbein, M.D. a board certified orthopedic surgeon. Dr. Elfenbein examined Smadar Navaro's cervical and lumbar spine, left and right knee, and right and left ankle and foot. He found that the plaintiff's range of motion tests for each body part were within in normal ranges. And that she tested negative on the following objective tests: Distraction, Soto Hall, Fabere, Lachman, McMurray, Patella tracking, Apley's Drawer's and instability tests. In two instances Dr. Elfenbein found that the plaintiff's flexion in her lumbar spine, left and right knees exceeded normal values. Dr. Elfenbein's final impression was that Smadar Navaro suffered sprains and/or strains to her cervical and lumbar spine, as well as in her right and left knees. But all of which were resolved.

The plaintiff submits the expert statement of David N. Lifschutz, M.D. a neurologist. Dr.

Lifschutz examined the plaintiff on February 9, 2010 and found limitations in the plaintiff's range of motion in her cervical and lumbosacral spine. Dr. Lifschutz found that the plaintiff has a linear meniscal tear, and a continued sprain/strain/myofasciitis to her cervical and lumbar spines accompanied by disc bulges.

Discussion

Defendants seek summary judgment on the ground that the plaintiffs have not sustained a "serious injury" as defined in Insurance Law §5102(d).[1] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.[2] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[3] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine serious injury threshold categories.[4]

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law *§5102*(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's

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[1] A serious injury must be a personal injury, "[W]hich 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 constitutes 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" (Insurance Law *§5102* [d]).

[2] *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

[3] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[4] *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[5] The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[6] The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.[7] Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, the defendants contend that the plaintiff did not sustain a permanent consequential limitation of use of a body organ; and/or a significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing all of the material acts which constitute such persons usual and customary daily activities for not less than 90 out of the first 180 days immediately following the occurrence of the injury or impairment. The defendant's expert avers that while the plaintiff may have suffered a sprain or strain to her cervical and lumbar spine and left and right knees, these injuries are resolved. The defendant's expert supports these findings with the requisite objective tests.

The burden now shifts to the plaintiff must come forward with an expert report based on quantitative objective findings, in addition to an opinion as to the significance of the injury to successfully.[8]

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[5] S*ee*, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[6] S*ee*, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

[7] *Id*.

[8] *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

Here, the plaintiff had a gap in treatment from Dr. Lifschutz of approximately two years and five months. Substantial delays between cessation of plaintiff's medical treatments post-accident and an expert examination must be explained.[9] The plaintiff states in her affidavit that she stopped treating with Dr. Lifschutz because her no fault benefits expired. As a result she could no longer afford to continue treatment. Such an explanation sufficiently explains the gap in treatment given to the plaintiff for her alleged injuries.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.[10] The plaintiff's expert, Dr. Lifschutz, submits a report that demonstrates that the plaintiff's range of motion in her cervical and lumbar spine is drastically reduced. And he submits a diagnosis of a linear meniscal tear. This report is sufficient to establish a limitation of use. As such, it is an issue of fact as to whether the plaintiff suffered a permanent consequential limitation, or a significant limitation of use of a body function or system

However, the plaintiff testified that she missed no time from school as a result of the accident, nor did she miss time from work. And the plaintiff's expert report does not reference any limitations on the plaintiff's activities after his initial examination. As such, the plaintiff's claim under the 90/180 category must be denied.

Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues

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[9] *Grossman*, 268 AD2d at 84.

[10] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2nd Dept 2002].

of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[11] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[12] Here, the parties experts submit contradictory findings based on objective tests as to whether suffered a "serious injury" as defined in Insurance Law §5102(d).

Accordingly, it is hereby:

ORDERED, that the defendants' motion and cross motion are granted to the extent that the plaintiffs' claim pursuant to 90/180 is dismissed; and it is further

ORDERED, that the defendants' motion and cross motion are denied in all other respects; and it is further

ORDERED, that the parties shall return to DCM Part 3 on **Monday, July 12, 2010 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: May 24, 2010

Joseph J. Maltese
Justice of the Supreme Court

[11] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2nd Dept 1990].

[12] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].