

Parker v Louis J. Kennedy Trucking

2010 NY Slip Op 31305(U)

May 21, 2010

Supreme Court, New York County

Docket Number: 107613/06

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SHAKYRA PARKER,
Plaintiff,

INDEX NO. 107613/06

-against-

MOTION DATE _____

**LOUIS J. KENNEDY TRUCKING and
ROBERT COPELAND,**
Defendants.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

EMERIS LACEN,

Plaintiff,

INDEX NO. 107613/06

-against-

**ROBERT COPELAND JR., LOUIS J. KENNEDY
TRUCKING and SHAKYRA PARKER,**

Defendants.

The following papers, numbered 1 to 2 were read on this Motion by defendant(s) for a motion for summary judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
PAPERS NUMBERED _____
MAY 27 2010
NEW YORK COUNTY CLERK'S OFFICE

In this action for personal injuries resulting from a motor vehicle accident, defendants Robert Copeland, Jr. and Louis J. Kennedy Trucking, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the grounds that plaintiff, Shakyra Parker (Parker), has not met the serious injury threshold as defined by New York's No-Fault Law (Insurance Law § 5102 [d]). Defendants contend that, based upon medical exams and

objective testing, Parker does not have a serious injury as defined by the statute.

Parker argues that the motion for summary judgment must be denied, because her injuries meet the threshold for a serious injury pursuant to section 5102 (d) of the Insurance Law.

FACTUAL ALLEGATIONS

Parker was involved in a motor vehicle accident which took place on August 26, 2005, at the intersection of Queens Boulevard and Van Dam Street in Queens, New York. Parker maintains that, although she was wearing a seatbelt, her body was jerked forward and back, and her neck and back hit the seat.

Parker's alleged injuries include a disc bulge at C4-C5 and L5-S1, straightening of the lordotic curve, cervical radiculopathy, cervical sprain/strain, lumbosacral radiculopathy, and a lumbar sprain/strain. Parker also maintains that as result of the injuries, she has experienced depression, headaches, anxiety, fear, emotional issues, and shock.

Following the accident, Parker sought treatment with her private doctor, Dr. Sinclair, who gave her a prescription for painkillers and muscle relaxers and referred her for physical therapy. Although Parker maintains that she visited Dr. Sinclair, she did not provide the date of the visit. Thereafter, on October 21, 2005, Parker sought treatment at Crotona Heights Medical Center and underwent a physical examination and testing with Dr. Andrew Cordaro, M.D. Dr. Cordaro's office conducted range of motion testing which revealed that Parker's cervical spine flexion was 40 degrees (60 degrees normal), extension was 30 degrees (50 degrees normal), left lateral flexion was 30 degrees (40 degrees normal), and right lateral flexion was 30 degrees (40 degrees normal). The examination also revealed reduced range of motion of the lumbar spine. Flexion was at 80 degrees (90 degrees normal) and extension was at 20 degrees (30 degrees normal). Dr. Cordaro recommended physical therapy at a rate of two times per week.

An MRI of the cervical spine was conducted on September 21, 2005, and was read by

Dr. Charles Cooper, M.D. The MRI revealed a C4-C5 annular disc bulge, straightening of the normal lordotic curvature of the cervical spine due to muscle strain or spasm, and no evidence of disc herniation. On September 28, 2005, a MRI of the lumbar spine was conducted and reviewed by Dr. Charles DeMarco, M.D., which revealed posterior disc bulges at L5-S1 and no evidence of disc herniation.

On February 16, 2006 and February 18, 2006, Parker underwent manipulation under anesthesia which was performed by Dr. Tarakchya, D.C., at Queens Surgi-Center.

On September 21, 2006, Dr. Shahid Mian, M.D., conducted an orthopedic examination of Parker. Dr. Mian agreed with Dr. Cooper and Dr. DeMarco's review of the MRI films and diagnosed Parker with a bulging C4-5 disc and a bulging L5-S1 disc. He concluded that with a reasonable degree of medical certainty, Parker's injuries casually related to the August 26, 2005 accident.

On June 11, 2009, Dr. Mian conducted range of motion tests on Parker's cervical and lumbar spines which were analyzed in comparison to the normal ranges of motion published by the American Medical Association. Dr. Mian found decreased range of motion in the cervical and lumbar spine. For example, Parker's flexion of the cervical spine was 30 degrees (60 degrees normal) and flexion of the lumbar spine was 70 degrees (90 degrees normal). After reviewing Parker's medical history including the subsequent injuries from a November 1, 2005 incident which plaintiff hurt her wrist and a second motor vehicle accident which occurred on January 5, 2007, Dr. Mian concluded that Parker's injuries to the cervical and lumbar spine are permanent and casually related to the August 26, 2005 motor vehicle accident.

At the request of the defendants, on February 5, 2008, Dr. Maurice Carter, M.D., performed an orthopedic examination of Parker. Dr. Carter conducted several tests including measuring Parker's reflexes, manual motor testing, light touch sensory, and chin to chest extension. Dr. Carter noted that Parker had no injury which would require the manipulation

under anesthesia procedure which was performed by Dr. Tarakchya. Based upon his examination and his review of her medical records, Dr. Carter concluded Parker had recovered fully from whatever sprains or strains which were a result of the motor vehicle accident.

Also at the request of the defendants, on February 26, 2008, Dr. William Head, Jr., M.D., conducted a neurological examination of Parker. Dr. Head's range of motion testing revealed that Parker's cervical extension was 50 degrees (50 degrees normal), cervical extension was 60 degrees (60 degrees normal), and cervical rotation was 80 degrees bilaterally (80 degrees bilaterally normal). Lumbar flexion was 60 degrees (60 degrees normal), lumbar extension was 5 degrees (25 degrees normal) and lumbar lateral flexion was 25 degrees, bilaterally (25 degrees, bilaterally). After completing several other tests, Dr. Head concluded that he could find no objective evidence that Parker had any lasting neurological condition or disability.

Defendants maintain that, although counsel for plaintiff submits a medical affirmation from Dr. Cooper who evaluated MRI films taken in September of 2005, Dr. Cooper failed to discuss an MRI taken on October 11, 2006 which shows no evidence of posterior bulge, herniation, central canal, or neuroforaminal narrowing. Defendants also submit a report from Alfred L. Cipriani, P.E. (Cipriani), an accident reconstruction expert, who concluded that the force of the impact felt by Parker as a result of the accident, was comparable to that of a severe cough.

DISCUSSION

Section 5102 (d) of New York State's Insurance Law defines the term "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.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture, or loss of a fetus. Therefore, the court must determine if the injuries asserted by Parker constitute a permanent loss of use of a body organ, member, function, or system; or, a permanent consequential 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 substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Defendants maintain that, upon viewing the facts most favorable to Parker, it is clear that her injuries are not serious as defined by section 5102 (d) of the Insurance Law, because she does not have a significant limitation of the use of a body function or system. Defendants contend that the physicians whom examined Parker have offered their qualitative assessment of her injuries and concluded that she has a normal range of motion and no limitations or other indications of any residual loss of function. Therefore, defendants have met their burden by producing the affirmations of both Dr. Carter and Dr. Head, and the burden now shifts to Parker to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law. *Gaddy v Eyer*, 79 NY2d 955, 957 (1992); *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003).

The First Department has held that "[i]n order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation

has an objective basis and compares the plaintiff's limitations to the normal use of the affected body system or function." *Shinn v Catanzaro*, 1 AD3d at 198. In addition, the Court of Appeals has held that a significant limitation must be something more than a "minor, mild or slight limitation of use." *Gaddy v Eyler*, 79 NY2d at 957, quoting *Licari v Elliott*, 57 NY2d 230, 236 (1982).

Here, the results of Parker's recent examinations vary greatly. For example, Dr. Head's February 26, 2008 examination revealed that Parker's cervical flexion was 50 degrees (50 degrees normal) and lumbar flexion was 60 degrees (60 degrees normal). Dr. Head concluded that he could find no objective evidence of any lasting neurological condition or disability. However, on June 11, 2009, Dr. Mian's examination found decreased range of motion in the cervical and the lumbar spine. Parker's cervical flexion was 30 degrees (60 degrees normal) and lumbar flexion was 70 degrees (90 degrees normal). Dr. Mian concluded that Parker's injuries to the cervical and lumbar spine are permanent.

Although Dr. Head and Dr. Mian's conclusions as to range of motion differ, the Court of Appeals has held that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury -- such as a gap in treatment, an intervening medical problem or a preexisting condition -- summary dismissal of the complaint may be appropriate." *Pommells v Perez*, 4 NY3d 566, 572 (2005).

Defendants contend a gap in treatment exists because the last time Parker received treatment before the independent medical examination was in 2006. However, Parker testified that her medical treatment stopped, because her no-fault insurance benefits were terminated. Contrary to the contentions of defendants, this explanation is a reasonable one, sufficient to explain the cessation in treatment. See *Perez v Vasquez*, __AD3d__, 2010 NY Slip Op 02065 (1st Dept March 18, 2010) (plaintiff adequately explained the gap in treatment by providing in

his affidavit that he stopped receiving treatment for his injuries when his no-fault insurance benefits stopped).

There is also a dispute over the level of impact felt by Parker at the time of the accident and whether the impact was strong enough to inflict the alleged injuries. While Cipriani, an accident reconstruction expert, maintains that the impact was comparable to that which one feels as a result of a strong cough, Parker maintains that the impact resulted in serious injuries due to her body jerking forward and back, as well as her neck and back hitting the seat.

As there exists conflicting medical affirmations between the examining physicians relating to Parker's range of motion and concerning the permanency of the injuries, and because of the conflicting arguments as to whether the impact from the accident was strong enough to cause Parker's injuries, the motion for summary judgment must be denied.

Parker also contends that she has suffered an injury under the "90/180" category of the Insurance Law. In determining whether a person has suffered a "90/180" injury, plaintiff must show that she was incapacitated from performing all of her usual and customary activities for at least 90 out of 180 days following the accident. See *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 (1st Dept 2008); *Thompson v Abbasi*, 15 AD3d 95, 100-101 (1st Dept 2005).

Parker testified that as a result of the accident, she is unable to play basketball, has trouble sweeping and no longer goes to the gym. She also has difficulty sitting and standing for long periods of time, walking long distances, climbing stairs, lifting heavy things, bending, sleeping, doing laundry and grocery shopping. However, Parker returned to work as a temporary security guard at the U.S. Open on the same night which she was involved in the accident and continued to work there until the temporary position ended. She also worked at various security positions and presently works at a department store, where her duties include customer service and sweeping the floor.

Although some of Parker's activities have been impacted as a result of the accident,

there is no evidence that she has sustained injuries which have prevented her from performing substantially all of the material acts that constitute her usual and customary daily activities for at least 90 days during the 180 days immediately following the accident. See *Cartha v Quin*, 50 AD3d 530, 530 (1st Dept 2008) (minor curtailment of usual activities during the "90/180" time frame does not satisfy the statute).

Therefore, Parker fails to raise a triable issue of fact as to whether her injuries do not fall under the "90/180" category of serious injury as defined by the Insurance Law. Nonetheless, as set forth above, the motion must otherwise be denied because based upon the disputed findings of the various physicians, Parker has met her burden of raising a triable issue of fact under section 5102 (d) of the Insurance Law.

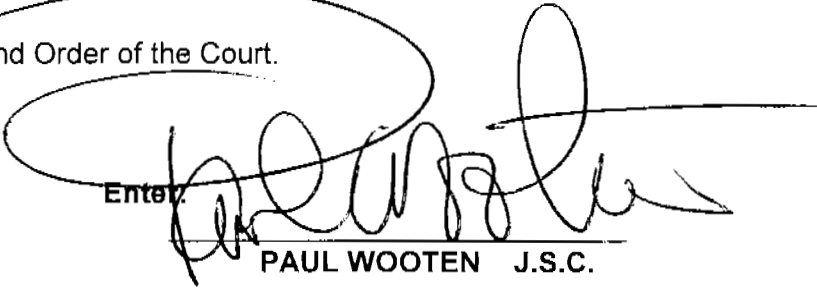
Accordingly, it is hereby

ORDERED that defendants Louis J. Kennedy Trucking and Robert Copeland's motion for summary judgement is denied.

ORDERED plaintiff shall serve a copy of this Order with Notice of Entry on defendant's counsel. Upon payment of the appropriate fees and filing of a copy of this Order with proof of service with the Clerk of this Court not later

This constitutes the Decision and Order of the Court.

Dated: May 21, 2010

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PAUL WOOTEN J.S.C.

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