Qureshi v Severe
2010 NY Slip Op 31319(U)
May 18, 2010
Supreme Court, Nassau County
Docket Number: 22261/08
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ANJUM A. QURESHI, Plaintiff, - against - ALMAGE SEVERE, Defendant.	TRIAL / IAS PART 29 NASSAU COUNTY Index No. 22261/08 Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1
Answering Affidavits	2
Replying Affidavits	3
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendant moves pursuant to CPLR 3212 and Insurance Law Article 51 for summary judgment dismissing the complaint which seeks damages for personal injuries sustained in an October 25, 2007 motor vehicle accident. The defense contends those injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), so the plaintiff's claim for non-economic loss is barred by Insurance Law § 5104 (a). The motion is supported by a February 2, 2010 affirmation by defense counsel, who points to the plaintiff's November 16, 2009 deposition testimony, the January 6, 2010 affirmation by Issac Cohen, M.D., East Hills Medical Services, P.C., who performed an

independent orthopedic evaluation of the plaintiff on January 6, 2010, the January 30, 2010 affirmation by Steven M. Peyser, M.D., a radiologist, who on January 30, 2010 reviewed a MRI of the plaintiff's cervical spine performed by A Plus Medical, P.C. November 26, 2007, and on January 30, 2010 reviewed a MRI of the plaintiff's right shoulder performed by A Plus Medical, P.C. November 12, 2007.

Dr. Cohen reviewed the plaintiff's medical reviews, the verified bill of particulars, the response to the defense demands for discovery and inspection, spoke to the plaintiff about then present complaints, and other papers regarding the plaintiff's conditions. Dr. Cohen opined there were no gross abnormalities with respect to the plaintiff's cervical spine, the plaintiff's range of motion was satisfactory, and a compression test was negative. Dr. Cohen found there was no motor weaknesses nor sensory deficit nor muscle atrophy with respect to the plaintiff's upper extremities. Dr. Cohen's examination of the plaintiff's right shoulder found unremarkable with no gross deformity noted, and no erythema nor effusion present. Dr. Cohen also found no tenderness on palpation of the AC joint, no weakness of the external rotation present, and the impingement signs were negative. Dr. Cohen opined palpation of the paravertebral area was supple and non-tender, and performed a range of motion tests. With respect to the plaintiff's lower extremities, Dr. Cohen found the reflexes are present, equal and symmetrical, in both lower extremities, knee jerks, and heel cords, and the plaintiff's motion strength is satisfactory with normal sensation and no muscle atrophy. On examination of the right

hip, Dr. Cohen concluded there was normal range of motion, the Patrick test was negative, and there was no tenderness nor swelling present. Dr. Cohen examined the plaintiff's right knee, and found flexion in active fashion, normal with full extension, no medial nor lateral instability, no tenderness nor swelling present, and the Lachman test and Spring test were negative. Dr. Cohen noted the plaintiff told him she was working full time for an extended period of time as a physical therapist in the same capacity as prior to the October 25, 2007 motor vehicle accident. Dr. Cohen opined the plaintiff "has a satisfactory normal functional capacity of both upper and lower extremities and as stated, has no evidence of residual disability or permanency documented related to the accident of record, 10/27/2007. Her subjective complaints are not corroborated by any objective findings in the physical examination or on the objective work up performed."

Dr. Peyser opined "the finding of spondylitic change with associated right paracentral disc herniation at C5-6 is most consistent with long standing degenerative disc disease and associated disc herniation. There is no evidence of post-traumatic etiology on this examination." Dr. Peyer reference was to his review of the MRI of the plaintiff's cervical spine. Dr. Peyser also opined "the finding of degenerative changes of the acromioclavicular joint with subacromial bursitis is most consistent with long standing degenerative disc disease change and inflammatory change. There is no evidence of post-traumatic change on this evaluation." Dr. Peyer reference was to his review of the MRI of the plaintiff's right shoulder.

The plaintiff opposes this motion. The plaintiff submits a March 4, 2010 affirmation by plaintiff's counsel, a legal memorandum, a February 16, 2010 affidavit by the plaintiff, a November 7, 2007 copy of a notice and proof of claim form for disability benefits by Eddy G. Rodriguez, M.D., Valley Medical Care, P.C., who affirms he is a licensed medical provider, a November 7, 2007 unsworn statement by Dr. Rodriguez regarding a November 7, 2007 initial consultation, November 26, 2007 unsworn statements by John S. Lyons, M.D., A Plus Medical, P.C. regarding routine non-contrast MRI images of the plaintiff's cervical spine obtained on November 26, 2007, and routine non-contrast MRI images of the plaintiff's lumbosacral spine obtained on November 26, 2007, a November 12, 2007 unsworn statement by Dr. Lyons regarding routine non-contrast MRI images of the plaintiff's right shoulder obtained on November 12, 2007, and a February 22, 2010 follow up examination report affirmed by Yury Koyen, M.D., Relief Medical P.C., who examined the plaintiff on February 16, 2010.

In the unsworn statements, neither Dr. Rodriguez nor Dr. Lyons make reference to the causal relationship between the plaintiff's complaint, and these results of these examinations and MRI outcomes with the October 25, 2007 motor vehicle accident. Dr. Koyen performed objective tests on the Dr. Koyen opined "it is clear that this patient has sustained a significant trauma to the above mentioned areas. Patient examination shows injuries and limitations that are casually related to the accident sustained by her on 10/25/07. Prognosis for recovery is poor without surgical repair of the right shoulder."

The defense attorney reiterates, in a April 23, 2010 affirmation, the defendant tendered competent medical proof sufficient for a prima facie showing the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). The defense attorney points out the plaintiff's opposition fails to tender competent medical proof sufficient to raise a triable issue of whether the plaintiff sustained a "serious injury" in the October 25, 2007 motor vehicle accident. The defense attorney argues Dr. Rodriguez's report has no probative value because that doctor failed to conduct any objective range of motion testing in the near aftermath of the October 25, 2007 motor vehicle accident. The defense attorney notes Dr. Rodriguez fails to tender any objective proof contemporaneous with the October 25, 2007 motor vehicle accident demonstrating the plaintiff sustained any limitation of motion to her cervical spine, lumbar spine or right shoulder, body in the near aftermath of the October 25, 2007 motor vehicle accident. The defense attorney maintains Dr. Rodriguez's report fails to establish the plaintiff was medically disabled from performing substantially all of her customary daily activities for at least 90 day out during the 180 days immediately following the October 25, 2007 motor vehicle accident. The defense attorney points out Dr. Rodriguez's report fails to establish the plaintiff's no-fault benefits were ever terminated, and the plaintiff reached maximum medical improvement when the plaintiff ceased all treatment with that doctor on February 7, 2008. The defense attorney argues, in the absence of any recent examinations, Dr. Rodriguez's report has no probative value. The defense attorney contends the notice and

proof claim for disability benefits submitted by Dr. Rodriguez has no probative value. The defense attorney asserts the MRI reports of Dr. Lyons have no probative value. The defense attorney avers the February 22, 2010 report of Dr. Koyen has no probative value because of the failure to explain the more than two year gap and complete cessation of treatment. The defense attorney notes the Dr. Koyen failed to address the findings of degenerative disc disease and change in the plaintiff's cervical spine and right shoulder, and renders speculative findings that the purported injuries to the plaintiff's cervical spine and right shoulder were caused by the October 25, 2007 motor vehicle accident. The defense attorney argues Dr. Koyen's report has no probative value since this doctor failed to conduct any objective range of motion testing during his only examination of the plaintiff. The defense attorney argues Dr. Koyen fails to tender any objective proof contemporaneous with the October 25, 2007 motor vehicle accident demonstrating the plaintiff sustained any limitation of motion to any portion of the plaintiff's body in the near aftermath of the October 25, 2007 motor vehicle accident. The defense attorney maintains Dr. Koyen's report fails to establish the plaintiff was medically disabled from performing substantially all of her customary daily activities for at least 90 day out during the 180 days immediately following the October 25, 2007 motor vehicle accident. The defense attorney notes, contrary to the plaintiff's claims in the verified bill of particulars, Dr. Koyen makes no diagnosis of disc herniations nor bulges. The defense attorney states the plaintiff's February 16, 2010 affidavit is self-serving, and devoid of probative value;

her deposition testimony confirms the plaintiff underwent only three months of physical therapy at Valley Medical Care, P.C.; and the plaintiff makes no representation no-fault benefits were terminated.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Court of Appeals held:

> In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (***see e.g. Dufel***, 84 NY2d at 798; ***Lopez***, 65 NY2d at 1020). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (***see Dufel***, 84 NY2d at 798). When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.

Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350-351, 746 N.Y.S.2d 865 [2002].

The Court of Appeals also held:

> This case concerns a different category of serious injury--the "90/180" category. Although this statutory category lacks the "significant" and "consequential" terminology of the two categories at issue in ***Toure*** and ***Manzano***, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]; ***see also Licari***, 57 NY2d at 236-239)

Toure v. Avis Rent A Car Systems, Inc., supra, at 357.

The Court of Appeals further held:

> While a cessation of treatment is not dispositive--the law surely does not

> require a record of needless treatment in order to survive summary judgment--a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so

Pommells v. Perez, 4 N.Y.3d 566, 574, 797 N.Y.S.2d 380 [2005].

Here, the defense submissions shifted the burden of coming forward with evidence to plaintiff to show a serious injury causally related to the October 25, 2007 motor vehicle accident (***Pommells v. Perez***, supra, at 579). In opposition, the plaintiff has not made that showing, and the plaintiff fails to furnish any explanation why she neglected to pursue any treatment for these injuries after February 7, 2008, nor did the plaintiff's doctors. This Court finds the defendant has established a ***prima facie*** entitlement to summary judgment as a matter of law, and the plaintiff has failed to properly oppose that showing.

Accordingly, the motion is granted.

So ordered.

Dated: **May 18, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION XXX NON FINAL DISPOSITION

ENTERED
MAY 20 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE