

McPhatter v Universal Logistics Group

2010 NY Slip Op 31466(U)

June 8, 2010

Sup Ct, NY County

Docket Number: 114611/2007

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER
J.S.C.

PART 22

Index Number : 114611/2007
MCPHATTER, BELINDA
VS.
UNIVERSAL LOGISTICS GROUP
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2, 3, 4
5, 6, 7

FILED
JUN 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, defendants Universal Logistics Group, Inc. and Pablo A. Quintana ("defendants") move pursuant to CPLR § 3212 for an order granting them summary judgment and dismissing the complaint of plaintiff Belinda McPhatter ("plaintiff") on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 [d].

Plaintiff alleges in her bill of particulars that as a result of the March 7, 2007 accident, she sustained traumatic cervical radiculopathy, secondary to disc herniations at C2-C; thoracic derangement with herniation at T3-T4; bilateral C7 radiculopathies per EMG studies; traumatic lumbar radiculopathy, secondary to multi-level disc bulges and disc herniation at L5-S1; contusion and derangement of the left wrist and both hips; and abdominal strain. Plaintiff alleges that her injuries are serious in that they constitute a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; and/or a significant limitation of use of a body function or system.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (*Wadford v. Gruz*, 2006 NY Slip Op 9381 [1st Dept]). "[A] defendant can establish that [a] 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

Dated: 1/3

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of their motion, defendants submit the affirmed report of Dr. Arnold Berman, who performed an orthopedic examination of plaintiff on December 15, 2008. Using a goniometer and comparing his measurements to the normal range of motion values set forth in the AMA Guide for Evaluation of Permanent Impairment, sixth edition, Dr. Berman found that plaintiff had normal range of motion in her cervical spine and her thoracolumbar spine. Dr. Berman concluded that plaintiff sustained cervical, thoracic and lumbar strains and contusions to the left wrist and hips which had resolved with no clinical residuals. Dr. Berman further noted that the x-rays and MRI of plaintiff's cervical spine demonstrated multiple degenerative disc disease with posterior bulges, none of which are compressing on any nerve roots, while the MRI of the lumbar spine demonstrated multiple level degenerative changes with disc bulges. Moreover, Dr. Berman noted that the x-ray of plaintiff's left humerus demonstrated pre-existing calcific bursitis but noted that plaintiff's shoulder examination was normal. This report satisfies defendants' burden of establishing prima facie that plaintiff did not suffer a serious injury (*Yagi v. Corbin*, 2007 NY Slip Op 7749 [1st Dept]) and the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*Grossman*, 268 AD2d at 83-84).

Defendants also submit the affirmed report of Dr. Daniel J. Feuer, who performed a neurological examination of plaintiff on December 15, 2008 and found that plaintiff did not demonstrate any objective neurological disability or neurological permanency causally related to the subject accident.

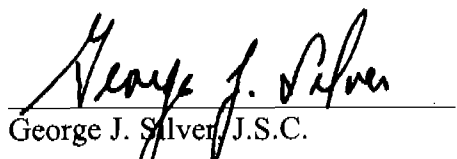
In opposition, plaintiff submits the affirmation of Dr. Noel Fleischer, plaintiff's treating neurologist. On August 11, 2009 Dr. Fleischer performed range of motion studies using an inclinometer and found that plaintiff had restricted range of motion in her cervical spine and lumbosacral spine when compared to normal. Dr. Fleischer also found straight leg raising positive to forty five degrees bilaterally. According to Dr. Fleischer, these restrictions of motion are significant, permanent and causally related to his objective findings of straight leg raising, the MRI findings of disc herniation and bulging of the cervical and lumbosacral spines and EMG studies. Moreover, Dr. Fleischer avers that his reading and interpretation of the MRI films of plaintiff's cervical and lumbar spines clearly and definitely demonstrated that the herniations of C2 through C6, the herniation at T3/T4, the bulges at L2/L3, L3/L4, L4/5 L5/S1 and the herniation at L5/S1 were caused by the subject accident and are not pre-existing. Dr. Fleischer's report, therefore, is sufficient to raise an issue of fact with respect to plaintiff's claims of significant limitation or permanent consequential limitation of the use of her spine (*Blake v Portexit Corp.*, 2010 NY Slip Op 65 [1st Dept]). However, nowhere in his affirmation does Dr. Fleischer indicate that plaintiff has sustained a total loss of use of either her cervical or lumbar

spine. Plaintiff, therefore, has failed to raise a question of fact with respect to her claim under the permanent loss category (*Byong Yol Yi v. Canela*, 2010 NY Slip Op 1580 [1st Dept]). Accordingly, it is hereby

ORDERED that defendants; motion for summary judgment is granted solely to the extent that plaintiff's claim under the permanent loss of use category of Insurance Law § 5102 [d] is dismissed. Defendants' motion is otherwise denied; and it is further

ORDERED that defendants are to serve a copy of this order with notice of entry within thirty (30) days.

This constitutes the decision and order of the Court.


George J. Silver, J.S.C.

Dated: June 8, 2010
New York County

GEORGE J. SILVER
J.S.C.

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