

Osterhout v Banker

2010 NY Slip Op 31776(U)

July 13, 2010

Supreme Court, Wayne County

Docket Number: 67032/2009

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

MARGARET A. OSTERHOUT and
CLINTON OSTERHOUT,
Plaintiffs,

-vs-
TAMMY BANKER,
Defendant.

DECISION

INDEX No. 67032

2009

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Attorney for Plaintiffs

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The Defendant has moved pursuant to CPLR §3212 for an Order granting summary judgment against the Plaintiffs and dismissing the Complaint in the above personal injury action. The Defendant's motion is based on the assertion that the Plaintiff Margaret A. Osterhout has failed to demonstrate that she suffered a serious injury as that term is defined under New York State Insurance Law §5102. (Plaintiff Clinton Osterhout's claim is based on loss of consortium only.) Alternatively, the Defendant asserts that, even if the Plaintiff is able to make a prima facie showing of a serious injury, she has failed to present sufficient evidence to indicate that the

subject accident caused or contributed to her alleged condition. The Plaintiffs have opposed the Defendant's motion.

Under CPLR §3212(b), a summary judgment motion requires a court to determine whether the cause of action, counterclaim, or defense at issue requires a trial before it can be sustained or rejected. On a defendant's motion for summary judgment the supporting papers must establish a prima facie case for dismissal, through evidence in admissible form, (See, e.g. *Rampello v Ferguson*, 280 AD2d 986 (4th Dept, 2001)). Should a defendant make such a showing, the burden then shifts to the plaintiff to come forward with sufficient evidence to defeat defendant's motion, by demonstrating the existence of an issue of fact as to whether plaintiff did sustain a serious injury as defined by the Insurance Law. (*Gaddy v Eyley*, 79 NY2d 955 (1992)). However, should a defendant fail to meet that initial burden, then the Court need not consider the sufficiency of plaintiff's papers. (*Byrnes v Hertz Corp.*, 278 AD2d 867 (4th Dept, 2000)).

The Plaintiff's claim arises from a motor vehicle accident, which occurred in the parking lot of the Webster Town Center Plaza located at 925 Holt Road, Webster, New York. The Plaintiff was the driver of the vehicle in which her daughter was a passenger. As the Plaintiff's vehicle

was proceeding westbound along the center driveway of the parking lot, the vehicle driven by the Defendant, Tammy Banker, emerged from a side driveway and collided with the Plaintiff's vehicle in the intersection.

In her Bill of Particulars, the Plaintiff alleges that she sustained numerous physical injuries as a result of the accident, including a bruised right knee, left elbow abrasion, and neck whiplash. (These injuries have apparently healed.) She also maintains that she continues to experience disabling pain in her right hip, radiating into her lower back and right thigh, resulting from lumbago, sacroilitis, sciatica and enthesopathy. The Plaintiff maintains that, based on these injuries, she has suffered a serious injury as defined by Insurance Law §5102(b), to wit:

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.

Plaintiff's deposition testimony is also before the Court, together with her supporting affidavit and numerous medical records, as detailed below.

In support of the motion, the Defendant has submitted a transcript of the deposition testimony of the Plaintiff, the affidavit of P. William Haake, M.D., to which is attached the results of his IME of the Plaintiff. The exhibits also include voluminous medical records regarding the Plaintiff, obtained from Geneses Group Health, (Wilson Center) dating back many years, as well as the report of John Genier, M.D., and an MRI study performed upon the Plaintiff on November 14, 2007. Based on the results of that study, the Defendant maintains that there is no objective evidence that Plaintiff sustained a serious injury. Rather, the Defendant argues that, while the Plaintiff may have exhibited subjective complaints of pain, the MRI study was normal, and Dr. Haake's examination indicated full range of motion and no traumatic injury. Even if the Plaintiff exhibited some slight limitation of movement, the Defendant maintains that the Plaintiff cannot demonstrate the "significance" of the alleged injury in terms of "both degree and duration". (See, e.g. *Mejia v DeRose*, 35 AD3d 407 (2nd Dept, 2006)).

The Defendant relies on the reasoning of the Court of Appeals in Gaddy (supra) and its progeny, in which the Court stated that summary judgment is appropriate if the alleged injury results in a “minor, mild or slight limitation of use”, which is classified as “insignificant” under the statute.

In seeking to establish the Defendant’s prima facie entitlement to summary judgment dismissing the Plaintiff’s complaint, counsel primarily relies on the examination of Dr. Haake, together with the Plaintiff’s medical records from the Wilson Center, dating back some 30 years which he considered in preparing his report. Most of the records are not relevant to the condition which is the focus of this action, but some of the reports indicate that the Plaintiff has suffered from similar complaints in the past. Defendant also relies on the results of the lumbar MRI study, which indicate soft tissue injury only. Finally, the Defendant relies on the Plaintiff’s own deposition testimony, which, maintains the Defendant, does not support her claim that she was unable to engage in her normal activities for 90 out of the 180 days following the accident.

Initially, the Court notes that, in his Attorney Affirmation, counsel for the Plaintiffs maintains that the Court should not consider the affirmation or report submitted by Dr. Haake, based on the fact that the Defendant never

disclosed the physician as an expert witness until the making of this motion. Therefore, he claims that the Court should disregard Dr. Haake's opinion.

Recently, in the companion case of Rebecca Osterhout v Tammy Banker and Lucas Shulla, Index No. 67044, this Court was faced with the same argument. In that matter, the Court found as follows:

"The case law regarding the use of the report of a previously-undisclosed expert in the context of a summary judgment is conflicting. On the one hand, appellate courts have held that a trial court should not consider an expert affidavit offered by a party opposing a summary judgment motion, if the party did not provide an excuse for failing to identify the expert in response to the Plaintiff's discovery demands, and the other party was unaware of the expert until the filing of the summary judgment. (See, e.g. Yax v Development Team, Inc., 67 AD3d 1003 (2nd Dept, 2009))."

"However, other appellate courts have found that the trial court properly considered a previously-undisclosed expert's affidavit, declaring that CPLR §3101 does not require a party to respond to a demand for expert witness information at any specific time, nor does it require

preclusion of such testimony unless there is a showing of willful failure to disclose, coupled with a showing of prejudice by the other party. (See, e.g. Browne v Smith, 65 AD3d 996 (2nd Dept, 2009).”

Given the discrepancies in the appellate decisions, this Court is inclined to find that the Plaintiff’s alleged failure to disclose Dr. Haake as an expert does not preclude consideration by the Court of his report in the context of this motion. This finding is supported by the fact that Dr. Haake’s identity was known to the Plaintiff as the doctor who performed the independent medical examination of the Plaintiff. Therefore, the Court finds no basis to preclude the use of the report. (The Court also finds that the other technical objections raised by both parties regarding the submission of various exhibits do not affect the admissibility of the respective documents.)

Therefore, based on the above allegations, the Court finds that the Defendant has met her initial burden of proof as to the alleged absence of an objective serious injury as defined by the Insurance Law. Even if the evidence demonstrates that the Plaintiff suffers from such an injury, the Defendant has also raised an issue as to whether that injury has been shown to be causally related to the accident. Finally, the Defendant has

raised a prima facie issue, based on the Plaintiff's EBT testimony, as to whether she meets the "90/180" threshold required by the statute.

Therefore, as the Defendant has met her quantum of proof, the burden now shifts to Plaintiff to come forward with sufficient competent medical evidence, based on objective medical findings and diagnostic tests, to raise an issue that, as a result of the accident Plaintiff did suffer a serious injury which meets the statutory definition. (*Barbagallo v Quackenbush*, 271 AD2d 724 (3rd Dept, 2000)).

In response to the Defendant's motion, the Plaintiff offers her own affidavit, together with the affirmation of John Genier, M.D., her primary care physician, including copies of his examination notes. The Plaintiff has also submitted certified copies of reports from International Pain Management, which include findings by Ajai K. Nemani, M.D., and records of the Plaintiff's chiropractic practice. Based on the above exhibits, counsel for the Plaintiff maintains that there is sufficient evidence to defeat the Defendant's motion for summary judgment.

As counsel for the Plaintiff argues in his Memorandum of Law, at this stage of the proceedings, the Plaintiff only needs to establish that her "... proffered evidence raises questions of material fact as to whether (s)he

sustained a (serious injury).” (*Toure v Avis Rent a Car Systems, Inc.*) 98 NY2d 345 (2002)). Dr. Genier’s Affirmation indicates that the Plaintiff had a “positive straight leg raise”, a conclusion based on an objective test used in assessing back injuries. He also noted spasm in her lower back. Numerous courts have held that “spasm” can constitute objective evidence of injury. (See, e.g. *Mancuso v Collins*, 32 AD3d 1325 (4th Dept, 2006)). He also directed her to take prescription muscle relaxants and referred her for epidural injections. The records of the Plaintiff’s chiropractic provider indicate “lumbar paraspinal muscle spasm, intersegmental fixation and joint dysfunction.”

Moreover, even Dr. Haake’s examination indicated that the Plaintiff exhibited decreased ranges of motion in her lumbar spine. While Dr. Haake opined that the reduced range may be the result of complaints of pain and guarding, the objective finding of a diminished range of motion was noted.

Finally, as to the so-called “90/180” category of serious injury under §5102(d) of the Insurance Law, the Defendant maintains that the Plaintiff was not incapacitated, in that she was able to perform her usual and customary activities during the period in question, and that she did not

receive any ongoing treatment from a doctor for her alleged injuries or take part in any extensive physical therapy or rehabilitation.


Following Dr. Genier's examination of the Plaintiff less than a week after the accident, the doctor's report indicates that he found positive straight leg raise and spasm, which resulted in a restriction of Plaintiff's activities, including a direction that she not work. The Plaintiff was regularly treated by her chiropractor. The Plaintiff's affidavit indicates that she also underwent a course of physical therapy, which, however, she could not continue, although prescribed by her doctor, due to financial constraints. She has also received injections and undergone additional forms of pain treatment. She sets forth a list of her customary activities which she is either totally unable to perform, or which she can perform only a very limited basis, and only with the use of painkillers. While she returned to work part-time, her activities have allegedly been restricted in both scope and duration.

Moreover, counsel for the Plaintiff brings out the fact that Dr. Haake did not see the Plaintiff until more than 28 months after the accident. Therefore, his personal knowledge of her condition during the 180 days immediately following the accident is necessarily limited. In Ames v

Paquin, 40 AD3d 1379, 1380 (3rd Dept, 2007) the Court held that the affidavit of the defendant's expert that was prepared more than 28 months after the accident was insufficient to support summary judgment because the affidavit failed to address the plaintiff's limitations during the 180 days immediately following the accident. The Court finds that the affidavit and report of Dr. Haake are likewise insufficient in this regard.

The Court acknowledges that the Plaintiff may face difficulties at trial in proving both objective injury and causality. However, the Court finds that, based on a review of the records and reports submitted, that determination should be left to the jury. Therefore, the Court finds that the Plaintiff has raised a material issue of fact as to whether she suffered a serious injury as that term is defined by the statute. Since the Court finds that the Defendant has not met her evidentiary burden, the motion of the Defendant for summary judgment is denied. Counsel for the Plaintiffs shall submit an order in accordance with the Court' decision.

Dated: July 13, 2010
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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WAYNE COUNTY SUPREME AND COUNTY COURT