

Wind v Fedele

2010 NY Slip Op 32405(U)

August 25, 2010

Supreme Court, Suffolk County

Docket Number: 38760/2007

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

COPY

PRESENT:

WILLIAM B. REBOLINI
Justice

Dale Wind,

Plaintiff,

-against-

Brian J. Fedele, Jr., and Alba Jimenez,

Defendants.

Motion Sequence No.: 001; MG
SETTJ

Motion Date: 2/11/10
Submitted: 6/23/10

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Clerk of the Court

Upon the following papers numbered 1 to 17 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 9; Answering Affidavits and supporting papers, 10 - 15; Replying Affidavits and supporting papers, 16 -17.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident which occurred on May 28, 2005 at the intersection of Route 25, Daly Road and Eldorado Drive, in the Hamlet of Elwood, Huntington, New York. The accident purportedly occurred when a vehicle owned by defendant Alba Jimenez, and operated by defendant Brian J. Fedele, collided with a vehicle owned and operated by the plaintiff. The plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, the bill of particulars alleges that she sustained serious and permanent

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injuries including C5-6 and C6-7 moderate to severe degenerative disc space narrowing with anterior and posterior hypertrophic spurring; mild bilateral neural foraminal narrowing at C5-6 and C6-7; neck pain; back pain; cervical sprain/strain; neck sprain/strain; insult to muscular skeletal system of both the cervical and lumbar spine; and radiculitis. It further alleges that, following the accident, the plaintiff was not confined to the hospital or to her bed. She was confined to her home for approximately two weeks following the accident and partially to date. The plaintiff was unemployed at the time of the accident. Lastly, the bill of particulars alleges that the plaintiff sustained a serious injury within the meaning of the Insurance Law in that she sustained, *inter alia*, dismemberment; significant disfigurement; a fracture; a permanent loss of use of a body organ, member, function, system; a consequential limitation of use of a body organ or member; a significant limitation of use of a body function of system; and a medically determined injury of a non-permanent nature whereby she could not substantially perform her usual activities within 90 days during the 180 day period following the accident.

The defendants now moves for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as set forth in Insurance Law §5102(d).

A “serious injury” is defined 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 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]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a “serious injury” is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see, Licari v. Elliott*, 57 NY2d 230 [1982]; *Charley v. Goss*, 54 AD3d 569 [1st Dept., 2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see, Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept., 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez*

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v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

In support of the motion, the defendants submitted the affirmation of Michael J. Katz, M.D. and the plaintiff's deposition testimony. Dr. Katz avers that he examined the plaintiff on July 21, 2009. Upon examination of the plaintiff's cervical spine, he found no paravertebral muscle spasm. He measured the range of motion of the plaintiff's cervical spine, compared to normal range of motion values, and found the plaintiff's range of motion to be normal in all respects. He performed the Adson's test and obtained a negative result. Upon examination of the plaintiff's thoracolumbosacral spine, Dr. Katz found no paravertebral muscle spasm. He measured the range of motion, compared it to normal values, and found the range of motion of the plaintiff's thoracolumbosacral spine to be normal in all respects. He performed the Straight Leg Raising test and obtained negative results. He performed Babinski and Patrick tests and obtained negative results. He concluded that the plaintiff had suffered from cervical and thoracolumbosacral radiculitis which was now resolved. He found that the plaintiff showed no current signs or symptoms of permanence relative to the musculoskeletal system and relative to the accident. He concluded that the plaintiff is not disabled, is capable of activities of daily living is capable of all pre-loss activities and is capable of gainful employment.

At her deposition the plaintiff testified that on the date of the accident she began feeling pain in her neck and was experiencing stiffness and tightness and that two days after the accident she went to her primary care physicians and complained of pain and difficulty moving her neck. Commencing in early June she began seeing a chiropractor twice a week. She saw the chiropractor for approximately two months. Thereafter, commencing in approximately August of 2005, she saw a physical therapist two times a week for approximately six months. After six months, she "just stopped" treating with the physical therapist. She has not treated anywhere else since she was last treated at the physical therapy office and does not have any future appointments with any medical providers for the injuries she sustained in the accident. She was never given prescription medication to treat the complained of injuries. The plaintiff testified that there was not a period of time immediately following the accident that she remained home because of the pain in her neck; rather, following the accident she was able to leave the house with discomfort. Plaintiff claims that as a result of the accident she performs house work slower and with pain, has pain when she is working on the computer and gardening, and has a difficult time finding a comfortable position to sleep in. She goes to the gym less frequently than she did

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prior to the accident. The plaintiff admitted that she was involved in a prior car accident in 1996, but testified that she was not injured as a result thereof.

The evidence submitted by the defendants was sufficient to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury with the meaning of Insurance Law § 5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]; Pagano v Kingsbury, 182 AD2d 268 [2nd Dept., 1992]).

In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (see, Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]). The plaintiff failed to meet this burden. In opposition, the plaintiff submitted, *inter alia*, photographs of her vehicle following the accident, the affidavit of her treating chiropractor, Scott Torns, D.C., the plaintiff's deposition testimony and the plaintiff's affidavit.

Contrary to the plaintiff's contention, the affidavit of her treating chiropractor was insufficient to raise a triable issue of fact as to whether she sustained a serious injury as a result of the subject accident. While Dr. Torns set forth findings indicating limitations in the plaintiff's range of motion based on a recent examination of her, neither he nor the plaintiff proffered competent, objective medical evidence of the existence of a significant limitation in the plaintiff's spine that was contemporaneous with the subject accident (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Milosevic v. Mouladi, 72 AD3d 1036 [2nd Dept., 2010]; Kuperberg v. Montalbano 72 AD3d 903 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept., 2009]). Moreover, the evidence submitted failed to adequately explain the four year gap between the time the plaintiff stopped treatment and her most recent examination with Dr. Torns (see, Pommells v. Perez, 4 NY3d 566 [2005]; Collado v. Abouzeid, 68 AD3d 912 [2nd Dept., 2009]; Rivera v. Bushwick Ridgewood Props., Inc., 63 AD3d 712 [2nd Dept., 2009]; Garcia v. Lopez, 59 AD3d 593 [2nd Dept., 2009]; Strok v. Chez, 57 AD3d 887 [2nd Dept., 2008]; Ning Wang v. Harget Cab Corp., 47 AD3d 777 [2nd Dept., 2008]; Waring v. Guirguis, 39 AD3d 741 [2nd Dept., 2007]; Kearse v. New York City Tr. Auth., 16 AD3d 45 [2nd Dept., 2005]).

In addition, the plaintiff failed to submit competent medical evidence that the injuries she

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allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see, Casimir v. Bailey, 70 AD3d 994 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Rabolt v. Park, 50 A.D.3d 995 [2nd Dept., 2008]; Sainte-Aime v. Suwai Ho, 274 AD2d 569 [2nd Dept., 2000]).

Based on the foregoing, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted; settle judgment (see, 22 NYCRR §202.48).

Dated: August 25, 2010


HON. WILLIAM B. REBOLINI, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION