

Jones v Kovnat

2010 NY Slip Op 32600(U)

September 13, 2010

Sup Ct, Nassau County

Docket Number: 205/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

MATTIE JONES,

Plaintiff(s),

Index No. 205/09

-against-

**Motion Submitted: 7/12/10
Motion Sequence: 001**

DANIELLE M. KOVNAT and SIMON KOVNAT,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendants move this Court for an Order granting summary judgment in their favor and dismissing the instant complaint on the ground that the plaintiff has not suffered a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on October 24, 2008, in Nassau County, New York. Plaintiff alleges that, while she was stopped in traffic, the motor vehicle she was operating was hit in the rear by a motor vehicle operated by defendant Danielle M. Kovnat and owned by defendant Simon Kovnat. The impact caused plaintiff's vehicle to hit a motor vehicle in front of her. As a result of this accident, plaintiff claims to have suffered serious and permanent injuries, including restricted range of motion in her lumbar spine, cervical spine, and aggravation of pre-existing conditions in those areas.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, the defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (*Felix v. New York City Transit Auth.*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendants have met their burden.

In support of their motion for summary judgment, defendants submitted affirmed medical reports from their three examining physicians. Plaintiff was examined by John C. Killian, M.D., a board certified orthopedic surgeon, on January 8, 2010. Dr. Killian measured plaintiff's range of motion in her cervical and lumbar spine areas and compared the results with normal range of motion. According to Dr. Killian, plaintiff's range of motion in those areas was full/normal. Plaintiff was also able to bend forward fully to touch her toes (normal touching). Straight leg raising was negative bilaterally in the sitting position and in the supine position. Following his examination, Dr. Killian opined that the plaintiff showed degenerative changes but showed no traumatic abnormalities as a result of the accident. Further, he stated there were no positive objective physical findings to confirm the plaintiff's subjective complaints. Dr. Killian concluded that plaintiff has recovered fully from the injuries allegedly sustained as a result of the accident on October 24, 2008.

Plaintiff's MRI studies taken of her cervical and lumbar spine areas in November and December 2008 were examined by David A. Fisher, M.D., defendants' board certified radiologist, on December 22, 2009. Dr. Fisher opined there was clear evidence of degenerative changes throughout the cervical spine, most pronounced from the C3/4 through the C6/7 levels; however, he asserted that these changes were highly unlikely to have developed in the short interval between the accident and the study, and that they represent a preexisting condition. He found no disc herniations. The disc bulges noted were compatible with the amount of degenerative change present. There was no radiographic evidence of traumatic or causally related injury to the cervical spine.

Dr. Fisher also stated that, “there are diffuse degenerative changes throughout the lower thoracic and lumbar spine, most pronounced at L5/S1 where there is a resultant bilateral foraminal stenosis. This is manifested by disc dehydration, disc space, narrowing and endplate spurring. There are accompanying mild annular bulges at all levels. . . . The multiple disc bulges noted are compatible with the amount of degenerative change present. No herniations are seen. There is no radiographic evidence of traumatic or causally related injury to the lumbar spine.”

On January 11, 2010 plaintiff was examined by Stephen M. Newman, M.D., defendants’ board certified neurologist. Dr. Newman set out his findings in detail and determined that, *inter alia*, plaintiff’s facial and jaw muscles were intact, that her hearing was normal, and that her muscle strength and tone were normal. Moreover, plaintiff’s gait was normal and she was able to perform straight leg raises with each of her legs to 90 degrees in the supine position without lower back pain. Dr. Newman opined that plaintiff did not sustain a neurological injury or disability as a result of the subject accident. Moreover, Dr. Newman asserted that any claimed abnormalities involving MRI scanning of the cervical spine and lumbar spine, or electro diagnostic abnormalities involving the upper and lower extremities, all appear to be degenerative in nature and not related to the subject accident.

Examining the reports of defendants’ physicians, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff’s expert(s) during cross examination at trial, and be weighed by the trier of fact (*Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); *Gaddy v. Eyler*, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Based on the foregoing reports of defendants’ physicians, the defendants met their initial burden of establishing, as a matter of law, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*See, Gaddy v. Eyler*, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992); *Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 5 [1982]).

The plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain and limitations of motion (*Farozes v. Kamran*, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has met her burden by establishing a triable issue of fact with respect to the serious nature of her injuries.

In opposition to the within motion, plaintiff has submitted the sworn affidavit of

Ronda Bachenheimer, D.C., plaintiff's chiropractor.¹ Dr. Bachenheimer has been continually treating plaintiff since October 28, 2008, four days after the accident. Plaintiff continues to treat two times per week at the chiropractor's office. It is Dr. Bachenheimer's diagnosis that the plaintiff sustained her injuries as a result of the motor vehicle accident forming the basis of this action. Dr. Bachenheimer's initial examination, conducted on October 28, 2008, included, *inter alia*, active range of motion testing that was conducted by the use of a goniometer. The active range of motion studies showed diminished ranges of motion of her cervical and lumbar spine areas as compared to normal ranges of motion for those areas. Dr. Bachenheimer set forth her specific findings and the percentages of range of motion loss suffered by plaintiff.

Dr. Bachenheimer's initial diagnosis included cervical sprain, thoracic sprain, lumbar sprain, cervicobrachial syndrome, lumbosacral radiculitis, sciatica, myospasm, thoracic neuralgia/radiculitis, all of which were casually related to the October 24, 2008 motor vehicle accident. Dr. Bachenheimer addressed the defendants' experts' opinions that the alleged injuries were the result of degeneration unrelated to the subject accident. Dr. Bachenheimer opined that the plaintiff had a pre-existing degenerative condition that was asymptomatic prior to the accident. Plaintiff's pre-existing condition predisposed the plaintiff to becoming symptomatic as a result of a trauma, such as the accident in this case. To the extent that the respective experts disagree as to the nature of the degenerative condition causing the injuries complained of, issue finding, rather than issue determination, is the key to determining a summary judgment motion (*see In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept., 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept., 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept., 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 [2d Dept., 2000]). In this case, there clearly exists a difference of opinion between plaintiff's and defendants' experts that is properly resolved by the trier of fact.

Furthermore, Dr. Bachenheimer conducted range of motion tests at a re-evaluation examination conducted on January 13, 2010. Through the use of a goniometer, Dr.

¹Defendants' assertion that Dr. Bachenheimer's affidavit is inadmissible "as it does not swear under the penalties of perjury the truth of the statements" is misplaced. The latter language must be used in a physician's affirmation "in lieu of and with the same force and affect as an affidavit." (*CPLR § 2106*). Moreover, defendants' arguments regarding plaintiff's submission of the unsworn reports of various physicians and emergency room records is unavailing. Defendants' experts (Drs. Killian and Newman) relied on the MRI reports, Dr. Bachenheimer's records, emergency room records and the unsworn reports of Drs. Nowakowski and Cavaliere, among many others (*see Williams v. Clark*, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); *Barry v. Valerio*, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]).

Bachenheimer determined that plaintiff suffers from continued and further restrictions of motion in the cervical and lumbar spine areas. Dr. Bachenheimer set forth her specific findings in her affidavit submitted with plaintiff's opposition papers.

Dr. Bachenheimer verified the plaintiff's complaints by objective tests, including the MRI findings and range of motion studies. The fact that plaintiff's "chronic" symptoms and functional limitations have continued for over one and one-half years led Dr. Bachenheimer to conclude, "to a reasonable degree of chiropractic certainty, that [plaintiff's] injuries constitute a permanent partial disability that affects her ability to function in significant and consequential ways." Dr. Bachenheimer also stated in her affidavit that the trauma to the plaintiff's lumbar and cervical spine caused permanent changes to her muscular and skeletal systems by the formation of scar tissue, multiple trigger points and spasms, reversal of the normal cervical curvature, and multiple disc bulges. According to Dr. Bachenheimer, plaintiff can expect continued exacerbations, pain and stiffness in the cervical and lumbar regions, and limitation of use of those areas of the body and related structures. Dr. Bachenheimer based her opinion on her contemporaneous and most recent examination of the plaintiff. (See, *Pearce v. Olivera-Puerto*, 73 A.D.3d 879, 903 N.Y.S.2d 408 (2d Dept., 2010); *Whitehead v. Olsen*, 70 A.D.3d 678, 894 N.Y.S.2d 93 (2d Dept., 2010); *Paula v. Natala*, 61 A.D.3d 944, 879 N.Y.S.2d 153 [2d Dept., 2009]).

The plaintiff's expert medical report is sufficient to raise triable issues of fact as to whether the plaintiff has suffered "serious injury" as the result of the subject accident (*Toure, supra*). The medical reports submitted by respective counsel give rise to questions of credibility precluding the granting of summary judgment. (*Lopez v. Senatore*, 65 N.Y.2d 1017, 484 N.E.2d 130, 494 N.Y.S.2d 101 (1985); *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974); *Galati v. Brice*, 290 A.D.2d 530, 736 N.Y.S.2d 626 (2d Dept., 2002); *Pareti v. Giglietta*, 221 A.D.2d 607, 634 N.Y.S.2d 201 [2d Dept., 1995]).

Defendants' motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: September 13, 2010
Mineola, N.Y.



J. S. C.

ENTERED
SEP 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE