

Taitt v Teixeira

2010 NY Slip Op 32683(U)

September 21, 2010

Sup Ct, Nassau County

Docket Number: 22713/08

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

ERMINE BROWN TAITT,

Plaintiff,

- against -

DAYVES L. TEIXEIRA, JESSICA S. TEIXEIRA,
BARBARA SACHS, ROBIN L. DUNN, WILLIAM
LORETZ, ALCYONE PLUMBING CO., INC.,
FRANCESCA M. DUNN and ROBIN L. DUNN,

Defendants.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 22713/08

X X X

MOTIONS SUBMISSION
DATE: 8/5/10

MOTION SEQUENCE
NOS. 1, 2, 3, 4, 5

The following papers read on this motion:

- Notice of Motions and Affidavits..... X
- Notice of Cross-Motions and Affidavits..... X
- Affirmations in Opposition..... X
- Reply Affirmations..... X

RELIEF REQUESTED

The defendants, Dayves L. Teixeira and Jessica S. Teixeira, (hereinafter referred to as "Teixeira"), move for an order dismissing plaintiff's complaint and granting defendant summary judgment on the threshold injury. The defendant, Barbara Sachs, (hereinafter referred to as "Sachs"), cross-moves for summary judgment dismissing the complaint on the grounds that the injuries claimed by the plaintiff do not satisfy the serious injury threshold requirement of §5102(d) of the Insurance Law of the State of New York. The defendant, Sachs, adopts the legal arguments and exhibits of Teixeira's threshold motion. The defendants, Robin L. Dunn and Francesca M. Dunn, (hereinafter referred to as "Dunn"), move for an order pursuant to CPLR §3212 on the grounds that the Dunn vehicle was stopped when it was struck in the rear. Dunn adopts the legal arguments and exhibits in the motion by defendants, William Loretz and Alcyone Plumbing Co., Inc., (hereinafter referred to as "Loretz"). Dunn also move for summary judgment on the basis that the plaintiff did not sustain a "serious injury" under §5102(d) of the Insurance Law. Dunn adopts the legal arguments and exhibits in the motion by Teixeira. The defendant, Loretz, moves for summary judgment on liability and threshold. Loretz adopts the legal arguments and exhibits in the motion

by Teixeira. The defendant, Sachs, submits opposition to the motions submitted by Dunn and Loretz. The plaintiff submits opposition to the threshold motions, but does not oppose the liability motions. The moving defendants submit reply affirmations.

THRESHOLD MOTIONS

The defendants move pursuant to CPLR §3212 for an order granting summary judgment in their favor dismissing plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by §5102(d) of New York Insurance Law, and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of New York Insurance Law. On this threshold motion, the defendants submit the medical examination report of Dr. Michael Katz, an orthopedist, who examined the plaintiff on December 18, 2009, and the report of Dr. Sheldon P. Feit, a radiologist.

The plaintiff initiated this action to recover for personal injuries sustained on March 4, 2008 as a result of a motor vehicle accident. The plaintiff alleges injuries including disc herniations at C3-C4, C4-C5, C6-C7, radiculopathy at C5-C6, and limitation of range of motion of the cervical and lumbar spine.

Applicable Law

"Serious Injury" is defined in Insurance Law §5102(d) as:

"...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 day during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of the 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 plaintiff's claim" (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a "plaintiff's subjective claim of pain and limitation of motion must be supported by verified objective medical findings". (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member”, or “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,” 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 is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

The Court in *Pommells v. Perez*, 4 NY3d 566, in stating that proof of a herniated disc, without additional more medical evidence, is not alone sufficient to establish a serious injury, provides that once the defendants make a *prima facie* showing that the plaintiff’s injuries do not satisfy No-Fault’s serious injury threshold, the plaintiff has the burden to present objective medical proof of a serious injury casually related to the accident in order to survive summary judgment dismissal. (*Id.*) The Court in *Pommells* stated that in “the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a ‘serious injury’ can be particularly vexing”. The Court in *Pommells* concluded that “even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury - such as a gap in treatment, an intervening medical problem or a pre-existing condition - summary dismissal of the complaint may be appropriate”.

Discussion

Here, the defendants have met their burden in establishing that the plaintiff has not sustained a serious injury. The defendants’ examining physician found that plaintiff’s cervical and lumbosacral strain resolved. Dr. Katz’s report provides objective medical findings to establish that the plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d). Dr. Feit’s report provides that his review of plaintiff’s cervical MRI reveals pre-existing degenerative changes. The defendant has also demonstrated that the plaintiff testified that she only missed two or three days of work following the accident. The defendants’ submissions have demonstrated that the plaintiff, who missed a short time from work and was not confined to home for a significant period of time, was not prevented from performing substantially all of the material acts constituting her usual and customary daily activities within the statutory period. (*Sainte-Aime v. Ho*, 274 AD2d 569; *Bartley v. Trans Car & Limo, Inc.*, 41 AD3d 624). As the defendants have met their initial burden of proof, the burden shifts to the plaintiff to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990).

The plaintiff, in opposition to the motion, has failed to present objective medical proof of a serious injury casually related to the subject accident in order to survive summary judgment dismissal. The plaintiff submits the sworn affidavit of Dr. Raymond A. Semente, a chiropractor. Dr. Semente refers to unsworn reports of other doctors, reports which are not in admissible form. Where a physician’s report improperly relies on the unaffirmed findings of other physicians, that physician’s report is without any probative value in opposing a defendant’s summary judgment motion. (*Codrington v. Ahmad*, 40 AD3d 799; *Elder v. Stokes*, 35 AD3d 799; and *Felix v. New York*

City Transit Authority, 32 AD3d 527) Additionally, the plaintiff does not address that the plaintiff's MRI's revealed degenerative disc disease. Under these circumstances, the plaintiff's examining physician's conclusion that the plaintiff's injuries were casually related to the subject accident were speculative. (*Tudisco v. James*, 28 AD3d 536; *Baksh v. Shabi*, 32 AD3d 525; *Zinger v. Zylberberg*, 35 AD3d 851).

It is also well established that an examining physician's affidavit must be based on a recent examination of the plaintiff and not upon observations made earlier. (*Elgandy v. Nieradko*, 307 AD2d 25). An affirmed medical report of plaintiff's treating physician is insufficient to raise an issue of fact as to whether a plaintiff sustained a "serious injury" when the report is not based upon a recent examination of the plaintiff. (*Barzey v. Clarke*, 27 AD3d 600; *Albano v. Onolfo*, 36 AD3d 728; *Moore v. Edison*, 25 ad3D 672; *Hernandez v. DIVA Cab Corp.*, 22 AD3d 722). Here, plaintiff does not submit a medical examination report based upon a recent medical examination of the plaintiff. Additionally, the plaintiff failed to submit competent medical evidence that she was unable to perform substantially all the daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. (*D'Alba v. Yong-Ae Choi*, 33 AD3d 650; *Sainte-Aime v. Ho*, *supra*; *Zinger v. Zylberberg*, *supra*, *Baksh v. Shabi*, *supra*).

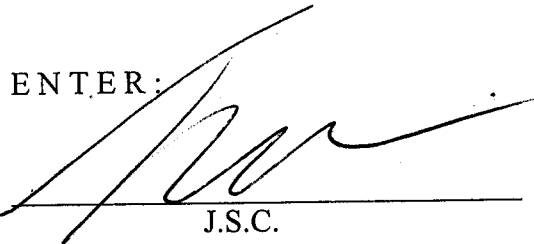
LIABILITY MOTIONS

As the defendants have demonstrated that the plaintiff has not sustained a "serious injury" as defined by §5102(d) of the Insurance law, the liability motions submitted herein need not be addressed.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that the summary judgment motions and cross-motions are granted, and therefore, plaintiff's complaint is hereby dismissed.

ENTER:

J.S.C.

Dated: September 21, 2010

cc: Vitacco & Vitacco, Esqs.
Law Office of Robert P. Tusa, Esq.
Richard Lau & Associates
Russo, Apoznanski & Tambasco, Esqs.
Martyn, Toher & Martyn, Esqs.

ENTERED
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