

Bennett v Albanese

2010 NY Slip Op 32701(U)

August 31, 2010

Supreme Court, Nassau County

Docket Number: 19526/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 5
NASSAU COUNTY**

CHANTEL BENNETT,

Plaintiff,

-against-

**INDEX NO.: 19526/08
MOTION SEQ. NO.: 001**

BRITTANY A. ALBANESE,

MOTION DATE: 7/9/10

Defendant.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

The motion by defendant BRITTANY A. ALBANESE for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff CHANTEL BENNETT, age 35, alleges that on September 7, 2007, at approximately 9:00 a.m., she was the owner and operator of a motor vehicle which came into contact with a motor vehicle owned and operated by defendant BRITTANY A. ALBANESE. The accident occurred at Atlantic Avenue and South Long Beach Avenue, Freeport. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212** on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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” (numbered by the Court). The Court’s consideration in this action is confined to whether plaintiff’s injuries constitute a “permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, defendant submits an affirmed report of examination, dated August 25, 2009, of orthopedist Alan J. Zimmerman, MD, covering an examination of that date.

Using a goniometer, Dr. Zimmerman reported that physical examination of plaintiff’s cervical and lumbar spines, revealed normal range of motion results, comparing the results to norms. Dr. Zimmerman’s other reported findings include no tenderness or spasms in the cervical, thoracic or lumbar spines, normal muscle strength (providing numerical results), sensation and reflexes, and negative supine and reverse seated straight leg raise tests. Dr. Zimmerman diagnosed “cervical sprain, resolved.” Dr. Zimmerman concluded that “cervical disc bulges are of no clinical significance” and “there is no support for diagnosis of radiculitis.” Dr. Zimmerman also noted that “cervical derangement, whiplash syndrome and thoracic derangement are not medically accepted diagnoses.”

Defendant also submits the deposition testimony of plaintiff conducted on August 11, 2009. Plaintiff testified that after the accident, she was taken by ambulance to South Nassau Communities Hospital (“South Nassau”) and was treated and released after two to three hours (Deposition testimony, pp. 36-38). Plaintiff testified she first sought medical treatment approximately four to five days later with physiatrist Dr. Lanter complaining of stiffness in her neck and pain in her mid back and left arm (Deposition testimony, pp. 42-43). Plaintiff stated that she treated with a physical therapist in Dr. Lanter’s office twice a week from September 2007 until January 2008, and that she had acupuncture treatments two or three times (Deposition testimony, pp. 45-46). Plaintiff testified that she last saw Dr. Lanter in January 2008 because her no-fault benefits were terminated but that she did not appeal her carrier’s denial of benefits (Deposition testimony, p. 45). She also stated that she does not currently have any appointments with Dr. Lanter. (Deposition testimony, p. 51). Plaintiff testified that less than one month after the accident and then again two months later, Dr. Lanter sent her for MRIs of her neck and back (Deposition testimony, pp. 48-50). Plaintiff stated that she did not have an EMG (Deposition testimony, pp. 63-64) and that she does not remember if Dr. Lanter prescribed any medications (Deposition testimony, pp. 48-50, 65). Plaintiff testified that as a result of injuries allegedly sustained in the accident, she did not take any time off from her full time job with Cablevision (Deposition testimony, p. 53, 65).

Plaintiff stated that since the accident, she and the father of her children, drove twenty-two hours to Florida (Deposition testimony, pp. 62-63). Plaintiff also testified that she currently suffers from constant burning pain in her back, numbness between her shoulder blades, and “once in a blue” pain in her neck which she feels after sleeping and tending to her daughter (Deposition testimony, pp. 63-65). With respect to activities, plaintiff testified that since the accident, she cannot run, sit for more than two hours without feeling a burning pain in her back or take long walks. Plaintiff stated that she can only engage in the following activities with difficulty: pick up her daughter who weighs thirty pounds, do her daughter’s hair, climb in and out of the tub, sleep and clean (Deposition testimony, pp. 56-61).

The Court finds that the reports of defendant’s examining physician is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination to satisfy the Court that an “objective basis” exists for his opinion. Accordingly, the Court finds that defendant has made a *prima facie* showing, that plaintiff CHANTEL BENNETT did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff’s counsel argues that defendant’s examining physician, Dr. Zimmerman, in his report dated August 25, 2009, almost two years post accident, failed to address the claim asserted in plaintiff’s bill of particulars that she suffered a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the September 7, 2007 accident. Plaintiff’s counsel argues that, consequently, defendant has failed to make a *prima facie* showing, that plaintiff CHANTEL BENNETT did not sustain a serious injury.

The Court finds that defendant’s motion papers have adequately addressed plaintiff’s 90/180 claim asserted in her bill of particulars. In making a determination with respect to this category of serious injury, the Court notes that the Second Department has considered the entirety of a defendant’s motion papers, including sworn deposition testimony and statements made by a plaintiff to a defendant’s examining physician. *See generally* **Kreimerman v. Stunis**, 74 AD3d 753; **Ranford v. Tim’s Tree & Lawn Service, Inc.**, 71 AD3d 973; **Sierra v. Gonzalez First Limo**, 71 AD3d 864; **Saetia v. VIP Renovations Corp.**, 68 AD3d 1092; **Richards v. Tyson**, 64 AD3d 760; **Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.**, 48 AD3d 664; **Berson v. Rosada Cab Corp.**, 62 AD3d 636.

In the case at bar, the Court finds that defendant has made a *prima facie* showing that

plaintiff did not satisfy the 90/180 category of serious injury. Plaintiff testified that after the accident she did not miss any time from work (Deposition testimony, p. 53). *See Kreimerman v. Stunis*, *supra* (missed two weeks of work); *Clarke v. Delacruz*, 73 AD3d 965 (missed three days of work); *Catalano v. Kopman*, 73 AD3d 963 (missed two to three days of work); *Nieves v. Michael*, 73 AD3d 716 (missed seven days of work); *Kuperberg v. Montalbano*, 72 AD3d 903 (missed no time from work); *Sierra v. Gonzalez First Limo*, *supra* (missed two to three days of work); *Bleszcz v. Hiscok*, 69 AD3d 890 (missed one day of work). Plaintiff also testified that she did not hire any help to assist her in activities, such as house cleaning and gardening, after the accident (although plaintiff did claim that her mother helped her) and that Dr. Lanter did not restrict her driving (Deposition testimony, p. 55). In addition, plaintiff's deposition testimony that she cannot run, sit for more than two hours without feeling a burning pain in her back or take long walks, and can only pick up her daughter with difficulty (Deposition testimony, pp. 56-61), is self serving and is insufficient by itself to satisfy this category of serious injury. The Court also notes plaintiff's contradictory claim in her bill of particulars that she was "confined to bed and home for intermittent days and part days to date" is wholly unsupported by the record especially in view of plaintiff's testimony that she did not miss any time from work.

In opposition, plaintiff submits (i) an affirmation of Robert Lanter, DO, dated June 16, 2010, covering examinations of plaintiff conducted on September 12, 2007, December 20, 2007, January 14, 2008 and April 22, 2010; (ii) an unaffirmed narrative report of Dr. Lanter, dated September 12, 2007; (iii) an affirmation of radiologist Harold Augenstein, MD affirming the accuracy of an attached report covering an MRI of plaintiff's cervical spine conducted on October 10, 2007; and (iv) plaintiff's affidavit, sworn to on May 25, 2010.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. At the outset, the Court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; *Grasso v. Angerami*, 79 NY2d 814; *Varveris v. Franco*, 71 AD3d 1128; *Haber v. Ullah*, 69 AD3d 796; *Yunatanov v. Stein*, 69 AD3d 708. As a result, the Court notes that Dr. Lanter's affirmation is not in strict compliance with **CPLR §2106** as he fails to affirm his statements to be *true* under the penalties of perjury or reference **CPLR §2106**. *See generally Arkin v. Resnick*, 68 AD3d 692; *Offman v. Singh*, 27 AD3d 284; *Jones v. Schmitt*, 7 Misc3d 47.

However, even considering Dr. Lanter's affirmation, the Court finds that it is conclusory and fails to raise an issue of fact. In his affirmation, Dr. Lanter only provides qualified range of motion results from his initial examination conducted on September 12,

2007 and from an examination conducted on April 22, 2010, subsequent to the filing of defendant's motion for summary judgment. As to his examinations of December 20, 2007 and January 14, 2008, Dr. Lanter notes that plaintiff has "decreased" range of motion of her cervical spine, without providing a numerical restriction. *See Perl v. Maher*, 74 AD3d 930; *Robinson-Lewis v. Grisafi*, 74 AD3d 774; *Ortiz v. Ianina Taxi Services, Inc.*, 73 AD3d 721; *Simanovskiy v. Barbaro*, 72 AD3d 930; *Frischia v. Mak Auto*, 59 AD3d 492; *Duke v. Saurelis*, 41 AD3d 770. Dr. Lanter also fails to specify the objective tests he performed to arrive at these conclusions. *See Resek v. Morreale*, 74 AD3d 1043; *Perl v. Maher*, *supra*; *Robinson-Lewis v. Grisafi*, *supra*; *Ortiz v. Ianina Taxi Services*, *supra*; *Nieves v. Michael*, 73 AD3d 716; *Keith v. Duval*, 71 AD3d 1093; *Knopf v. Sinetar*, 69 AD3d 809; *Spence v. Mikelberg*, 66 AD3d 765; *Sapienza v. Ruggiero*, 57 AD3d 643. Furthermore, Dr. Lanter covers injuries, such as to the right shoulder and arm, which are not claimed in plaintiff's bill of particulars. The Court notes in addition that Dr. Lanter only reviewed the MRI report rather than the actual MRI films. *See Umanzor v. Pineda*, 39 AD3d 539.

The Court finds that the Dr. Lanter's affirmation is "clearly tailored to meet the statutory requirements." *Knopf v. Sinetar*, *supra* at 810. *See Picott v. Lewis*, 26 AD3d 319; *Marte v. New York City Transit Authority*, 253 AD2d 519; *Sainte-Aime v. Ho*, 274 AD2d 569. Dr. Lanter's assertion that plaintiff has suffered a "permanent partial disability" is conclusory as he fails to offer any evidence of permanency. *See Gaddy v. Eyler*, 79 NY2d 955; *Lopez v. Senatore*, 65 NY2d 1017. Any statements of permanency of plaintiff's injuries are belied by her deposition testimony that she did not miss any time from work.

Further, the Court finds plaintiff's affidavit is self serving and insufficient to raise an issue of fact. *See Vilente v. Miterko*, 73 AD3d 757; *Lozusko v. Miller*, 72 AD3d 908; *Stevens v. Sampson*, 72 AD3d 793; *Keith v. Duval*, *supra*; *Singh v. City of New York*, 71 AD3d 1121; *Larson v. Delgado*, 71 AD3d 739; *Acosta v. Alexandre*, 70 AD3d 735. Plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See Scheer v. Koubek*, 70 NY2d 678; *Sham v. B & P Chimney Cleaning and Repair Co., Inc.*, 71 AD3d 978; *Ambos v. New York City Transit Authority*, 71 AD3d 801; *Acosta v. Alexandre*, *supra*; *Dantini v. Cuffie*, 59 AD3d 490; *Ranzie v. Abdul-Massih*, 28 AD3d 447.

The MRI report covering plaintiff's cervical spine finds small posterior disc bulges at C4-5 and C6-7. The Court finds that this report, together with Dr. Augenstein's affirmation, fail to express an opinion as to causation of plaintiff's alleged cervical spine injuries. The Court notes, that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See Pommells v. Perez*, 4 NY3d 566 at 574; *Bleszcz v. Hiscock*, *supra*; *Knopf v. Sinetar*, *supra*; *Chanda v. Varughese*, 67 AD3d 947; *Ciancio v. Nolan*, 65 AD3d 1273; *Yun v. Barber*, 63 AD3d 1140; *Caraballo v. Kim*, 63 AD3d 976;

Jules v. Calderon, 62 AD3d 958; **Ferber v. Madorran**, 60 AD3d 725.

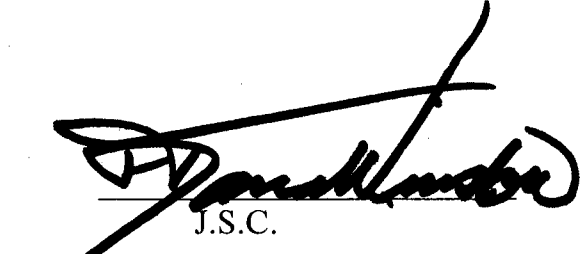
Finally, the Court finds that the “gap in treatment” is fatal to plaintiff’s claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. “Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and 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.” **Pommells v. Perez**, 4 NY3d 566 at 572. The Court notes that plaintiff testified at her deposition that she stopped treating with Dr. Lanter in January 2008, more than one and one-half years prior to plaintiff’s deposition, because her no-fault coverage ran out (Deposition testimony, p. 45) and that she did not treat with any other medical providers besides Dr. Lanter, the emergency room visit to South Nassau and the visit to the MRI facility (Deposition testimony, p. 50). The Court finds that an assertion that her no-fault benefits ran out, without more, such as evidence that plaintiff could not afford further treatment thereafter, is an inadequate explanation for this gap in treatment. *See generally* **Tai Ho Kang v. Young Sun Cho**, 74 AD3d 1328; **Domanas v. Delgado Travel Agency, Inc.**, 56 AD3d 717; **Jules v. Barbecho**, 55 AD3d 548; **Francovig v. Senekis Cab Corp.**, 41 AD3d 643; **Black v. Robinson**, 302 AD2d 438.

Based on the foregoing, it is

ORDERED, that the motion by defendant BRITTANY A. ALBANESE for summary judgment dismissing the complaint of plaintiff CHANTEL BENNETT pursuant to **CPLR §3212**, on the grounds that plaintiff failed to sustain a “serious injury” within the meaning of **Insurance Law §5102(d)** is **granted**.

This constitutes the Order of the Court.

Dated: **Aug 31**, 2010


J.S.C.

ENTERED

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