

Bruno v Bilski

2010 NY Slip Op 33021(U)

September 17, 2010

Supreme Court, Suffolk County

Docket Number: 07-6393

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 10-9-09
ADJ. DATE 7-14-10
Mot. Seq. # 002 - MG; CASEDISP

-----X
CHRISTINE BRUNO, :

Plaintiff, :

- against - :

JENNIFER A. BILSKI and JOSEPH L. ARMA, :

Defendants. :

-----X
JENNIFER A. BILSKI and JOSEPH L. ARMA, :

Third-Party Plaintiffs, :

- against - :

RICARDO BRUNO, :

Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 26; 27 - 28; Replying Affidavits and supporting papers 29 - 30; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Jennifer Bilski and Joseph Arma for summary judgment dismissing the complaint against them on the ground that plaintiff Christine Bruno did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Christine Bruno ("plaintiff") when her vehicle collided with a vehicle owned by defendant Joseph Arma

and operated by defendant Jennifer Bilski at the intersection of Woodside Avenue and Station Road in the Town of Brookhaven, New York, on October 28, 2005. At the time of the accident, plaintiff Christine Bruno in the main action was a passenger in a vehicle owned and operated by the third-party defendant Ricardo Bruno. Plaintiff Christine Bruno was previously involved in an unrelated motor vehicle accident in the 1990's and subsequently fell off her porch in 1999 or 2000.

By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries including bulging discs at C5-C6 and L3-L4; a herniated disc at L4-L5; left ulnar neuropathy; paraspinal muscle spasm of the neck; right quadratus lumborum spasm; cervical radiculopathy and derangement; bilateral shoulder pain; loss of consciousness; numbness of the 4th and 5th fingers of the left hand; and cervical and lumbar sprain/strain. In addition, plaintiff claims that she was incapacitated from her employment for approximately two months following the subject accident.

Defendants Jennifer Bilski and Joseph Arma (“defendants”) in the main action now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; plaintiff’s deposition testimony; the medical records of Brookhaven Memorial Hospital Medical Center; the affirmed medical report dated February 9, 2009 of their examining orthopedist, Dr. Jay Nathan, based on an examination of the plaintiff on same date; and three affirmed MRI reports of their examining radiologist, Dr. Alan Greenfield, based on his review of three MRI examinations of plaintiff’s cervical, thoracic and lumbar spine, taken on October 30, 2005.

Insurance Law § 5102 (d) defines “serious injury” 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 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 recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). The

initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of her examining physicians and plaintiff’s bill of particulars (*see, Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 [2005]). Dr. Greenfield’s three MRI reports dated August 11, 2009 indicated that he reviewed three MRI studies of plaintiff’s cervical, thoracic and lumbar spine, taken on October 30, 2005. Dr. Greenfield opined that degenerative disc disease was present at all cervical and lumbar levels and was associated with degenerative bulging discs at C5-C6, L3-L4, and L4-L5 and a small herniated disc at L4-L5 and that there was no bulging or herniated disc in plaintiff’s thoracic spine. Moreover, Dr. Greenfield concluded that plaintiff’s lumbar spine injuries were not causally related to the subject accident.

On February 9, 2009, approximately three years and three months after the subject accident, Dr. Nathan examined plaintiff, using certain orthopedic and neurological tests, including impingement sign, drop arm test, Tinel’s sign, Phalen’s sign, Finkelstein’s test, Fabere-Patrick’s maneuver, Foraminal compression test, straight leg raising test, and Lasegue’s test. Dr. Nathan found that all the test results were negative or normal, except the positive Tinel’s sign in plaintiff’s left cubital tunnel. He also found that there was no spasm or tenderness in plaintiff’s cervical and lumbar spine, hands, elbows, hips and shoulders, except minimal mid thoracic vertebral tenderness. Dr. Nathan performed range of motion tests on the plaintiff’s shoulders, elbows, wrists, hands, hips, and cervical and thoracolumbar spine using a goniometer. Dr. Nathan reported his findings with respect to the various ranges of motion and compared those findings to the normal ranges of motion. Dr. Nathan concluded that plaintiff had normal range of motion in her shoulders, elbows, wrists, hands, hips, and cervical and thoracolumbar spine and opined that plaintiff had no disability related to the subject accident and that she was “able to return to pre-loss activity levels, including occupational duties without restrictions” (*see, Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2005]).

At her deposition, plaintiff Christine Bruno testified that she worked for Verizon as an operator at the time of the accident; that, after she missed approximately two months of work as a result of the accident, she returned to work on the same job; and that she had received physical therapy until the spring of 2006. Plaintiff also testified that there is no activity that she is unable to perform. Her deposition testimony reveals that her injuries did not prevent her from performing “substantially all” of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see, Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [1997]).

Thus, defendants have therefore met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system and that she was not prevented from performing substantially all of

her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see, Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [2005]).

In opposition, plaintiff Christine Bruno contends that she did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, she submits, *inter alia*, two unaffirmed MRI reports dated October 30, 2005 of Dr. Steven West concerning plaintiff's cervical and lumbar spine; the affirmed report dated October 26, 2009 of her examining physician, Dr. Andrea Coladner; the unaffirmed record dated October 28, 2005 of Brookhaven Memorial Hospital Medical Center including numerous reports and notes of her treating physician, Dr. Saad Shukri, and test results; the discharge summary report prepared by Dr. Shukri; the affirmed report dated December 21, 2005 of her treating neurologist, Dr. Antonio Flores; and the affirmed record of North Fork Physical Therapy, PC.

It is well established that the existence of herniated or bulging discs do not in themselves constitute a serious injury. Instead, such injuries must be accompanied by objective evidence of the extent or degree of the alleged physical limitations resulting therefrom and the duration thereof (*see, Bravo v Rehman*, 28 AD3d 694, 814 NYS2d 225 [2006]; *Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]; *Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). It is equally well established that limitations and restrictions purportedly attributable to injuries sustained in the accident which are duly observed and properly quantified months after the accident, rather than contemporaneously therewith, are insufficient to establish an actionable serious injury under § 5102 (d) of the Insurance Law (*see Borgella v D& L Taxi Corp.*, 38 AD3d 701, 834 NYS2d 199 [2007]; *Imusen v Konopka*, 38 AD3d 608, 831 NYS2d 530 [2007]; *Ponce v Magliulo*, 10 AD3d 644, 781 NYS2d 703 [2004]). To demonstrate the causation of plaintiff's alleged injuries, plaintiff was required to submit medical evidence based on an initial examination close to the date of the accident (*see, Borgella v D& L Taxi Corp.*, *supra*; *Imusen v Konopka*, *supra*) as well as medical evidence based on a recent examination in admissible form (*see, Oliva v Gross*, 29 AD3d 551, 816 NYS2d 110 [2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2005]).

Here, the plaintiff failed to raise a triable issue of fact that she sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident (*see, Sims v Megaris*, 15 AD3d 468, 790 NYS2d 487 [2005], *lv denied* 5 NY3d 703, 800 NYS2d 374 [2005]). Dr. Shukri's discharge summary report indicated that the MRI examination of plaintiff's cervical, thoracic and lumbar spine showed bulging discs at C5-C6, L3-L4, and L4-L5. The mere fact that a plaintiff suffers from a bulging or herniated disc is insufficient to establish "serious injury" for purposes of Insurance Law § 5102 (d) (*see, Howell v Reupke*, 16 AD3d 377, 790 NYS2d 703 [2005]; *Foley v Karvelis*, 276 AD2d 666, 714 NYS2d 337 [2000]). Instead, for such injuries to constitute a "serious injury" within the contemplation of the Insurance Law, it is incumbent upon a plaintiff to provide objective medical evidence of the degree of the alleged physical limitation resulting from the injuries and their duration (*see, Toure v Avis Rent A Car Sys.*, *supra*; *Foley v Karvelis*, *supra*).

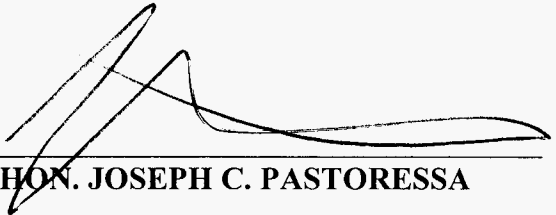
Although the plaintiff has submitted the affirmed report dated October 26, 2009 of her examining physician, Dr. Coladner, she failed to submit any other medical evidence based on an initial examination in admissible form, except for the affirmed report dated December 21, 2005 of her treating neurologist,

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Dr. Flores, who failed to discuss the range of motion of the plaintiff's cervical and lumbar spine. Moreover, although Dr. Coladner, in his report, concluded that plaintiff had range of motion restrictions in her cervical spine and that she had a bulging disc at L3-L4 and a herniated disc at L4-L5, he failed to discuss the range of motion of the plaintiff's lumbar spine. Furthermore, the plaintiff also failed to submit any competent medical evidence to support a claim that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days as a result of the subject accident (*see, Vita v Enterprise Rent-A-Car*, 8 AD3d 558, 779 NYS2d 128 [2004]).

The plaintiff has thus failed to raise a triable issue of fact that she had sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident. Accordingly, the motion by defendants Jennifer Bilski and Joseph Arma for summary judgment dismissing the complaint is granted.

Dated: September 17, 2010



HON. JOSEPH C. PASTORESSA

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