

Keys v Baker

2010 NY Slip Op 33595(U)

December 23, 2010

Supreme Court, Nassau County

Docket Number: 008893/09

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

EBONY KEYS,

Plaintiff(s),

-against-

DIANA BAKER,

Defendant(s).

ORIGINAL RETURN DATE:08/31/10
SUBMISSION DATE: 11/01/10
INDEX No.: 008893/09

MOTION SEQUENCE #1

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The following papers read on this motion:

Notice of Motion.....	1
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Defendant's motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff failed to sustain a serious injury as required under New York Insurance Law Section 5102(d) is granted.

This is an action to recover damages for personal injuries allegedly sustained as a result of the negligence of the defendant in the ownership and operation of her motor vehicle on or about February 12, 2008. Plaintiff testified at her deposition that she was involved in a prior accident in 2002, where she injured her lower back and right side [arm area] (see movant's Ex. E).

Defendant alleges that the reports of plaintiff's physicians from her prior accident and the affirmed reports of Michael J. Katz, M.D. and Alan B. Greenfield, M.D., as well as the Emergency Room report from Winthrop University Hospital and the deposition testimony of plaintiff, do not disclose the presence of a serious injury arising out of the subject accident. It is submitted that plaintiff does not suffer from permanent consequential limitations or significant limitations as a result of this accident.

To meet the threshold "significant limitation of use of a body function or system" or "permanent consequential limitation of a body organ or member" categories, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon

credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyer*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff's complaints, as alleged in the Bill of Particulars, consist of, among other things, broad-based disc bulge at L4-5, creating impingement on the neural canal; straightening of the cervical lordosis and focal disc bulges at CD5-6 and C6-7; cervical radiculitis; cervical disc syndrome; lumbar radiculitis; lumbar disc syndrome; pain, tenderness and limitation of motion of the cervical and lumbosacral spines. (Movant's Ex. D).

The report of Sima Anand, M.D. of the EMG test results of June 26, 2003, shows active denervation in left C5-6 and C6-7 and L3-4 and L4-5 innervated musculature and reveals the presence of a right cervical and lumbar radiculopathy (Movant's Ex. F). The affirmed report of Socorro C. Vicente, M.D. dated April 18, 2003, revealed his findings after a follow-up medical evaluation of plaintiff's involvement in her prior motor vehicle accident on November 3, 2002. Dr. Vicente's impression/diagnosis was:

- "1. CERVICAL RADICULOPATHY WITH SPASM, SECONDARY TO THE MOTOR VEHICLE ACCIDENT.
2. LUMBAR RADICULOPATHY WITH SPASM, SECONDARY TO THE MOTOR VEHICLE ACCIDENT. . . ." (Movant's Ex. G).

Counsel for defendant submits that the foregoing is evidence of preexisting cervical and lumbar spine radiculopathy and proof that the alleged injuries are not causally related to the accident which is the subject of this action. Plaintiff's counsel's argument that this report references an Ebony Douglas, and that there is no evidence that this is plaintiff, is unavailing as plaintiff testified at her deposition that she was known as Ebony Douglas, her married name (Movant's Ex. E, pp. 4, 5). Plaintiff was married on February 14, 2002, and separated in July 2007 (Id.).

Moreover, it is submitted that comparison studies of the MRI films of plaintiff's lumbar spine in 2003 and 2008 reveal virtually identical findings (Movant's Ex. H). Dr. Greenfield opines that there are no abnormalities which can be attributed to the accident of February 12, 2008, and that these findings are clearly degenerative in origin (Id.). With regard to the cervical spine, Dr. Greenfield also found his findings virtually identical to those seen on the prior examination of June 19, 2003 (Movant's Ex. I). Dr. Greenfield opines that there are no findings which can be attributed to the accident of February 12, 2008 (Id.).

Plaintiff sought emergency room treatment at Winthrop Hospital the day after the subject accident. X-rays were taken. The diagnosis was "acute cervical sprain" (Movant's Ex. J). In his reports dated March 31, 2008, Dr. Igor Stiller, plaintiff's own neurologist, noted that her electrodiagnostic studies revealed no evidence of cervical or lumbar radiculopathy (Movant's Exs. K and L).

Dr. Katz, an orthopedic surgeon, performed an examination of plaintiff on May 21, 2010. Dr. Katz's diagnosis was "[c]ervical strain with radiculitis - resolved" and "[l]umbosacral strain with radiculitis - resolved" (Movant's Ex. M). Dr. Katz opined that plaintiff "shows no signs or symptoms of permanence relative to the musculoskeletal system. She is currently not disabled. She is capable of gainful employment as an admissions worker without restriction" (Id.).

Based upon the testimony of plaintiff at her deposition, defendant concludes that plaintiff was not prevented from performing all of her usual and customary activities for 90 out of the first 180 days following the accident. Moreover, "there was no competent medical evidence which would support a claim that the plaintiff 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 (citation omitted)" (*Boyle v. Gundogan*, 19 AD3d 351 [2d Dept. 2005]).

Where, as here, defendant has provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (see, *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Tabacco v. Kaster*, 229 AD2d 526 [2d Dept. 1996]). "To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)" (*Seyfeid v. Greenspan*, 92 AD2d 563, 564 [2d Dept. 1983]; see, *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmed report of Mark Shapiro, M.D., as well as the affidavit of Shawn A. Sosnik, a chiropractor. Plaintiff first presented herself to Dr. Sosnik on February 16, 2008. Dr. Sosnik avers that he treated plaintiff for approximately four months and that plaintiff did not present herself again until an examination on August 27, 2010. Range of motion testing of the cervical and lumbar spines using an Inclinator revealed restrictions. Plaintiff's treating chiropractor indicated that plaintiff mentioned a prior back injury due to a motor vehicle accident in 2002 but claimed that she was pain free for several years. Dr. Sosnik failed to account for these injuries in his report. His assertions, therefore, that plaintiff's restrictions of motion in his spine were causally related to the subject accident are mere speculation (see, *Moore v. Sarwar*, 29 AD3d 752 [2d Dept. 2006]).

Dr. Sosnik posits that he discharged plaintiff from therapy as her no fault benefits were denied but instructed her to come to his office for treatments periodically as needed. The Court of Appeals has held that a gap in treatment is the period of time between the end of plaintiff's treatment [here June 2008] and her visit to the doctor to obtain an expert medical report [here August 2010] (*Pommells v. Perez*, 4 NY3d 566, 574 [2005]). Although it was indicated that plaintiff's insurance ran out, "no corroborative proof was submitted to substantiate these bare allegations" (*Paul v. Allstar Rentals, Inc.*, 22 AD3d 476, 477 [2d Dept. 2005]).

The affirmed reports of Mark Shapiro, M.D., a board certified radiologist, reveals the following results from MRIs performed in March 2008:

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"BROAD BASED DISC BULGE AT L4-5, CREATING IMPINGEMENT ON THE NEURUAL CANAL."

"STRAIGHTENING OF THE CERVICAL LORDOSIS."

"FOCAL DISC BULGES AT C5-6 AND 6-7." (Ex. B)

"The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (citations omitted)" (*Catalano v. Kopmann*, 73 AD3d 963 [2d Dept. 2010]).

Plaintiff's submissions failed to raise a triable issue of fact. Accordingly, plaintiff's complaint is dismissed, without costs.

This decision constitutes the order and judgment of the court.

Dated: 12-23-10

HON THOMAS P. PHELAN
THOMAS P. PHELAN, J.S.C.
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