

Kachalia v Jager

2011 NY Slip Op 30259(U)

January 27, 2011

Sup Ct, Suffolk County

Docket Number: 28116/2007

Judge: Paul J. Baisley

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

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
AMY KACHALIA, RADHA KACHALIA &
HASMUKRAI KACHALIA,

Plaintiffs,

-against-

LINDA JAGER,

Defendant.
-----X

INDEX NO.: 28116/2007
CALENDAR NO.: 201000603MV
MOTION DATE: 10/14/2010
MOTION NO.: 003 MOT D

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-11 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-21 ; Replying Affidavits and supporting papers 22-23 ; Other ; (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that this motion by defendant for, *inter alia*, an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint on the ground that plaintiffs Amy Kachalia and Radha Kachalia did not sustain a "serious injury" as defined in Insurance Law §5102(d) and for an order pursuant to CPLR 3126 dismissing the claims of plaintiff Radha Kachalia for failure to appear for an independent medical examination is determined as follows.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Amy Kachalia and plaintiff passenger Radha Kachalia as a result of a rear-end motor vehicle accident that occurred on May 24, 2007. By their supplemental bill of particulars, plaintiffs allege that Amy Kachalia and Radha Kachalia sustained serious injuries as a result of the subject accident, including severe pain and muscle spasms overlying the cervical spine, neck, lower lumbar and gluteal muscles. Further, as to plaintiff Amy Kachalia, they allege that she sustained paraspinal tenderness on her right side, impingement and rotator cuff tenderness on her left side, cervicalgia, disc displacement, and rotator cuff syndrome of her left shoulder. At the time of the accident, plaintiff Amy Kachalia was employed as a bookkeeper and plaintiff Radha Kachalia was a full-time student. Plaintiffs also allege that plaintiff Amy Kachalia and plaintiff Radha Kachalia sustained economic loss in excess of basic economic loss as defined in Insurance Law §5102(a).

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiffs Amy Kachalia and Radha Kachalia did not sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the subject accident. In addition, defendant asserts that the claims of plaintiff Radha Kachalia should be dismissed pursuant to CPLR 3126 for failure to appear for a scheduled independent medical examination on six separate occasions without any credible excuse. In the alternative, defendant seeks an amendment or re-submission of said motion after plaintiff Radha Kachalia appears for an independent medical examination.

In opposition to the summary judgment motion, plaintiffs contend, among other things, that the motion is untimely and that defendant waived her right to an independent medical examination of plaintiff Radha Kachalia when her counsel executed the certification order of this action without preserving her right to any outstanding discovery.

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 Inc.*, 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 “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided 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 (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is well settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

The Court initially addresses the timeliness of the instant motion under CPLR 3212(a). A review of the Court’s computer records reveals that the note of issue of this action was filed on April 5, 2010, and that the 120-day deadline for making a summary judgment motion was August 3, 2010. According to the affidavit of service of the instant motion for summary judgment, the motion was made on August 2, 2010, the date on which it was served (*see, CPLR 2211*). As such, the instant motion was interposed prior to the expiration of the 120-day time limitation set forth under CPLR 3212(a) and is timely. The Court now considers the merits of the motion.

Here, defendant established, *prima facie*, that plaintiff Amy Kachalia did not sustain a “serious injury” within the meaning of Insurance Law §5102(d) as a result of the subject accident by submitting plaintiff’s deposition testimony and the affirmed medical report dated February 16,

2010 of defendant's examining orthopedic surgeon, Michael J. Katz, M.D. (*see, Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Ranzie v Abdul-Massih*, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]). The affirmed report of defendant's examining orthopedic surgeon, who tested the ranges of motion of plaintiff Amy Kachalia's cervical spine, lumbar spine, and both shoulders using a goniometer, revealed that plaintiff's specified ranges of motion when compared with the norms were all within normal ranges (*see, Staff v Yshua*, 59 AD3d at 614). In addition, defendant's examining orthopedic surgeon listed the other orthopedic tests that he performed and reported that their results were all negative (*see, id*). In concluding his report, defendant's examining orthopedic surgeon diagnosed cervical strain with radiculitis, resolved; lumbosacral strain, resolved; and bilateral shoulder contusion, now resolved. He opined that plaintiff Amy Kachalia showed no signs or symptoms of permanence relative to the musculoskeletal system and that her cervical spine MRI findings were age-related degenerative findings which were totally unrelated to the accident. Defendant's examining orthopedic surgeon further opined that plaintiff was capable of gainful employment as an accountant, but that she is not working by choice.

Moreover, plaintiffs' bills of particulars and the deposition testimony of plaintiff Amy Kachalia that she returned to work as a bookkeeper three weeks after the accident established that such plaintiff did not sustain a medically-determined injury of a nonpermanent nature which prevented her, for 90 of the 180 days immediately following the subject accident, from performing her usual and customary activities (*see, Furrs v Griffith*, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]). Furthermore, there is no evidence that plaintiff Amy Kachalia incurred economic loss in excess of basic economic loss as defined in Insurance Law §5102(a) (*see, Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden thus shifted to plaintiffs to show, by admissible evidentiary proof, the existence of a triable issue of fact with respect to plaintiff Amy Kachalia (*see, Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition, plaintiff Amy Kachalia failed to raise a triable issue of fact as to whether she sustained a "serious injury" (*see, Srebnick v Quinn*, 75 AD3d 637, 904 NYS2d 675 [2d Dept 2010]). The sole medical evidence submitted by plaintiff Amy Kachalia in opposition to the motion is the affidavit and attached report of her chiropractor based on his examination of plaintiff on August 17, 2010. Plaintiff's chiropractor, who did not commence treating plaintiff until May 2010, noted in his report that plaintiff's right cervical rotation was 40 degrees (normal 75 degrees), diagnosed plaintiff as having right cervical radiculitis at C5-C6, and opined that plaintiff's injuries were related to the subject motor vehicle accident. However, the mere existence of a herniated or bulging disc, and even radiculopathy, 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 (*see, Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]). Here, plaintiff Amy Kachalia failed to proffer competent objective medical evidence that was contemporaneous with the subject accident concerning her cervical range of motion (*see, Torchon v Oyezole*, ___ AD3d ___, 910 NYS2d 662 [2d Dept 2010]). Without such contemporaneous findings, plaintiff failed to raise a triable issue of fact under the permanent loss, permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law §5102(d) (*see, Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2d Dept 2010]).

Also, the affidavit of plaintiff Amy Kachalia was insufficient to raise a triable issue of fact (*see, Silla v Mohammad*, 52 AD3d 681, 861 NYS2d 83 [2d Dept 2008]). Moreover, plaintiff's submissions failed to set forth competent medical evidence that the injuries she allegedly sustained as a result of the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days thereafter (*see, Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (*see, Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Therefore, defendant is granted summary judgment with respect to the claims of plaintiff Amy Kachalia. Inasmuch as the claims on behalf of plaintiff Amy Kachalia must be dismissed, the derivative cause of action on behalf of her husband, plaintiff Hasmukrai Kachalia, must also be dismissed (*see, Cabri v Park*, 260 AD2d 525, 688 NYS2d 248 [2nd Dept 1999]).

With respect to plaintiff Radha Kachalia, defendant did not submit any medical proof in support of her summary judgment motion. Thus, defendant failed to meet her *prima facie* burden of showing that plaintiff Radha Kachalia did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) as a result of the subject accident (*see, Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Therefore, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see, id.*).

Regarding defendant's request for sanctions against plaintiff Radha Kachalia for allegedly failing to appear for an independent medical examination ("IME"), the drastic remedy of striking a pleading pursuant to CPLR 3126(3) for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious (*see, CPLR 3126; Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654, 896 NYS2d 152 [2d Dept 2010]). As for the alternate request of discovery at this stage of proceedings, post-note discovery may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21 (*see, Tirado v Miller*, 75 AD3d 153, 157, 901 NYS2d 358 [2d Dept 2010]). One method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), by merely showing that discovery is incomplete and that the matter is not ready for trial (*Tirado v Miller*, 75 AD3d at 157; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138, 707 NYS2d 137 [2d Dept 2000]). The second method, beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21 (d), meet a more stringent standard and demonstrate "unusual or unanticipated circumstances and substantial prejudice" absent the additional discovery (*Tirado v Miller*, 75 AD3d at 157; *Audiovox Corp. v Benyamini*, 265 AD2d at 138).

Here, defendant has failed to demonstrate that the failure of plaintiff Radha Kachalia to appear at the scheduled independent medical examinations was willful or contumacious (*see, Hughes v Cai*, 55 AD3d 675, 866 NYS2d 253 [2d Dept 2008]). In addition, defendant's prior motion to vacate the note of issue did not address the issue of plaintiff's alleged failure to appear for an IME, and in any event was denied by the Court (BAISLEY, J.) pursuant to a short-form order dated August 18, 2010. Therefore, any additional discovery sought by defendant must meet the requirements of 22 NYCRR 202.21(d) that the discovery is needed due to "unusual or unanticipated circumstances" and that its absence causes "substantial prejudice" (*see, Tirado v Miller*, 75 AD3d at 157). Defendant's attorney does not address why his office executed the

certification order for this action in February 2010 without preserving his claim fo an outstanding IME and what post note of issue “unusual or unanticipated circumstances” arose. Thus, defendant failed to make the requisite showing that “unusual or unanticipated circumstances” arose after the filing of the note of issue (*see, Racine v Grant*, 65 AD3d 535, 882 NYS2d 908 [2d Dept 2009]). Defendant’s alternate requests to amend the subject motion or resubmit the subject motion for summary judgment dismissing the claims of plaintiff Radha Kachalia after she appears for an independent medical examination are denied.

Accordingly, the instant motion is granted solely with respect to the dismissal of the claims of plaintiff Amy Kachalia in the first cause of action and the dismissal of the third cause of action of plaintiff Hasmukrai Kachalia. The remaining claims are severed and continued.

Dated: January 27, 2011

PAUL J. BAISLEY, JR.

J.S.C

____ FINAL DISPOSITION X NON-FINAL DISPOSITION