

Lacen v Copeland

2011 NY Slip Op 31710(U)

June 23, 2011

Supreme Court, New York County

Docket Number: 110718/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 110718/2006

LACEN, EMERIS'

INDEX NO. _____

vs

COPELAND, ROBERT, JR.

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. 003

SUMMARY JUDGMENT

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

JUN 23 2011

Dated: _____

HON. JUDITH J. GISCHE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Emeris Lacen,

Plaintiff (s),

-against-

Robert Copeland Jr., Louis J. Kennedy
Trucking and Shakyra Parker,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 110718-06
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the motion, is set forth in this (these) motion(s):

Papers	Numbered
Parker n/m (3212) w/DSG affirm, exhs	1
Copeland and Kennedy x/m (3212) w/ADG affirm, exhs	2
Lacen opp w/SC affirm, EL, JSG affids, exhs	3
Parker reply w/TAP affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This case arises from a motor vehicle accident. Issue was joined by the defendants. Shakyra Parker ("Parker") has moved and Robert Copeland Jr. ("Copeland") and Louis J. Kennedy Trucking ("Kennedy") have cross moved for summary judgment on the basis that plaintiff Emeris Lacen ("Lacen") did not suffer a serious injury, within the meaning of Insurance Law § 5102 [d]. Lacen opposes the motion. Since this motion was brought timely after the note of issue was filed, it will be decided on the merits (CPLR 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]).

This action was consolidated for discovery and joint trial with another action captioned Shakyra Parker v. Louis J. Kennedy Trucking and Robert Copeland, Sup Ct., N.Y., Index No. 107613/06 ("Parker action"). Both actions are now assigned to this court.

Arguments and Facts

Lacen was the front seat passenger in the vehicle operated by Parker (a Nissan Altima) when, on August 26, 2005, the car collided with a tractor-trailer owned by Kennedy and operated by Copeland. Lacen was deposed and has provided her sworn affidavit in opposition to defendants' motion. Lacen contends that Parker was in the process of making a left hand turn when the accident occurred. The passenger side of the Nissan was "pushed in" and "you couldn't really open the door of the car." Lacen was unable to get out of the passenger side door and exited through the driver's side door. The front bumper of the Nissan was also damaged.

Lacen contends that as a result of the impact, her body jerked up and down and from side to side, causing her to strike her head, right knee and right shoulder against the dash board, glove compartment, and passenger side door. She did not seek medical attention that day and there is a police report indicating no one was injured in the accident.

On August 27, 2005, the day after the accident, Lacen sought medical attention at a clinic complaining of pain and discomfort to her neck, back and right shoulder, head and right knee. Motrin was dispensed and she was told to get xrays or MRIs at Bronx Lebanon Hospital. Lacen did not have the xrays or MRIs taken.

Thereafter, on September 7, 2005, Lacen went to the Crotona Medical Center

where she was treated by Dr. Andrew J. Cordaro, M.D. for approximately seven (7) months. The treatment included physical therapy, chiropractic care and spinal manipulation under anesthesia by three (3) chiropractors who maintained offices in the same building as Crotona Medical Center. MRIs were taken in September 2005 revealed bulging discs, a disc herniation, and a curvature of the cervical spine which was attributed to muscle strain or spasm. Lacen was prescribed a corset and provided with an electrical impulse "machine." Her last treatment with Dr. Cordero was in March 2006.

In his initial evaluation dated September 7, 2005, Dr. Cordero did range of motion ("ROM") testing which showed flexion of Lacen's cervical spine was "40" (60 normal), extension "30" (50 normal), right lateral flexion "30" (40 normal), left lateral flexion "30" (40 normal), left and right rotation "60" (80 normal). The lumbar spine was within normal range, except for flexion which was "75" (90 normal) and extension "30" (20 normal). The prescribed treatment plan consisted of pain medication, physical therapy, hot/cold packs, ultrasound and acupuncture. Biofeedback training was also recommended for her headaches and neck spasms.

An MRI of the lumbar spine performed September 28, 2005 showed no fracture or spondylolisthesis or stenosis. The MRI did show, however, "1. L5-S1 annular disc bulge; 2. Small central disc herniation at the L4-5 level causing mild impression on the L5 nerve roots bilaterally and mild impingement on the anterior aspect of the spinal canal." An MRI of the cervical spine was performed September 21, 2005. It showed no evidence of stenosis but it did show "1. A straightening of the normal lordotic curvature of the cervical spine due to muscle strain or spasm; 2. C2-C3 annular bulge."

In the narrative of his final status report dated June 14, 2006, Dr. Cordero observed that although Lacen had attended physical therapy sessions for some months and been reevaluated, Lacen had not noticed much improvement and she continued to complain of pain. Dr. Cordero's prognosis was that the weaknesses exhibited by Lacen were the result of traumatic injuries sustained on August 26, 2005 and that "[considering] the patient's symptomatology, results of comparative tests, examination and past experience with similar cases, that those weaknesses may well predispose these areas to further problems which might not have otherwise bothered the patient prior to the accident. It is our considered opinion that these areas will be permanently weakened for an indefinite period of time resulting in significant and permanent restricted mobility." His overall prognosis for full and complete long term recovery was "guarded."

In her bill of particulars, Lacen contends she sustained injuries which are permanent and/or progressive in nature. She also claims the injuries effect her nervous system and may limit her activities in employment and her life. The claimed injuries include:

- Central disc herniation at L5-5 with impression on the L5 nerve roots
- L5-S1 disc bulge
- C2-3 disc bulge
- Impingement on spinal canal
- Chronic myofascitis noted in her lumbar regions
- Restricted ROM
- Antalgic gait
- Need for future surgery

Lacen was employed as a security guard at the time of the accident. She testified that she worked after the accident but later could not finish her job at the Javits

Center because she "caught a muscle spasm and I couldn't get out of the bed." Upon further questioning, she explained this was in July 2006 but that she did not resume work after the accident. When asked at her deposition about things she used to do which she can no longer do as a result of the accident, Lacen responded that "I really can't stand for a long time. I can't sit ...for a long period of time...I get a lot of migraines, every other day, but other than that ...the numbness...starts on the [right] shoulder...and it goes to the tips of my fingers...I just get these tingling sensations." In her sworn affidavit, Lacen complains of ongoing pain, stiffness, tingling, numbness and a loss of range of motion in her neck and back. She also states that she has been unable to resume her customary daily activities. According to Lacen, her condition worsens when she does household chores and the weather affects her back.

After completing her treatments with Dr. Cordero in March 2006, Lacen was referred by her then attorney to a medical practice called "Chelsea Village." The doctor at Chelsea Village only examined Lacen. He did not treat her, nor prescribe any medication. This was sometime after she stopped treatments with Dr. Cordero but before January 2007.

Lacen did not treat again with any physician after Dr. Cordero until January 2007 when Lacen saw Dr. Jonathan Garay, D.O. Dr. Garay provides his sworn affidavit that Lacen came to him in January 2007, complaining of constant headaches, weakness, numbness and decreased mobility. Dr. Garay did range of motion testing and describes his findings. Lacen's cervical extension was 50 degrees and flexion was 35 degrees whereas normal ROM is 50 and 45, respectively. The lateral bending of her neck was 40 degrees to the left and 35 degrees to the right, compared to the normal

ROM of 45 degrees each direction. Other tests revealed her cervical rotation was 80 degrees to the left and 70 degrees to the right. Normal cervical rotation is 80 degrees. Lumbar extension was 15 degrees and flexion 75 degrees (normal is 30 degrees and 80 degrees, respectively). The lateral bending of Lacen's lumbar was 20 degrees to the left and right whereas normal is 30 degrees. He diagnosed her with "cervical and lumbar spine derangements, lumbar radiculopathy, L5-S1 disc bulge, L4-L5 disc herniation and C2-C3 annular disc bulge." Dr. Garay also noted "a restriction of spinal motion and areas for paraspinal muscle spasms." The doctor also "noted a possible need for surgical removal of the L4-L5 disc herniation."

According to Dr. Garay, he continues to treat Lacen on an "as needed basis." The next time Dr. Garay saw Lacen was in January 2009 for a re-evaluation. At that time Lacen reported her neck pain as being an "8" out of 10 and her lower back pain as a "10" out of 10. Based upon his testing, first hand observations and Lacen's own reports of continued pain, weakness and limited motion, Dr. Garay opines that Lacen has suffered a "significant limitation in use of her cervical spine and lumbar spine and it is a permanent disability" and that the restrictions in motion and pain "prevents [Lacen] from fully carrying out many of her normal activities and daily chores."

Dr. Daniel J. Feuer, M.D., a neurologist, examined Lacen on behalf defendant ("IME") Parker. Dr. Feuer states that Lacen "did not demonstrate any objective deficits referable to the central peripheral nervous systems" and her examination was within normal limits finding that her ROM on all rests was "normal." He opines that Lacen "is neurologically stable to engage in full active employment as well as the full activities of daily living without restriction."

Dr. Lester Lieberman, M.D., an orthopedic, conducted an IME of Lacen on Parker's behalf in October 2008. Dr. Lieberman also performed ROM tests and found the results were all "normal," there is no abnormal reflex, muscle strength is good and detected no tenderness in the upper or lower extremities. Dr. Lieberman noted in his report that Lacen works a 40 hour work week in security and does not lift or carry. He also noted that Lacen missed work since the accident and is not actually working at the present time.

Although separately moving for summary judgment, Copeland and Kennedy adopt Parker's arguments for why summary judgment should be granted dismissing the complaint against all three defendants. In addition to relying on the reports of Drs. Feuer and Lieberman that Parker has provided, Copeland and Kenney separately submit the report of Alfred L. Cipriani, P.E., who is a mechanical engineer and an accident reconstruction specialist.

Cipriani examined various documents, reviewed transcripts of the parties' depositions and also took the statements of Parker and Lacen about how the accident occurred. Cipriani compared the repairs made of the Nissan to photographs taken of the vehicle showing the damage to the car after the accident. He then compared the repair estimate, photographs and police accident report to the statements made by Lacen and Parker.

The Repair estimates for the Nissan were \$4,476.28 and included things like a front bumper emblem, a front license bracket, and wheel covers. Parker and Lacen each stated that all occupants of the car were wearing seat belts when the impact occurred. According to Lacen and Parker, the rear of the tractor trailer driven by

Copeland hit the front of Parker's car causing the car to lift upwards. Neither Lacen nor Parker reported seeing any damage to the truck and the air bags in Parker's car did not deploy.

Cipriani also reviewed the deposition testimony of Copeland who testified that Van Dam Street (Queens), where the accident occurred, was "very congested" and that he was only traveling at "a very low rate of speed" which was "definitely less" than 20 mph when the accident occurred. Cipriani observes that everyone in the Parker vehicle refused medical attention and no injuries were reported. He also notes that the documented damage to the Nissan is not consistent with a side impact or the severity of the accident, as described by Lacen.

Based upon the foregoing, Cipriani opines that the "speed change of Ms. Parker's Nissan was no more than 6.5 mph, resulting in an average rearward acceleration of no more than 3.0 g's for a duration of approximately 100 milliseconds (msec) during the collision of August 26, 2005. The cited scientific research shows that the average acceleration of Ms. Parker's Nissan was not sufficient to cause persistent injury to volunteer test subjects." In lay terms, Cipriani opines that at its peak level, the accident was no more serious than a "cough."

Law Applicable to a Motion for Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect

Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts (Zuckerman v. City of New York, *supra* at 563-64).

Discussion

A "serious injury" is defined by Insurance Law § 5102 [d]:

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 determining a motion for summary judgment where the issue is whether plaintiff has sustained a serious injury, the defendant bears the initial burden of presenting competent evidence that the plaintiff has no cause of action (Brown v. Achy, 9 AD3d 30 [1st Dept 2004]). Here, the issue framed by these motions is whether Lacen's injuries fall within the latter two categories of the statute, to wit: has she suffered a significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constitute her usual and customary daily activities for a period of not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

Where there is a lengthy gap in treatment, the gap must be explained to dispel the suggestion that any injury plaintiff sustained has resolved, thus eliminating any possibility that the plaintiff sustained a "serious injury" (Pommells v. Perez, 4 N.Y.3d 566 [2005]; Berete v. Ford Motor Credit Co., 10 Misc.3d 1067(A) [Sup Ct N.Y. Co. 2006]). Thus, while a gap in treatment is not dispositive of a plaintiff's claim of a serious injury under the No-Fault Law, a plaintiff who terminates therapeutic measures following an automobile accident, while claiming "serious injury," must offer some reasonable explanation for having done so (Pommells v. Perez, supra).

Lacen last treated with Dr. Cordero in March 2006. While under his care, medication was prescribed, she participated in physical therapy, received high voltage pulse current stimulation, and was prescribed exercises to do at home. The final narrative report address Lacen's progress: "the patient attended physical therapy sessions regularly over the next few months, and did not notice much improvement. During several follow-up visits, the patient continued to [complain] of the same pain."

Lacen states that after she stopped treatments with Dr. Cordero, she continued doing prescribed exercises at home. She also contends that she was told that additional treatment would be palliative because she had reached the maximum medical improvement without surgery. This is consistent with Dr. Garay's "guarded" prognosis for her recovery and opinion that "surgical removal of the L4-L5 disc herniation" might be necessary."

There is no requirement that a plaintiff continue to undergo needless treatment for his or her case to survive a summary judgment motion (Delgado v. Bernard, 23 Misc.3d 1131(A) [Sup Ct. Bx. Co. 2009]). Furthermore, in deciding a summary

judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The court must also liberally construe the evidence in the light most favorable to the party opposing the motion (Kesselman v. Lever House Restaurant, 29 AD3d 302 [1st Dept. 2006]). Applying these legal principles, Lacen has provided an adequate explanation for why she did not treat with another doctor until January 2007 when she saw Dr. Garay (Pommels v. Perez, supra). Defendants' motion for summary judgment, dismissing the complaint on the basis of an unexplained gap in treatment is, therefore, denied.

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Defendants' examining orthopedic and neurologist did physical examinations of Lacen and performed ROM testing. Dr. Lieberman opines that all Lacen's test results were "normal," that she has no abnormal reflex, she has good muscle strength and that he detected no tenderness in the upper or lower extremities. Dr. Feuer, the neurologist, opines that Lacen "did not demonstrate any objective deficits referable to the central peripheral nervous systems" and her examination was within normal limits finding that her ROM on all rests was "normal." He also opines that Lacen "is neurologically stable to engage in full active employment as well as the full activities of daily living without restriction." These reports satisfy defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury," shifting the burden to Lacen to raise a triable issue of fact that she sustained a serious injury, within the

meaning of the Insurance Law (see, Gaddy v. Eyer, 79 NY2d 955 [1992]).

In opposition, Lacen provides medical affidavits demonstrating that her threshold motion limitations were objectively measured and observed by the Drs Cordero and Garay. A physician's observation as to actual physical limitations qualifies as objective evidence since it is based on the physician's own examinations. (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]). Dr. Cordero's physical examination and ROM testing was done contemporaneous with the accident (only two weeks later) and the testing shows plaintiff's quantitative restrictions (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]).

Medical proof must also be based on a recent examination of the plaintiff (see Bent v Jackson, 15 AD3d 46 [1st Dept 2005]; Nunez v Zhagui, 60 AD3d 559 [1st Dept 2009]). Dr. Garay's report satisfies this requirement because he examined Lacen in 2007 and reevaluated her in 2009. Since Lacen has submitted objective medical evidence establishing that her claimed injuries were caused by the accident, and she has provided "objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (Noble v Ackerman, 252 AD2d 392, 394 [1st Dept 1998]), she has raised a triable issue of fact whether she sustained a significant limitation of use of a body function or system, i.e. a serious injury. Therefore, defendants' motion for summary judgment dismissing the complaint is denied.

Although defendants claim that the impact of the collision between the tractor trailer and Parker's vehicle was no more severe than a cough, Lacen describes how she was jerked about when the Nissan and truck collided, causing her to strike different parts of her body. It is for the jury to decide whether the injuries alleged by Lacen are

causally related to the accident, that is whether the accident was severe enough to have caused the injuries alleged. Cipriani's opinion, that the accident was minor, merely presents a different factual account of the severity of the accident and is not a basis to award defendants summary judgment.

Lacen claims that she suffered an injury which prevented her from performing substantially all of her daily activities for a period of 90 days out of the 180 days after the accident. In order to prove "serious injury" under the 90-out-of-180-day rule, "plaintiff must prove that she was curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (Gaddy v. Eyley, 79 N.Y.2d 955, 958 [1992]; Licari v. Elliott, 57 N.Y.2d 230, 236 [1982]).

Lacen contends that she did not work following the accident. Although she obtained work providing security at the Javits Center, that employment was not until July 2006, which is beyond the 180 day period relevant to a motion for summary judgment on a threshold issue. Lacen also claims she is still unable to perform daily activities, such as lifting, household chores (i.e. cooking, cleaning, vacuuming and groceries) and that she depends on her family to assist with these chores. She also claims to be unable to sit very long, nor can she bend repetitively. While defendants claim that Lacen was actively seeking employment after she was injured, this argument is based upon statements by her taken out of context.

Lacen did work as a "temp" at a data entry company, possibly in April 2006. She also indicated that she was trying to get employment in the security field because she was being "hassled" about receiving public assistance. There is, however, nothing to support defendants argument that Lacen did not miss time from work or that in the 180

day period following her accident she worked or was trying to obtain employment. Since discovery has been completed, if defendants had any evidence contradicting Lacen's statements that she was unemployed after the accident they should have presented it on this motion. Having failed to do so, they are not entitled to summary judgment dismissing Lacen's claim of "serious injury" under the 90-out-of-180-day rule. Lacen has, in any event, raised triable issues of fact that she was curtailed from performing her usual activities to a great extent rather than some slight curtailment.

Since the note of issue was filed, this case is ready to be tried. Lacen shall serve a copy of this decision/order on Mediator Vigilante before whom there is scheduled mediation on July 21, 2011 and on the Office of Trial Support so the case can be scheduled.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by defendant Shakyra Parker for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by defendants Robert Copeland Jr. and Louis J. Kennedy Trucking for summary judgment dismissing the complaint is also denied; and it is further

ORDERED that Lacen shall serve a copy of this decision/order on Mediator Vigilante before whom there is scheduled mediation on July 21, 2011 and on the Office of Trial Support so the case can be scheduled; and it is further

ORDERED that any relief requested that has not been addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 23, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

JUN 24 2011

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