

Lyon v Rosen

2011 NY Slip Op 31725(U)

June 15, 2011

Supreme Court, Nassau County

Docket Number: 6537/2009

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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BRITTNEY LYON,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.:6537/2009
Motion Seq. Nos.: 01 & 02**

LORI ROSEN, HAROLD RUTLOFSKY, NERMEEN AZAB
and MONIKA AZAB,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Defendants Rosen & Rutlofsky's Notice of Motion	01
Defendants Azabs' Notice of Motion	02
Plaintiff's Opposition	xx
Defendants Rosen & Alvarez' Reply	xx

In motion sequence number one, defendants Lori Rosen and Harold Rutlofsky move by Notice of Motion for summary judgment dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury as required under New York Insurance Law §5102(d). In motion sequence number two, defendants Nermeen Azab and Monika Azab move for the same relief as defendants Rosen and Rutlofsky.

In this action, the plaintiff seeks to recover monetary damages for personal injuries she sustained in an automobile accident that occurred on April 29, 2006 . Lyon was a seat-belted front passenger in the vehicle owned by defendant Monika Azab and operated by defendant Nermeen Azab at the time of the accident. After the accident, she was taken by ambulance to Franklin Hospital for an evaluation. She was discharged later that day and prescribed pain relief medications. During her deposition the plaintiff testified that in addition to the subject accident she was involved in an accident on December 23, 2005. Lyon testified that she was treating with a physical therapist at South Shore Physical Medicine approximately three times per week as a result of the 2005 accident when the subject accident occurred.

In the plaintiff's Bill of Particulars she indicated that as a result of the accident the following injuries were caused: aggravated exacerbated and/or rendered symptomatic: L2/3 and L3/4 disc

bulges, central herniation at L5/S1, lumbar spine sprain/strain with myofascial pains; cervical sprain/strain; thoracic spine sprain/strain; C3/4 through C6/7 posterior subligamentous disc bulges; posterosuperior nasopharyngeal soft tissue prominence, suggesting possible adenoidal hyperplasia; altered signal within this region suggests a possible area of hemorrhage; dextroconvex scoliosis, levoconvex scoliosis; L2/3 and L3/4 posterior disc bulges; L4/5 posterior disc herniation, extending to eccentrically narrow the right foramen; L5/S1 posterior disc herniation. The plaintiff claims that as a result of the aforementioned injuries her life and style of living have been restricted and have interfered with her opportunities including but not limited to: inability to socialize with family, friends and neighbors, inability to ambulate, difficulty in normal daily activities; additional assorted and numerous other physical limitations which has resulted in increased anxiety; constant and intermittent pain in the injured areas; acute depression and emotional overlay resulting from the injuries. The plaintiff claims to have experienced an interruption of personal activities by the necessity of repeated and numerous doctor visits for aftercare and treatment, and resulting anxiety from difficulty in traveling to and from doctor's offices.

On July 1, 2010, Dr. Neil Watnik conducted an independent orthopedic examination of the plaintiff. Prior to examining Lyon, Dr. Watnik took notes about Lyon's medical history at which time Lyon indicated that she had an accident in 2005, was not taking any medications, and that she was experiencing pain in her neck and lower back. Dr. Watnik performed a range of motion test using a goniometer. After Dr. Watnik's examination, he opined that "there is no muscle spasm noted upon palpation of the paracervical muscles or at the trapezius bilaterally. There is no tenderness noted upon palpation of the paracervical muscles or at the trapezius bilaterally. Range of motion is noted to be in flexion at 50 degrees (50 degrees normal), extension at 60 degrees (60 degrees normal), right lateral flexion at 45 degrees (45 degrees normal) and left lateral flexion at 45 degrees (45 degrees normal), and right rotation at 80 degrees (80 degrees normal) and left rotation at 80 degrees (80 degrees normal). The defendants have submitted the expert opinion of several doctors who opine that the plaintiff did not sustain a causally related serious injury.

The plaintiff opposes the motions by submitting the affirmed medical reports of plaintiff's treating physicians, Dr. Nizarali Visram and Dr. Robert Diamond. Dr. Nizarali Visram affirms that the plaintiff suffers from significantly restriction of range of motion in her cervical spine of as much as 56% of normal and restrictions in her lumbar spine of as much as 60% of normal as a result

of her significant injuries that are casually related to the subject accident.

Dr. Nizarali Visram first examined Ms. Lyons on May 9, 2006 wherein she complained of sharp, stabbing neck pain that radiated into both shoulders and mid back, with pins and needles in bilateral mid trapezius. Ms. Lyons reported at the visit that her pain was aggravated with bending and turning. During the visit Lyon also complained of mid back pain radiating from the neck. She began physical therapy on May 9, 2006 and continued until June 14, 2006. Lyon claims that she could not continue with the physical therapy because her medical benefits for services were denied.

On June 2, 2006, a MRI of Lyons lumbar spine revealed the following: Levoconex Scoliosis, L 2/3 and L3/4 posterior disc bulges, L4/5 posterior disc herniation-extending to eccentrically, narrow the right foramen, L5/S1 posterior disc herniation. MRI of the cervical spine dated June 2, 2006 reveals the C3/4 through C6/7 posterior subligamentous disc bulges, posterosuperior nasopharyngeal soft tissue prominence, suggesting possible adenoidal hyperplasia; altered signal within the region suggests a possible area of hemorrhage; dextroconvex scoliosis; levoconvex scoliosis; L2/3 and L3/4 posterior disc bulges; L4/5 posterior disc herniation, extending to eccentrically narrow the right foramen; L5/S1 posterior disc herniation. Dr. Visram's initially indicated that the plaintiff had significantly reduced range of motion in her cervical spine of up to 50% of normal together with extensive positive orthopedic testing and restrictions in lumbar range of motion of nearly 50% of normal.

Dr. Nizarali Visram has submitted a report dated January 5, 2011 wherein he states the Ms. Lyon continues to suffer from "significantly restricted range of motion in her cervical spine of as much as 56% of normal and restrictions in her lumbar spine of as much as 60% of normal as a result of her significant injuries that are causally related to the subject accident."

Dr. Robert Diamond reviewed the MRI scan of the plaintiff's lumbar spine. He opined that," Levoconvex scoliosis is present. L2/3 and L3/4 posterior disc bulges are identified. L4/5 posterior disc herniation is noted, extending to eccentrically narrow the right foramen. L5/S1 posterior disc herniation is seen. L5/S1 disc hydration loss is present. The examination otherwise demonstrates the remaining lumbar vertebral bodies to be unremarkable in height and signal. The conus medullaris is unremarkable in signal, morphology and position. No other significant prevertebral or posterior paraspinal abnormal masses or altered signals are otherwise noted."

Neither Dr. Visram or Dr. Diamond reviewed or affirmed the plaintiff's February 3, 2006

cervical and lumbar spine MRI reports which were referred to in Dr. Nizarali Visram's report. Additionally, the plaintiff has failed to include the MRI in her opposition papers. There is no indication that the MRI images of February 3, 2006, taken after the 2005 accident and prior to the subject accident, were compared with the MRIs taken post the 2006 accident. No distinction has been made between the injuries sustained by the plaintiff in the 2005 accident and the subject accident. The plaintiff needs to establish a causal link between the alleged injuries and the subject accident in order to survive summary judgment.

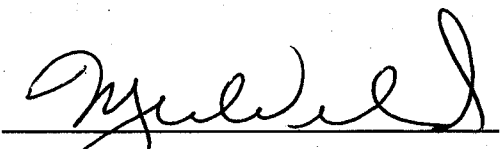
The defendant established, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see *Toure v Avis Rent A Car Sys.*, 98 NY 2d 345 [2002] *Gaddy v Eyer*, 79 NY 2d 955, [1992] *Acosta v Rubin*, 2 AD 3d 657 [2d Dept 2003]).

"The plaintiff needs to establish a causal link between the alleged injuries and the subject accident and show that she was asymptomatic at the time of the subject accident in order to raise an issue of fact and defeat a summary judgment threshold motion". See *Jaramillo v. Lopez* 32 AD 3d 417 (2d Dept 2006). In opposition, the plaintiff has failed to submit evidence in admissible form to refute the defendants' prima facie case. Based on the foregoing, the defendants' motions are **granted**. It is hereby

ORDERED, that the plaintiff's complaint is **dismissed**.

This constitutes the Decision and Order of the Court.

DATED: June 15, 2011
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.
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JUN 21 2011
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