

Eifu v Wirtz

2011 NY Slip Op 33399(U)

December 14, 2011

Sup Ct, Nassau County

Docket Number: 023326/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

IAS PART 18

_____ X

IRENE EIFU,

Plaintiff,

Index No.: 023326/09

Motion Sequence...01

Motion Date...09/28/11

-against-

MABEL M. WIRTZ,

Defendant.

_____ X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the Defendant, MABEL M. WIRTZ's ("Wirtz") motion seeking an order granting her summary judgment, pursuant to CPLR § 3212 and dismissing the complaint of the Plaintiff, IRENE EIFU ("Eifu"), on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided.

The Plaintiff commenced this lawsuit by filing a Summons and Complaint on December 23, 2009, wherein the Plaintiff claimed personal injuries resulting from a motor vehicle accident which occurred on November 20, 2008. Issue was then joined by service

of the Defendant's answer on or about January 29, 2010.

In her complaint, the Plaintiff claims that she suffered a serious injury within the meaning of New York's Insurance Law § 5102. The Plaintiff amplified the allegations in the complaint in a Verified Bill of Particulars, dated April 12, 2010. According to the Plaintiff, as a result of the accident, the Plaintiff sustained the following injuries: exacerbation of pre-existing but asymptomatic degenerative disc disease C4-5, C5-6 and C6-7 with bulge and riding resulting in encroachment of foramina; cervical radiculitis; cervical sprain and strain; and myofascial pain syndrome. (*See* Verified Bill of Particulars, ¶ 7, attached to the Defendant's Notice of Motion as Exhibit "B") The Plaintiff claims that she lost time from work as a result of the accident from November 20, 2008 to December 4, 2008, a total of fourteen (14) days. (*Id.* at ¶ 10) In the Plaintiff's Supplemental Verified Bill of Particular, dated April 19, 2011, she additionally claims that, as a result of the accident, she suffered from headaches, exacerbation of right knee joint effusion and required visco elastic supplementation injection. (*See* Defendant's Notice of Motion Exhibit "C")

The Defendant argues that the Plaintiff's injuries do not meet any definition of "serious injury" as defined in Insurance Law § 5102 (d) and therefore move for summary dismissal of the Plaintiff's complaint in its entirety.

In support of the motion, the Defendant relies upon the deposition testimony of the Plaintiff, taken on December 20, 2010. As adduced from the Plaintiff's deposition, she was the owner and operator of a 2005 Lexus at the time of the accident. The Plaintiff was a seat-belted driver stopped at a red light for approximately one minute prior to being

hit in the rear by the Defendant's vehicle. As a result of the impact, the airbags did not deploy and no glass shattered. The Plaintiff did not suffer any blood loss and did not lose consciousness. (See Plaintiff's Deposition Transcript, dated December 20, 2010, pages 11-16) The Plaintiff further testified that, as a result of the impact, her body moved forward and backward, her head went forward making contact with the steering wheel, her right knee came into contact with the dash and her head went backwards and hit the back of the headboard. (*Id.*) After the accident, the Plaintiff went to work. The first time she sought medical treatment for her injuries was the next day, November 21, 2008. (*Id.* at page 24)

On May 10, 2010, the Plaintiff was involved in a subsequent accident for which she claims additional physical injuries. The Plaintiff was also involved in a prior accident in or about April, 2007, for which the Plaintiff claims no resulting injuries. (*Id.* at pages 31-32) The accident on May 10, 2010 resulted in a lawsuit entitled, *Irene Eifu v. Magali M. Visconti*, Index No.: 023326/09, wherein the Plaintiff served a Verified Bill of Particulars, dated September 29, 2010. In the *Visconti* Bill of Particulars, the Plaintiff claimed the following injuries: exacerbation of pre-existing but asymptomatic degenerative disc disease C4-5, C5-6 and C6-7 with bulge and riding resulting in encroachment of foramina; exacerbation of pre-existing but asymptomatic glenohumeral joint arthrosis with joint effusion of the right shoulder; exacerbation of pre-existing but asymptomatic hypertrophic acromioclavicular joint arthrosis of the right shoulder; cervical radiculitis; cervical spine strain; lumbar radiculitis; lumbar spine strain; exacerbation of pre-existing but asymptomatic degenerative changes at the L3-L4, L4-L5 and L5-S1 disc level.

(See Plaintiff's Verified Bill of Particulars, dated September 29, 2010, attached to Defendant's Notice of Motion as Exhibit "F") The Defendant's counsel contends that Plaintiff's purported admission that her injuries were asymptomatic as of the date of the Bill of Particulars in the subsequent lawsuit, September 29, 2010, necessarily leads to the conclusion that the injuries claimed to the Plaintiff's cervical spine in this matter were asymptomatic as well.

In further support of the motion, the Defendant submits the affirmed report of Dr. Robert Israel, a licensed orthopedist, dated February 1, 2011. The Plaintiff presented to Dr. Israel with complaints of pain to her neck, upper back, lower back, right shoulder and right knee. According to Dr. Israel, the Plaintiff denied any history of similar conditions or prior or subsequent accidents. Dr. Israel reported that the Plaintiff missed one week of work as a logistics manager as a result of the accident. Dr. Israel examined the Plaintiff's cervical and thoracic spine. The range of motion was measured by use of goniometer. A review of Dr. Israel's report reveals that all of the range of motion measurements of the Plaintiff's cervical and thoracic spine were normal in comparison to the normal range of motion for that particular body part.

Dr. Israel's examination of the Plaintiff's right knee revealed that the knee was 7 degrees of valgus and muscle strength is graded at 5/5. Further, "[t]he knee was found to be stable on valgus and varus stress, anterior stress at 30 and 90 degrees. The range of motion of the knee was normal from 0-150 degrees (0-150 degrees being normal).

Based upon Dr. Israel's examination, his impression was that the Plaintiff

sustained a resolved sprain of the cervical spine, resolved sprain of the thoracic spine and pre-existing cervical degenerative disc disease. Moreover, Dr. Israel opined that, based on his examination from an orthopedic point-of-view, the Plaintiff “has a mild disability as a result of the accident of record”. Dr. Israel also concluded that “if the history of the accident is correct, there was a cause and effect relationship between the above diagnosis and the reported accident”. (See Dr. Israel’s Affirmed Report, dated February 1, 2011, attached to the Defendant’s Notice of Motion as Exhibit “G”)

The Defendant also submits the affirmed report of Dr. A. Robert Tantleff, a licensed radiologist, dated April 7, 2011. Upon review of the Plaintiff’s MRI films, dated March 24, 2009, Dr. Tantleff opined that the MRI revealed longstanding chronic degenerative discogenic disc disease and cervicothoracic spondylosis with advanced discogenic changes at C5/6 and C6/7 and to a lesser extent at C4/5. He further opined that a review of the MRI revealed that the degenerative changes were normal and consistent with the Plaintiff’s age and normal aging process. Dr. Tantleff concluded that the findings are not causally related to the date of the accident as they are chronic longstanding wear-and-tear degenerative processes requiring years and decades to develop as presented. (See Affirmed Report of Dr. Tantleff, dated April 7, 2011, attached to the Defendant’s Notice of Motion as Exhibit “H”)

Based on the foregoing, the Defendant avers that all of the injuries claimed by the Plaintiff are minor, soft tissue injuries, warranting the granting of summary judgment in the Defendant’s favor.

In moving for summary judgment, a defendant must make a prima facie showing that the plaintiff did not sustain a “serious injury” within the meaning of the statute. In the event this is established, the burden then shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a “serious injury” was sustained. *See Pommels v. Perez*, 4 N.Y.3d 566 (2005); *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 (2nd Dept. 2000).

When a defendant’s medical expert is rendering an opinion with respect to the plaintiff’s range of motion, the medical expert must specify the objective tests upon which the stated medical opinions are based and must compare any findings to those ranges of motion considered normal for the particular body part. *Browdame v. Candura*, 25 A.D.3d 747 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506 (2d Dept. 2006); *Qu v. Doshna*, 12 A.D.3d 578 (2d Dept. 2004).

Applying the aforesaid criteria to the reports of the various doctors, this Court finds that the moving Defendant has not established a prima facie case that the Plaintiff failed to sustain a “serious injury” as defined by New York State Insurance Law § 5102 (d).

Quite notably, the affirmed report of Dr. Israel in and of itself creates an issue of fact warranting the denial of the Defendant’s motion. Although the examination by Dr. Israel was conducted on February 1, 2011, there was no mention of the Plaintiff’s subsequent accident of May 10, 2010 in Dr. Israel’s report. The Defendant’s counsel urges this Court to grant summary judgment, partly due to the alleged admission of the Plaintiff that her injuries were asymptomatic as of the date of the Bill of Particulars from the subsequent

accident. However, the Defendant's counsel's affirmation alone is insufficient to establish that the Plaintiff's injuries were asymptomatic at any time following the accident. Further, the Defendant's counsel's argument is contrary to Dr. Israel's conclusion that the Plaintiff has a mild disability as a result of the accident of record.

The only other medical report submitted on behalf of the Defendant is the report of Dr. Tantleff which fails to resolve this conflict. Dr. Tantleff repeatedly states that a review of the Plaintiff's MRI reveals chronic degenerative disc disease. However, in light of the fact that Dr. Tantleff's and Dr. Israel's report are inconsistent, an issue of fact is created that cannot, and should not, be resolved by this Court. While it is well settled that additional contributing factors, such as an intervening medical problem or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury, *Pommels v. Perez*, 4 N.Y.3d 566 (2005), in the instant matter, the Defendant's proof did not sufficiently eliminate any issues of fact with respect to the causation element. Rather, the Defendant's proof created an issue of fact which must be examined by the trier of fact. At this juncture of the litigation, the burden is on the Defendant to establish that there exist no issues of fact.

Since the Defendant failed to meet his prima facie burden, it is unnecessary to consider whether the Plaintiff's opposition papers were sufficient to raise a triable issue of fact. *Coscia v. 938 Trading Corp.*, 283 A.D.2d 538 (2d Dept. 2001).


Accordingly, it is hereby

ORDERED, that the Defendant, MABEL M. WIRTZ's ("Wirtz") motion

seeking an order granting her summary judgment, pursuant to CPLR § 3212 and dismissing the Plaintiff, IRENE EIFU's ("Eifu") complaint, on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is **DENIED.**

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York
December 14, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
DEC 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE