

Montas v Jaipersaud
2011 NY Slip Op 33420(U)
December 21, 2011
Supreme Court, Queens County
Docket Number: 20876/2009
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

HAYDEE MONTAS, Index No.: 20876/2009
Plaintiff, Motion Date: 12/01/11
- against - Motion No.: 30
Motion Seq.: 1

RAMNARINE JAIPERSAUD,
Defendant.

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The following papers numbered 1 to 12 were read on this motion by defendant, RAMNARINE JAIPERSAUD, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of HAYDEE MONTAS on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, HAYDEE MONTAS, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on April 28, 2009, at or near the intersection of 103rd Avenue and 130th Street in the County of Queens, New York.

At the time of the accident, the plaintiff was driving on 130th Street on her way to Jamaica Hospital to get x-rays taken for her son. When she reached the intersection of 103rd Street she stopped her vehicle at the stop sign that controlled traffic in the direction that she was traveling. After remaining stopped for several seconds and after looking in both directions she and

began to move into the intersection. When she was halfway through the intersection her vehicle was struck by the defendant's vehicle which was traveling on 103rd Street and came from her left side. The impact caused her vehicle to spin around three times. The plaintiff claims that the defendant went through the stop sign facing in his direction. Plaintiff alleges that as a result of the impact she injured her right shoulder and right knee.

The plaintiff commenced this action by filing a summons and complaint on August 5, 2009. Issue was joined by service of defendant's verified answer dated September 21, 2009. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, William B. Stock, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Richard A. Heiden, orthopedic surgeon, Dr. Robert Israel, and neurologist, Dr. Ravi Tikoo; and a copy of the transcript of the examination before trial of plaintiff, Haydee Montas.

In her amended verified bill of particulars, plaintiff, age 51, states that as a result of the accident she sustained, inter alia, a tear of the rotator cuff of the right shoulder which required arthroscopic surgery, a sprain of the right knee, disc protrusion with impingement at L3-L4 and disc herniations at C3-4 and C6-7 impinging on the spinal canal. At the time of the accident, plaintiff was employed as a dry cleaner at Russo's on the Bay catering facility. She states in her bill of particulars that she was confined to her home and incapacitated from employment for one week after the accident and then again for two months after the arthroscopic shoulder surgery in May 2010.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Robert Israel, a board certified orthopedic surgeon, retained by the defendants, examined Ms. Montas on July 18, 2011. Plaintiff presented with pain to the neck, upper back, lower back and right knee. Dr. Israel performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, thoracic spine, lumbar spine, right shoulder and right knee. He concluded that the plaintiff had a resolved sprain of the cervical spine, resolved sprain of the lumbar spine, resolved sprain of the thoracic spine, resolved sprain of the right shoulder and resolved sprain of the right knee. He states that based upon his examination, the plaintiff has no disability as a result of the accident in question.

Ms. Montas, was examined by Dr. Tikoo, defendant's neurologist on July 20, 2011. In his affirmed report, he states that the plaintiff presented with complaints of neck, low back, right shoulder, right knee and right ankle pain. Dr. Tikoo performed a neurological exam and diagnosed the plaintiff with a history of cervical strain; history of lumbosacral strain; history of soft tissue injuries to the right shoulder, right knee and right ankle. Based upon his examination he concludes that the neurological examination of the plaintiff was essentially normal. The report states that "despite her subjective complaints, there were no objective findings to substantiate these complaints. Haydee does not need any further treatment or diagnostic testing." Dr. Tikoo also stated that the plaintiff is not disabled from a neurological basis and it was his opinion that the plaintiff did not sustain a permanent injury.

Dr. Richard A. Heiden, a radiologist reviewed the MRI studies of the plaintiff's right knee and right shoulder, which were performed prior to her arthroscopic surgery. He also reviewed MRI studies of the plaintiff's cervical spine and lumbar spine which were performed on June 2, 2009. In his affirmed report he states that the right knee and right shoulder only showed evidence of pre-existing degenerative changes. He states that there were no post-traumatic changes attributable to the accident in question on either MRI. Dr. Heiden identified a disc herniation at C3-4 but states that the disc demonstrates long-term degenerative changes of desiccation. The finding of herniation is likely degenerative and longstanding in origin. As far as the lumbar spine MRI, Dr. Heiden states that there is desiccation at L4-5 which is degenerative in origin. He did not observe a disc bulge or herniation in the lumbar spine.

In her examination before trial taken on May 19, 2011, the plaintiff states that she left the scene of the accident in an

ambulance and was taken to Jamaica Hospital. She was released from the emergency room the same day. Within the first two weeks she began treating with Dr. Pahng for pain to her back, neck and knee. She was treated for three months at the rate of three times per week and then went for treatment for another month and a half at the rate of two times per week. She then went to Integrated Neurological Associates on Queens Boulevard for further treatment for another month and a half. She was referred to an orthopedic surgeon Dr. Quach at New York Hospital of Queens. She had surgery performed on her right shoulder by Dr. Quach on May 7, 2010. She had three months of physical therapy at the Hospital following the surgery. She testified that immediately following the accident she was confined to her home more than a month. She did not know if she was confined to her home more than two months.

Defendant's counsel contends that the affirmed medical reports of Drs. Heiden, Israel and Tikoo and the deposition testimony of the plaintiff are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney Ezra Holczer, Esq., submits his own affirmation as well as the affirmations of Dr. Sung J. Pahng, Dr. David Lifschutz, Dr. Tony Quach, Dr. John Himelfarb, radiologist, Dr. Richard J. Rizzuti and the affidavit of the plaintiff Haydee Montas dated November 12, 2011.

Dr. Pahng, a specialist in physical medicine and rehabilitation, states that he first examined the plaintiff on May 4, 2009 shortly after her accident of April 28, 2009. At that time he found significant limitations of range of motion of the plaintiff's lumbar spine, cervical spine and right knee which were quantified and compared to normal. He treated plaintiff through June 2009. It was his opinion Ms. Montas sustained a permanent and significant limitation and restriction of motion to her cervical spine, lumbar spine, right shoulder and right knee that was causally related to the accident in question.

Dr. Lifschutz, a neurologist, examined the plaintiff on October 26, 2011. At that time he found significant range of motion limitations in the plaintiff's lumbar spine, cervical spine which the physician stated were causally related to the accident. He states that the plaintiff sustained a permanent and significant limitation and restriction of motion to her cervical spine, lumbar spine and right knee.

Dr. Quach, an orthopedic surgeon who performed arthroscopic surgery on the plaintiff's right shoulder on May 7, 2010, states that when he last examined the plaintiff on October 6, 2010 she had post-surgery limitations of range of motion in her right shoulder.

Dr. John Himelfarb, a radiologist reviewed the plaintiff's MRI studies and submits an affirmation stating that his findings which include a tear in the distal supraspinatus tendon of the right shoulder were causally related to the Accident of April 28, 2009.

Dr. Rizzuti, a radiologist also submits an affirmation in which he states that he reviewed MRI studies of the plaintiff's cervical and lumbosacral spines and finds that the disc protrusion at L3-4 impinging on the spinal canal and the disc herniations at C3-4 and C6-7 are causally related to the plaintiff's motor vehicle accident.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly

raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Drs. Israel, Tikoo and Heiden was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Pahng, Lifschutz, Quach, Himelfarb and Rizzuti attesting to the fact that the plaintiff sustained a torn rotator cuff of the right shoulder and herniated discs of the cervical spine and had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion of the defendant for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: December 21, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.