

Occhicone v Susking
2011 NY Slip Op 33858(U)
September 27, 2011
Sup Ct, Bronx County
Docket Number: 308712/09
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

-----X
Vanessa A. Occhicone and Stephanie Ludwig,

Plaintiffs,

DECISION and ORDER
Index No 308712/09

-against-

Dennis A. Susking and Angelique Max,

Defendants.

-----X

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiffs Occhicone and Ludwig allege that they sustained serious injuries as a result of the defendants' negligence. A vehicle owned by defendant Susking and operated by defendant Max allegedly rear-ended a Volvo on 1/12/07 causing it to strike the vehicle ahead. Plaintiffs Occhicone and Ludwig were passengers in the Volvo. The defendants move for summary judgment on the ground that the plaintiffs sustained no serious injuries pursuant to Insurance Law § 5102(d).

DISCUSSION

Defendants Suskind and Max seek summary judgment on threshold grounds. Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) delineates the serious injury threshold:

a personal injury which results in ... 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 nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Significant limitations of use of a body function or system are established by identifying objective tests employed to measure ranges of motion, providing the patient's ranges of motion and indicating normal ranges of motion. (*Nagbe v Minigreen Hacking*, 22 AD 3d 326 [1st Dept 2005].)

In support of their motion, defendants Susking and Max proffer the affirmed findings of Dr. Michael R. Miller, their orthopedist. The doctor's "impression and opinion" were based on his review of the plaintiffs' respective files consisting of medical consultation reports, handwritten progress notes, EMG and MRI studies and cervical and lumbar spine x-ray reports. The Court declines to credit Dr. Miller's findings in the absence of his actual physical examinations of the plaintiffs. The defendants proffer the findings of Dr. David J. Ellenbogen, plaintiff Occhicone's treating physician and Dr. Daniel Brodoff, plaintiff Ludwig's radiologist.

Dr. Ellenbogen

Plaintiff Occhicone

Dr. Ellenbogen, plaintiff Occhicone's treating physician, examined the plaintiff on 3/16/10, 11/24/09, 11/3/09, 10/23/09 and 7/10/09. No causal relationship between the plaintiff's injuries and the 1/27/07 accident can be established because none of the reports mention the accident. Even if Dr. Ellenbogen established a nexus, serious injury cannot be established since Dr. Ellenbogen first examined the plaintiff on 7/10/09, approximately 1½ years post-accident, and thus lacks personal

knowledge of the plaintiff's medical condition at the time of the accident. (*Uddin v Cooper*, 32 AD 3d 270 [1st Dept 2006].)

Dr. Brodoff

Plaintiff Ludwig

The defendants tender the unsworn findings of Dr. Brodoff, plaintiff Ludwig's radiologist, who performed an MRI on Ms. Ludwig's cervical spine on 6/1/09. Dr. Brodoff opined that the plaintiff's cervical spine was normal. The doctor found no evidence of a focal osseous lesion, a herniated disc, spinal canal stenosis or significant degenerative changes.

PLAINTIFFS' OPPOSITION

In opposition to the defendants' motion, plaintiffs Occhicone and Ludwig proffer Ms. Occhicone's affidavit and the unsworn findings of Dr. Alexander Alperovich, plaintiff Occhicone's neurologist, who passed away on 12/7/10. The Court of Appeals has held that proof of serious injury must be proffered in admissible form to defeat a motion for summary judgment. (*Grasso v Angerami*, 79 NY 2d 813 [1991].) This strict requirement may be relaxed in limited circumstances. (*Costa v 1648 Second Avenue Restaurant, Inc.*, 221 AD2d 299 [1st Dept 1995].) Here, plaintiff Occhicone annexes Dr. Alperovich's death certificate to establish that the doctor's examination findings cannot be affirmed.

Plaintiff Occhicone also proffers the unsworn findings of Dr. Alexandria McBride, her other neurologist; Drs. Paul Bisson and Eial Faierman, her radiologists; and Dr. Lanny S. Schwartzfarb, her physician. Plaintiff Ludwig presents the unsworn report of Ellen Cheung, her physical therapist. The plaintiffs provide neither an excuse nor explanation for these unsworn reports.

Plaintiff Occhicone

In opposition to the defendants' motion, plaintiff Occhicone proffers the findings of Dr. Alperovich, her neurologist, who examined her on 2/12/07. Although the unaffirmed findings of the deceased doctor were deemed admissible, a physician cannot qualify a plaintiff's alleged injury as a permanent injury based on one physical examination. (*Berete v Ford Motor Credit Company*, 29 AD 3d 452 [1st Dept 2006].) Moreover, the doctor reports the plaintiff's range of motion for her cervical, thoracic and lumbar spine but omits normal range of motion parameters which are required to determine whether the plaintiff presents significant limitations of a body function as defined in Insurance Law § 5102(d). (*Nagbe v Minigreen Hacking*, 22 AD 3d 326, *supra*.)

By affidavit dated 5/8/11, plaintiff Occhicone states that an ambulance transported her to New York Presbyterian/Weill Cornell Hospital following the accident. She claims sustained injuries to her back and experiences lower back pain that radiates to her lower extremities resulting in muscle spasms, tenderness, numbness, stiffness and tingling. She recently commenced employment as a sixth grade school teacher at the time of the accident which caused her to miss three days of work. Although she received physical and hand therapy for approximately eight months, Ms. Occhicone continues to experience "significant back pain" and difficulty standing for prolonged periods of time which interferes with her work activities and performance. The plaintiff's subjective complaints of pain, however sincere, are unsupported by credible medical evidence and thus insufficient to establish a serious injury or raise a triable issue of fact. (*Lora v Calle*, 16 AD3d 359 [1st Dept 2005]; *Graham v Shuttle Bay*, 281 AD2d 372 [1st Dept 2001].)

CONCLUSION

Defendants Suskind and Max move for summary judgment on threshold grounds. They bear the burden to establish, by the submission of evidentiary proof in admissible form, that the plaintiffs sustained no serious injuries as a result of the accident. The burden thereafter shifts to the plaintiffs to demonstrate the existence of a triable issue of fact. (*Perez v Rodriguez*, 25 AD 3d 506 [1st Dept 2006].) The defendants met their burden through the findings of Dr. Ellenbogen, plaintiff Occhicone's treating physician, and Dr. Brodoff, plaintiff Ludwig's radiologist.

Plaintiffs Occhicone and Ludwig failed to meet their shifting burden. The examination findings tendered by plaintiff Occhicone of Drs. Alperovich and McBride, her neurologists; Drs. Bisson and Faierman, her radiologists; and Dr. Schwartzfarb, her physician, are insufficient. Plaintiff Ludwig submits no affirmed findings in opposition.

After a careful review of the evidence in a light most favorable to the plaintiffs (*Ferrer v Riverbay Corp.*, 214 AD 2d 312 [1st Dept 1995]), this Court grants the defendants' motion for summary judgment on threshold grounds.

This constitutes the Decision and Order of the Court.

Date: September 27, 2011

So ordered,



Hon. Lizbeth González, ASCJ