

Sweeney v Springs
2012 NY Slip Op 30415(U)
February 8, 2012
Supreme Court, Nassau County
Docket Number: 167/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU****P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**-----X
CYNTHIA SWEENEY,**Plaintiff,****-against-****DREW C. SPRINGS and LINDA M. POWELL,****Defendants.**
-----X**TRIAL/IAS PART 17****INDEX # 167/10****Motion Seq. 2****Motion Date 9-8-11****Submit Date 1-19-12**

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The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

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Defendant moves by notice of motion for the following relief: an order pursuant to CPLR 3212, granting summary judgment due to plaintiff's failure to meet the threshold limits set by Insurance Law §5102 and 5104.

This action arises out of motor vehicle accident that occurred on April 11, 2009

On or about December 23, 2009, the plaintiff commenced this action by the filing of a summons and complaint and the purchase of an index number. On or about March 12, 2010, issue was joined by the service of the defendants' answer. Pursuant to the defendants' demand for a bill of particulars, the plaintiff served a verified bill of particulars on or about September 1, 2010, wherein the plaintiff claimed she sustained serious injuries allegedly as a result of the motor vehicle accident.

In a personal injury action, a summary judgment motion seeking to dismiss the complaint requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious

injury within the meaning of Insurance Law § 5102 (d) (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the issue. (*Id.*) The court must then decide whether the plaintiff has established a prima facie case of sustaining a serious injury (*Licari v. Elliot*, 57 N.Y.2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept. 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold requirement, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, 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]).

Insurance Law §5102 (d) defines serious injury to mean a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, *supra*; *Licari v. Elliot*, 67 N.Y.2d 230 [1982]). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot*, *supra*). A claim raised under the "permanent consequential limitation of use of a body organ or

member” or “significant limitation of use of a body function or system” categories, can be made by an expert’s designation of a numeric percentage of a plaintiff’s loss of motion, in order to prove the extent or degree of the physical limitation (see *Toure v. Avis, supra*). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff’s limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*).

Finally, to prevail under the “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 90 during the 180 days immediately following the occurrence of the injury or impairment” category, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature which would have caused the alleged limitations on the plaintiff’s daily activities” (*Monk v. Dupuis*, 287 A.D.2d 187 [3rd Dept. 2001]). A curtailment of the plaintiff’s usual activities must be “to a great extent rather than some slight curtailment” (*Licari v. Elliott, supra* at 236). Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies (*Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900 [Sup. Ct., NY Cty., 2005]).

With these guidelines in mind, the court will turn to the merits of the defendant’s motion. In support of their motion, the defendants submit the following: a copy of the summons and verified complaint; verified answer; verified bill of particulars; report of Dr. Isaac Cohen, an independent medical examiner; and deposition testimony of plaintiff.

"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 (see, *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649; *Greenberg v Manlon Realty*, 43 AD2d 968, 969)." (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [N.Y. 1985])

The plaintiff’s verified bill of particulars indicates that the plaintiff claims the following injuries:

"C2-C3 cervical bulge, C3-C4 disc extrusion with impingement on the spinal cord and stenosis, C4-C5 disc extrusion with impingement on the spinal cord and severe stenosis, C5-C6 large central posterior disc extrusion impinging the spinal cord

and stenosis, C6-C7 disc extrusion with impingement on the spinal cord and stenosis, C7-T1 bulge and disc herniation; L5-S1 herniation, impinging on the thecal sac with encroachment on nerve roots at S-1 and L-5, L3-L4 and L4-L5 bulges with impingement on thecal sac and nerve roots, L1-L2 and L2-L3 bulges; cervical radiculopathy; lumbar radiculopathy; cervical sprain/strain; lumbar sprain/strain; depression; headaches; anxiety; fear; emotional upset and shock."

Plaintiff claims that she sustained a serious injury as defined in the Insurance Law Section 5102(d) in that she was disabled for a period in excess of 90 out of the first 180 days following the occurrence; that she sustained a significant limitation of use of a bodily function or system; that she sustained a significant disfigurement; that she sustained a permanent consequential limitation of use of a bodily organ and/or member; and that she sustained an injury encompassed within the intent and meaning of the Insurance Law.

The movant relies on the orthopedic medical evaluation of Dr. Isaac Cohen dated March 9, 2011 in support of the application for summary judgment. With respect to the cervical spine, Dr. Cohen found the following:

"Inspection of the cervical spine is unremarkable with maintenance of the normal curvature. She has no tenderness to palpation of the muscles, and no evidence of muscle spasms is present. In active fashion, 50 degrees of flexion is noted (45-65 degrees normal) with hyperextension to 50 degrees (45-65 degrees normal). Left and right lateral bending are to 45 degrees (40-52 degrees normal), and right and left rotational motion is to 80 degrees (63-93 degrees normal). Spurling test, to the right and left, is negative. Compression test is negative. Reflexes are equal and symmetrical in both biceps, triceps and brachioradialis. Hand grip, pinch and grasp are satisfactory normal in both upper extremities. There is no upper extremity motor weakness, muscle atrophy or sensory deficits present."

With respect to the lumbosacral spine, Dr. Cohen found the following:

"Inspection reveals maintenance of the normal lordotic curvature. Palpation of the paravertebral muscles demonstrates muscles to be supple and non-tender. There are no spasms or trigger points present. Range of motion in active fashion demonstrates flexion to 70 degrees (51-81 degrees normal), hyperextension to 30 degrees (28-38 degrees normal), right and left lateral bending are to 30 degrees (up to 30 degrees normal).

Straight leg sign, performed bilaterally in the sitting position, is negative to 90 degrees (normal to 90 degrees). Claimant is able to stand on toes and heels without difficulty. Reflexes are equal and symmetrical in both knee jerks and heel cords. On a clinical basis, muscle strength in both lower extremities is 5/5 with no muscle atrophy or sensory loss documented."

Dr. Cohen indicated that all measurements of the cervical and lumbosacral spine were taken with the goniometer.

Based on the admissible evidence, the court finds that the defendant has established a prima facie case that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d), specifically, a significant limitation of use of a body function or system or permanent consequential limitation of a body function or system or 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 90 days during the 180 days immediately following the occurrence of the injury or impairment. The burden now shifts to the plaintiff to raise an issue of fact with respect to whether she meets the serious injury threshold requirement.

In opposition to the application, the plaintiff submitted the following documentary evidence: affidavit of plaintiff; a sworn MRI report of plaintiff's lumbar spine from Dr. Sasan Azar; an unsworn MRI report of plaintiff's cervical spine from Dr. Faisal A. Sami; an affirmed medical report of Dr. Arden M. Kaisman dated September 23, 2010; an affirmed medical report of Dr. Sebastian Lattuga dated September 30, 2010; an affirmed medical report of Dr. Donald I Goldman dated December 1, 2011; an affirmation of Dr. Jean-Marie L. Francois dated December 6, 2011; affirmed medical report of Dr. Francois dated November 20, 2009; affirmed medical report of Dr. Jean Claude Demetrius dated June 15, 2009.

The court notes that the MRI report of plaintiff's cervical spine was not sworn, therefore, any reference to it by a physician for plaintiff is disregarded (see, *Mahoney v Zerillo*, 6 A.D.3d 403; *Friedman v U-Haul Truck Rental*, 216 A.D.2d 266; *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693).

The affirmation of Dr. Francois, dated December 6, 2011 as well as the medical reports of November 20, 2009 contain stamped signatures. The court finds these documents not to be in admissible form, therefore, any reference to them by a physician for plaintiff is disregarded (see, *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 A.D.3d 778; *Dowling v. Mosey*, 32 A.D.3d 1190, 1191).

The report of Dr. Jean Claude Demetrius, affirmed June 15, 2009 contain conclusions relating to decreased range of motion of the cervical and lumbar spine. However, it fails to contain numerical range of motion findings, therefore, the court will not consider it (see, *Toure v*

Avis Rent A Car Sys., Inc., 98 N.Y.2d 345).

Dr. Sasan Azar affirms that on June 2, 2009, an MRI of plaintiff's lumbar spine was conducted. She concludes that the injuries sustained by plaintiff were causally related to the accident. The MRI revealed the following:

"Broad-based central disc herniation at the L5-S1 level, impinging upon the anterior thecal sac with encroachment upon the bilateral S-1 nerve roots with extension into the neural foramina bilaterally and impingement of the bilateral L-5 exiting nerve roots, associated with hypertrophy of the bilateral facet joints."

"Broad-based posterior bulge at the L3-4 and L4-5 levels, impinging upon the anterior thecal sac within encroachment into the neural foramen bilaterally. Impingement of the bilateral exiting nerve roots at the level."

"Posterior bulges at L1-2 and L2-3 disc levels."

Dr. Kaisman examined the plaintiff on September 23, 2010. He concludes, based upon review of the medical records presented and upon his examination, *inter alia*, that the injuries sustained to her lumbar spine were causally related to the accident.

"The physical examination revealed that the lumbar spine flexion was to 40 degrees (normal is to 90 degrees). Lumbar spine extension is to 30 degrees (normal is to 40 degrees). Right and left lateral bending are to 25 degrees (normal is to 40 degrees). Right and left lateral rotation are to 45 degrees (normal is to 80 degrees)... Straight leg raising is positive bilaterally at 30 to 35 degrees... Achilles tendon reflexes are slightly decreased bilaterally. Palpation of the lumbar spine reveals pain and spasm bilaterally at the L4 through S2 levels."

These range of motion tests were performed with a goniometer with the doctor's hand on the plaintiff's spine.

Dr. Kaisman opines that the plaintiff is not a candidate for percutaneous discectomy at the L5-S1 level as there is a significant loss of disc height as well as the listhesis at that level. He states that if the epidural steroid injection did not work, plaintiff will need an open laminectomy and discectomy or lumbar spine fusion and should be evaluated by a spine surgeon.

Dr. Lattuga examined the plaintiff on September 30, 2010. He concludes, based upon his examination, that the injuries plaintiff sustained were causally related to the accident. The physical examination of the cervical and lumbar spine revealed restricted range of motion. However, he does not specify the tools used in making such determination. He concluded that plaintiff suffered a lumbar spine sprain, radiculopathy and HNP.

Dr. Goldman examined the plaintiff on October 20, 2011. He concludes, based upon his examination, that the injuries plaintiff sustained were causally related to the accident. He examined plaintiff using a goniometer and tape measure. Dr. Goldman concluded that plaintiff suffered a decreased range of motion with respect to her cervical and lumbar spine and that she sustained a permanent orthopedic disability demonstrated by the MRI.

To explain the gap in treatment, plaintiff submits an affidavit which states that she had to stop treating because her no-fault benefits ran out. Thus, she was unable to afford continued treatment (see, *Jules v Barbecho*, 55 AD3d 548, 549; *Francovig v Senekis Cab Corp.*, 41 AD3d 643; *Black v Robinson*, 305 AD2d 438).

However, despite the fact that the movants did succeed in making a prima facie showing that the plaintiff did not sustain a serious injury pursuant to the Insurance Law, the plaintiff successfully countered this showing with sufficient medical evidence demonstrating the existence of material issues of fact that she has in fact sustained a "serious injury" pursuant to the aforementioned insurance law. The sworn MRI report of the lumbar spine constituted sufficient objective evidence to establish the existence of a bulge or herniation (see, *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, *supra*). The range of motion tests performed by Dr. Kaisman and Dr. Goldman on plaintiff's cervical and lumbar spine proved positive for a limitation of range of motion. The doctors' observations as to actual limitations of movement qualifies as objective evidence (see, *Grossman v. Wright*, 268 A.D.2d 79). Dr. Goldman concludes, in his expert opinion, that the injuries are causally related to the accident and that they are permanent in nature. Based on conflicting medical affidavits, the motion must be denied (see, *Ocasio v. Zorbas*, 14 A.D.3d 499).

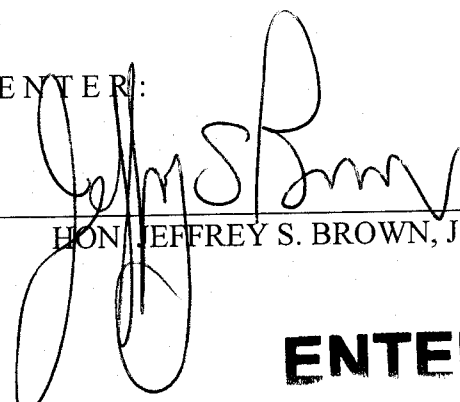
Accordingly, it is

ORDERED, that the application for summary judgment is **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: February 8, 2012

ENTERED:


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FEB 10 2012

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