

Forman v Rizvi

2012 NY Slip Op 31388(U)

May 7, 2012

Supreme Court, Nassau County

Docket Number: 021893/10

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

TRIAL/IAS PART 14

_____X

ELENITA FORMAN and ALAN FORMAN,

Plaintiffs,

Index No.: 021893/10
Motion Sequence...02
Motion Date...03/23/12

-against

SYED A.H. RIZVI,

Defendant.

_____X

- Papers Submitted:
- Notice of Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the Defendant’s motion, seeking an order pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, granting summary judgment in favor of the Defendant, Syed A.H. Rizvi, and dismissing the Plaintiffs’ complaint on the ground that the injuries claimed by the Plaintiff, Elenita Forman (“Mrs. Forman”), do not satisfy the “serious injury” threshold requirement of New York Insurance Law § 5102 (d), is determined as hereinafter provided.

The Plaintiff, Mrs. Forman, alleges that she sustained serious personal injuries in a motor vehicle accident on October 24, 2009. This action was commenced by the filing

of a summons and complaint on November 24, 2010. Issue was joined by the service of the Defendant's answer on or about January 12, 2011.

The Plaintiff claims in her verified bill of particulars that she sustained the following injuries: lumbosacral arthropathy; C6/C7 disc herniation; L5/S1 disc herniation; left C6/C7 radiculopathy; P.T.S.S.; bilateral carpal tunnel syndrome; traumatic myofascial pain syndrome; left ankle arthropathy; both knees arthropathy and post traumatic stress disorder.

In support of the motion for summary judgment, the Defendant submits the affirmed report of Salvatore Corso, an orthopedist who conducted an orthopedic examination of the Plaintiff on behalf of the Defendant. Dr. Corso performed quantified range-of-motion testing on the Plaintiff's cervical spine, thoracolumbar spine, right knee, left knee and left ankle using a goniometer, compared his findings to normal range-of-motion values and concluded the Plaintiff had normal ranges of motion. Based on Dr. Corso's clinical findings and medical records review, he diagnosed the Plaintiff with resolved strains of the cervical and lumbar spine, resolved sprain of the bilateral knee and resolved sprain of the left ankle, with no evidence of an orthopedic disability.

The Plaintiff acknowledged that he only missed two (2) weeks of work as a result of the accident.

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Hughes v. Cai*, 31 A.D.3d 385

(2d Dept. 2006); *Browdame v. Candura*, 25 A.D.3d 747 (2d Dept. 2006). The proof must be viewed in a light most favorable to the non-movants. *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213 (2d Dept. 2000). If the movant satisfies that burden, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 A.D.3d 220 (1st Dept. 2006).

The Defendants met their initial burden of establishing as a matter of law that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). *See Gaddy v. Eyler*, 79 N.Y.2d 955 (1992); *Licari v. Elliott*, 57 N.Y.2d 230 (1982).

In opposition to the motion, the Plaintiff submitted the affirmed medical report of Ali Guy, M.D. Dr. Guy conducted an initial examination of the Plaintiff on November 6, 2009, in connection with the injuries sustained as a result of the accident on October 24, 2009. The initial physical examination revealed diffuse tenderness, moderate spasm and multiple trigger points in the Plaintiff's neck and lower back. Upon examination of the left knee, Dr. Guy noted healing abrasions and positive crepitation. Further, the right knee was diffusely tender and positive for crepitation. Straight leg test revealed a significant limitation in range of motion. Dr. Guy also performed range-of-motion testing to the Plaintiff's cervical spine and lumbar spine which revealed significant limitations in the range of motion for those particular body parts when compared to the normal function. Dr. Guy's initial assessment was that the Plaintiff suffered multiple traumatic injuries.

The Plaintiff received treatment for approximately five months until her no

fault benefits were denied. Dr. Guy reported that the Plaintiff underwent an MRI of her lumbosacral spine on December 5, 2009 which revealed a small midline herniated disc in her low back at L5-S1. The Plaintiff also underwent an MRI of her cervical spine on December 5, 2009 which revealed a very small midline herniation at the C6-C7 level.

Dr. Guy also performed EMG studies of the Plaintiff's upper and lower extremities which revealed electrical evidence of left C7 cervical radiculopathy and left L5-S1 lumbar radiculopathy.

Dr. Guy performed a recent examination of the Plaintiff on January 12, 2012 where range-of-motion testing was performed by use of a goniometer which revealed significant limitations in the range of motion in the Plaintiff's cervical and lumbar spine.

Dr. Guy opined that the Plaintiff has achieved maximum benefit from physical therapy with regard to the cervical and lumbar areas. In Dr. Guy's medical opinion, the Plaintiff sustained a permanent injury to her cervical spine and lumbosacral spine with permanent restriction of motion. According to Dr. Guy, the disc herniations are not curable. Based upon his final examination, Dr. Guy's final diagnosis remained C6-C7 disc herniation, left C6-C7 cervical radiculopathy, traumatic myofascial pain syndrome, left L5-S1 lumbar radiculopathy, post traumatic stress disorder and bilateral carpal tunnel syndrome. Dr. Guy concluded, within a reasonable degree of medical certainty that the injuries suffered by the Plaintiff, as well as the Plaintiff's restrictions in performing her usual and customary daily activities, are a result of the accident that occurred on October 24, 2009. He further opined that the Plaintiff can no longer enjoy the usual, customary activities she had been able to

engage in prior to the accident for at least 90 out of the 180 days immediately following the accident.

Dr. Guy concluded that the injuries sustained by the Plaintiff are serious in nature and constitute a permanent consequential loss of use of those body organs. Dr. Guy specified the body organ and member for which there has been a significant loss of use including her cervical spine, lumbosacral spine and radiating pain extending to the left arm, hand, fingers and down her left lower extremities. Dr. Guy's reported limitations must be considered in the light most favorable to the Plaintiff, and are sufficient to defeat the motion for summary judgment pursuant to Insurance Law § 5102. *See Toure v. Avis Rent A car Sys. Inc.*, 98 N.Y.2d 345 (2002); *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985); *Grullon v. Chu*, 240 A.D.2d 367 (2d Dept. 1997); *Paretti v. Giglietta*, 221 A.D.2d 607 (2d Dept. 1995).

In addition to Dr. Guy's affirmed report, the Plaintiff also submits the affirmed report of Karen Weingarten, M.D., who reported and authenticated the MRI results of the Plaintiff's cervical and lumbar spine.

In Reply, counsel for the Defendant makes several inaccurate allegations including, but not limited to, that Dr. Guy failed to include recent findings of any significant limitation or restriction of a body part, member or function, that the Plaintiff failed to provide objective evidence of the Plaintiff's limitations contemporaneous with the accident, and that the Plaintiff failed to address the gap in treatment. The Defendant's counsel also states that the Plaintiff was involved in a prior 2007 slip and fall on ice wherein her back was injured. Counsel states that the prior accident was not addressed in Dr. Guy's report as a possible

cause for her injuries. However, by the same token, the Defendant's doctor, Dr. Corso, also fails to reference any prior accident or injuries that may interrupt the chain of causation.

Based on a review of the record, viewed in the light most favorable to the nonmoving party, the Plaintiff proffered sufficient evidence that raise issues of fact as to whether she suffered a "serious injury" as defined by New York's Insurance Law as a result of the accident on October 24, 2009.

Notwithstanding anything to the contrary, the Plaintiff failed to present competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the subject accident. *Jackson v. Colvert*, 24 A.D.3d 420 (2d Dept. 2005). The Plaintiff's deposition testimony and affidavit submitted in opposition to the Defendant's motion establishes that she did not suffer an injury that prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately after the accident.

Accordingly, the Defendant's motion seeking an order granting summary judgment dismissing the complaint is **DENIED**, except as to any injury that the Plaintiff claims prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately after the accident pursuant to Insurance Law § 5102 (d).

This constitutes the decision and order of the Court.

Dated: Mineola, New York
May 7, 2012

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**



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