

Astillero v Abramov

2012 NY Slip Op 31559(U)

June 12, 2012

Supreme Court, Queens County

Docket Number: 12460/2011

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

MARIBEL CAGUIOA ASTILLERO, Index No.: 12460/2011
Plaintiff, Motion Date: 06/04/12
- against - Motion No.: 8

Motion Seq.: 1

DAVID ABRAMOV and ASIA ABRAMOV,
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendants, DAVID ABRAMOV and ASIA ABRAMOV, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of MARIBEL CAGUIOA ASTILLERO on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10
Reply Affirmation.....	11 - 12

This is a personal injury action in which plaintiff, Maribel Caguioa Astillero, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on June 26, 2009, on the eastbound lanes of the Horace Harding Expressway near its intersection with 97th Place, Queens County, New York.

At the time of the accident, the plaintiff was a restrained front seat passenger in the vehicle operated by her husband. Plaintiff's vehicle was stopped on the Horace Harding Expressway when it was hit in the rear by the vehicle owned by defendant Asia Abramov and operated by defendant David Abramov. In her verified Bill of Particulars, plaintiff, age 33, states that as a result of the accident she sustained, inter alia, disc herniations at C3-4 and C5-6. She states that she was confined to

her house for five days following the accident. The plaintiff commenced this action by filing a summons and complaint on March 3, 2010. Issue was joined by service of defendant's verified answer dated June 2, 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.

Defendants now move 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, defendants submit an affirmation from counsel, Shawn P. O'Shaughnessy, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of neurologist, Dr. Robert S. April and radiologist, Dr. Melissa Sapan Cohn; and a copy of the transcript of the examination before trial of plaintiff, Maribel Caguioa Astillero.

Dr. Robert April, a neurologist, retained by the defendants, examined Ms. Astillero on February 15, 2012. Dr. April performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbosacral spine and in her arms. The doctor states that the plaintiff's neurological examination was within normal limits and there were no objective neurological findings. He stated that "based upon my review of documents and normal examination, I have concluded with reasonable medical certainty that the accident of record did not produce a neurological diagnosis, disability, limitation or need for further intervention."

Dr. Melissa Sapan Cohn, a radiologist, reviewed the MRI studies of the plaintiff's cervical spine. She states that her review of the cervical spine MRI found no evidence of disc herniations. She found straightening of the normal cervical lordosis which may reflect muscular spasm and minimal degenerative change at C3-4. Dr Cohn states, "in my opinion this

patient has very slight degenerative change at the C3-4 level. There is no evidence for disc herniation or acute traumatic related injury on the submitted cervical spine MRI."

In her examination before trial, taken on December 2, 2011, plaintiff testified that after the accident she felt pain in her neck and back. She left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital where x-rays were taken. She was discharged the same day with instructions to follow up with a private physician. Five days later she began treatments with physiatrist, Dr. Visram. She saw Dr. Visram three days a week for approximately eight months after which she stopped treatments on the recommendation of her doctor. She has not received any other medical treatment since that time. She stated that she presently has pain in her neck and back approximately twice a month.

Defendant's counsel contends that the medical reports of Drs. April and Cohn as well as the transcript of the plaintiff's examination before trial in which she states that she returned to work as a housekeeper, five days post-accident, 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 his 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 Elana Sharara, Esq., submits her own affirmation as well as the affirmations of physiatrist, Dr. Nizarali Visram and radiologist, Dr. Richard Rizzuti and the affidavit of plaintiff dated May 21, 2012.

Dr. Rizzuti states that on July 28, 2009 he interpreted the MRI studies of the plaintiffs cervical spine. He states that the MRI demonstrates posterior disc herniations at C3-4 and C5-6.

Dr. Visram states that he first examined the plaintiff on July 1, 2009 with respect to her accident of June 26, 2009. At the first examination, plaintiff was complaining of sharp neck pain radiating into the shoulders as well as mid-back pain. At that time Dr. Visram found significant limitations of range of motion of the plaintiff's cervical spine which were quantified and compared to normal. He treated plaintiff through March 31, 2010. He states that at

that point her no fault insurance benefits were terminated and he advised her that she had reached the maximum medical improvement and that any further treatment to the cervical spine would not substantially improve her condition, and therefore, she should discontinue physical therapy.

Dr. Visram re-examined the plaintiff on April 18, 2012, at which time he found that she still had complaints of persistent neck pain and still exhibited significant limitations of range of motion. It was his opinion that plaintiff's complaints of pain and discomfort in her cervical spine with the resulting loss of range of motion are directly and causally related to her motor vehicle accident of June 26, 2009. He states that the disc herniations at C3-4 and C5-6 and persistent active range of motion of the cervical spine are significant and permanent injuries which will cause the plaintiff to continue to have pain and dysfunction in the future. He also states that her injuries restricted her ability to perform her usual and customary daily activities for a period of not less than 90 days out of the one-hundred eighty days following the accident.

In her affidavit of May 21, 2012, the plaintiff states that she stopped treating with Dr. Visram because the treatments were no longer helpful. She states that to this day she still experiences severe pain in her neck and back for which she requires over-the-counter medication.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial 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 defendants, including the affirmed medical reports of Drs. April and Cohn and the plaintiff's examination before trial in which she stated that she returned to work full time five days after the accident were 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. Visram and Rizzuti attesting to the fact that the plaintiff 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 AD3d 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 and 90/180 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 AD3d 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]).

In addition, Dr. Visram adequately explained the gap in the plaintiff's treatment by stating that her no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

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

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

Dated: June 12, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.