

Knibbs v Frazier
2012 NY Slip Op 32635(U)
October 15, 2012
Supreme Court, Queens County
Docket Number: 23804/10
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

PAMELA KNIBBS,

Plaintiff,

Index No.: 23804/10

Motion Date: 10/11/12

- against -

Motion No.: 8

LISA FRAZIER,

Motion Seq.: 4

Defendant.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendant, LISA FRAZIER, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 6
 Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
 Reply Affirmation.....12 - 14

In this negligence action, plaintiff, Pamela Knibbs, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on January 18, 2010, between the plaintiff's vehicle and the vehicle owned and operated by defendant, Lisa Frazier. The accident took place on Foch Boulevard at its intersection with 165th Street, Queens County, New York. As the plaintiff was traveling eastbound on Foch Boulevard through the intersection with 165th Street, her vehicle collided with the defendant's vehicle which was proceeding northbound on 165th Street and attempting to make a left turn onto Foch Boulevard. Plaintiff was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on September 20, 2010. Issue was joined by service of defendant's verified answer dated May 23, 2011. The defendant now moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In her verified Bill of Particulars, the plaintiff, age 57, states that as a result of the accident she sustained, *inter alia*, a tear of the posterior horn of the lateral and medial menisci of the right knee; a disc herniation at C3-4; disc bulges at C4-5, C5-6, L3-4, L4-5 and L5-S1, as well as a tear of the triangular fibrocartilage of the left wrist.

The 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.

In support of the motion, defendant submits an affirmation from counsel, Tracy Morgan, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of orthopedist, Dr. Thomas Nipper and radiologist, Dr. Sheldon Feit, and a copy of the transcript of the plaintiff's examination before trial.

Dr. Nipper, an orthopedist retained by the defendant to perform an independent orthopedic examination, evaluated the plaintiff on January 30, 2012. Plaintiff told Dr. Nipper that as a result of the accident of January 18, 2010 she injured her neck, lower back, bilateral wrists and left knee. She told Dr. Nipper that she lost three weeks from her job as a manager and that she presently works full time. After performing objective and comparative range of motion tests, the doctor reported that the plaintiff had no limitations of range of motion of the cervical spine, thoracic spine, lumbar spine, both wrists and both knees. After performing the physical examination, Dr. Nipper states that the plaintiff had no objective evidence of any disability and his impression was that the plaintiff has resolved

cervical and lumbar sprain/strain; normal examination of the thoracic spine; resolved bilateral wrist sprains and resolved left knee contusion.

Dr. Feit, a radiologist, states in his affirmed report that he reviewed the MRI studies of the plaintiff's cervical spine and right knee. He states that he observed disc bulges at C3-4, C4-5 and C5-6. He states that the disc bulges were not post-traumatic but rather were degenerative secondary to annular degeneration and/or ligamentous laxity. He states that the findings are not causally related to the accident of January 18, 2010. He also reviewed the MRI of the plaintiff's right knee and states that although he observed meniscal degeneration within the posterior horns of both the medial and lateral menisci there is no evidence of meniscal tear, ligamentous injury or fracture. He states that no-significant post-traumatic changes are identified and there are no abnormalities causally related to the subject accident.

In her examination before trial, taken on January 13, 2012, Ms. Knibbs stated that she is a manager of the opthamology department at Brookdale Hospital. Immediately following the accident she missed about three weeks from work. She testified that as a result of the impact she injured her right knee, back, neck and wrists. She went to Brookdale Hospital emergency room the next day where she was treated and released. She subsequently went for treatment to Dr. Opam at Glenwood Medical, Neuro and Rehab. She had physical therapy sessions for her back, neck and wrists from the time of the accident in 2010 through the date of the deposition in January 2012. She uses her no-fault benefits as well as her private health insurance to pay for physical therapy. She testified that she saw an orthopedist who recommended surgery for her right knee. The plaintiff also that she still has pain in her lower back and neck as well as her right knee.

Defendant's counsel contends that the medical reports of Drs. Nipper and Feit as well as the transcript of the plaintiff's examination before trial in which she testified that she returned to work three weeks immediately following the 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 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, Anthony A. Ferrante, Esq., submits his own affirmation, as well as the affirmed medical reports of plaintiff's treating neurologist, Dr. Osfradu Opam; radiologist Dr. William Weiner, the affirmed no-fault examination of Osvaldas Pranevicius;; the unaffirmed reports of Dr. John Mitimura as well as the affidavit of the plaintiff dated May 25, 2012.

Dr. Opam states that he first examined the plaintiff on January 21, 2010 three days following the accident. He states that at that time, using objective tests, he found significant limitations of range of motion of the plaintiff's cervical spine and lumbar spine. He states that plaintiff underwent a course of physical therapy for two years. On August 6, 2012 he examined the plaintiff again at which time she still had complaints of persistent pain in her right knee, lower back, and pain on and off in her neck. His recent examination indicated limitations of range of motion of the plaintiff's cervical spine, lumbar spine, hips and knees. He states that the motor vehicle accident of January 18, 2010 was the competent producing cause of the plaintiff's injuries. He states that her injuries are chronic, permanent and disabling in nature.

Dr. Weiner, a radiologist, submits an affirmed report stating that he reviewed MRI studies of the plaintiff's cervical spine, lumbar spine, right knee and left wrist. He states that he found disc herniations at C3-4 and disc bulges at C4-5, C5-6, L3-4, L4-5 and L5-S1. With respect to the plaintiff's right knee, Dr. Weiner reports that he observed a tear of the posterior horn of the lateral meniscus and a tear of the posterior horn of the medial meniscus.

In her affidavit, Ms. Knibbs states that after the accident she commenced physical therapy treatments but stopped in November 2011 after a year of treatment because she was informed by Dr. Opam that additional care and treatment would be palliative in nature. However, in April 2012 her symptoms worsened and she returned to treatment with Dr. Opam. She then continued to treat with Dr. Opam through May 2012 when Dr. Opam again informed her that additional care and treatment would only be palliative.

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. Nipper and Feit as well as the plaintiff's deposition transcript were sufficient to meet defendants' 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. Opam and Weiner attesting to the fact that after a qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident. 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]).

In addition, Dr. Opam adequately explained the gap in the plaintiff's treatment by stating that the plaintiff reached the point of maximum medical improvement and any further treatments would be palliative (see 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 defendant's motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: October 15, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.