

Reid v Mattioli

2014 NY Slip Op 31006(U)

April 11, 2014

Supreme Court, Suffolk County

Docket Number: 9535-2011

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
IAS PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 04-23-13
ADJ. DATE 12-13-13
Mot. Seq. # 004, 005 *CASE DISP*

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Nicole M. Reid,

Plaintiff,

: Law Offices of Vel Belushin, PC
: Attorney for Plaintiff
: 1712 Kings Highway, Suite 2
: Brooklyn, New York 11229

- against -

Patricia Mattioli, a/k/a Patrizia Dempsey and
Debbie L. McCabe,

Defendant.

: Jeffrey E. Bollinger
: Attorneys for Defendant Mattioli
: 570 Taxter Road, Suite 275
: Elmsford, New York 100523

: Russo Apoznanski & Tambasco
: Attorneys for Defendant McCabe
: 875 Merrick Avenue
: Westbury, New York 11590

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Upon the following papers numbered 1 to 22 read on this motion summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers 18-24;
Answering Affidavits and supporting papers 12-43; Replying Affidavits and supporting papers _____; Other
_____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (005) and cross-motion (006) by the defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the subject accident, are granted.

This action arises out of a motor vehicle accident which occurred on May 14, 2007 on the Belt Parkway eastbound at or near the intersection with Knapp Street, County of Kings, State of New York. Defendant Dempsey filed a motion to change venue which was granted by order of the Hon. Bert Bunyan, dated January 5, 2011 transferring this matter from Supreme Court, Kings County to Supreme Court, Suffolk County.

By her bill of particulars, the plaintiff alleges that as a result of the accident she sustained serious injuries including tendinosis of the supraspinetous tendon of the right shoulder, posterior bulges at L3-L4, L4-L5, and L5-S1 levels of the lumbar spine, posterior bulges at the C3-C4, C4-C5, and C5-C6 levels of the cervical spine. A range of motion exam performed on July 7, 2007 revealed WP spine impairment 22%.

The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a “serious injury” as defined in Insurance law §5102(d) as a result of the subject accident. In support of the motion, the defendants submit the summons and complaint; their answer to the complaint; the plaintiff’s bill of particulars; the deposition of plaintiff Nicole M. Reid and the affirmed report of Lisa Nason, M.D.

For the purposes of this decision, defendant Debbie L. McCabe’s motion (004) and defendant Patricia Mattioli a/k/a Patrizia Dempsey’s cross-motion (005) which adopted the arguments of motion (004) will be consolidated.

Insurance Law §5102(d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.”

In order to recover under the “permanent loss of use” category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of the plaintiff’s limitations, with an objective basis, correlating the plaintiff’s limitations to the normal function, purpose and use of the body part (*see Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5102(d) (*see Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]), The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.* 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Trans. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the defendants met their prima facie burden of demonstrating their entitlement to judgment as a matter of law by showing, through the affirmed report of the medical expert and the plaintiff’s

deposition testimony, 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 Choi v Guerrero*, _____ NYS2d _____, 2011 WL 1086941, 2011 NY Slip Op. 02373 [NY AD 2 Dept Mar 22, 2011]; *Sham v B&P Chimney Cleaning & Repair Co., Inc.*, 71 AD3d 978, 900 NYS2d 72 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Villeda v Cassas*, 56 AD3d 762, 871, NYS2d 167 [2d Dept 2008]; *Taranto v McCaffrey*, 40 AD3d 626, 835 NYS2d 365 [2d Dept 2007]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]).

The affirmed report of the defendants examining orthopedic surgeon, Lisa Nason, M.D., who examined the plaintiff on May 9, 2013 reveals that she performed a detailed orthopedic examination and found that there was no evidence of an orthopedic disability finding that both the post cervical strain and post right shoulder sprain to be resolved. Dr. Nason, in testing the range of motion, performed with a goniometer and compared with AMA guidelines, found the following.

Cervical Spine: Examination of the cervical spine shows no structural abnormalities. There is no tenderness to palpation along the upper trapezius, supraspinatur and infraspinatus muscles or spasms present throughout. Foraminal compression test is negative. Range of motion is as follows:

	Normal	Examination
Flexion	50°	50°
Extension	60°	60°
Bilateral bending	45°	45°
Bilateral rotation	80°	80°

Right Shoulder: Examination of the right should revealsno tenderness to palpation at the acromioclavicular joint. The Hawkins sign was negative bilaterally. Impingement sign is negative. Range of motion is as follows:

	Normal	Examination
Flexion	180°	180°
Abdunction	180°	180°
Adduction	30°	30°
External rotation	90°	90°
Internal rotation	80°	80°

Lumbar Spine: There is no tenderness to palpation along the lumbosacral paraspinal muscles. There are no spasms present throughout. Heel/toe walk was normal. Straight Leg Raising and Laseque’s tests were negative. Range of motion is as follows:

	Normal	Examination
Flexion	60°	60°
Extension	25°	25°
Bilateral bending	25°	25°

Muscle Testing: Muscle testing measured as follows:

	Normal	Right	Left
Deltoid	5/5	5/5	5/5
Biceps	5/5	5/5	5/5
Triceps	5/5	5/5	5/5
Quadriceps	5/5	5/5	5/5
Hamstrings	5/5	5/5	5/5

Reflexes: Reflexes measured as follows:

	Normal	Right	Left
Biceps	2+	2+	2+
Triceps	2+	2+	2+
Knees	2+	2+	2+
Ankles	2+	2+	2+

Assessment:

1. Status post cervical sprain/strain, resolved.
2. Status post right shoulder contusion, resolved.
3. Status post lumbar sprain/strain, resolved.

Disability: Based on objective findings, there is no disability.

The burden then shifted to the plaintiff to show by admissible evidentiary proof, the existence of a triable issue of fact (*see Marietta v Scelzo*, 29 AD3d, 539, 815 NYS2d 137 [2d Dept 2006]).

The undersigned finds that the plaintiff has failed to show, by admissible evidentiary proof, the existence of a triable issue of fact.

Accordingly, the instant motions (004, 005) are granted and the complaint is dismissed in its entirety.

Dated: April 11, 2014

W. Gerard Ashe
J.S.C.

 FINAL DISPOSITION NON-FINAL DISPOSITION