Lorenzen v Allen
2016 NY Slip Op 30432(U)
March 17, 2016
Supreme Court, New York County
Docket Number: 154490/12
Judge: Leticia M. Ramirez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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JESSICA LORENZEN,

Plaintiff(s),

-against-

JEAN FRANCOIS ALLEN, LUCKY BARB CAB CORP., BONGA CAB CORP., KORAU MOHAMMED AZDIZKA, and EPHRAIM GABBAI,

Defendant(s).

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Index #: 154490/12
Mot. Seq: 03

DECISION/ORDER

HON. LETICIA M. RAMIREZ

Defendants Jean Francois Allen and Lucky Barb Cab Corp.'s motion[1], pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

Summary judgment is appropriate where there is no genuine triable issue of fact and where the papers submitted warrant that the court directs judgment in favor of the moving party as a matter of law. *Andre v Pomeroy, 35 N.Y.2d 361 (1974)*. While the plaintiff has the burden of proof, at trial, of establishing a prima facie case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), the defendants have the burden, on a summary judgment motion, of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 NY2d 320 (1986)*. Only if the defendants have met their burden, must the plaintiff then present evidence that she sustained a "serious injury" within the meaning of Insurance Law §5102(d). *Licari v. Elliot, 57 N.Y.2d 230 (1982)*.

To establish the existence of a "serious injury" based upon the "significant limitation of

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[1]Plaintiffs' claims against defendants Bonga Cab Corp., Korau Mohammed Azdizka and defendant Ephraim Gabbai were previously dismissed by Court Orders dated October 2, 2013 and April 29, 2015, respectively.

or member" categories, the law requires more than a mild, minor or slight limitation of use. Plaintiff's claim must be supported by admissible medical evidence of a quantified medical injury or condition that has been objectively measured. *Licari v. Elliot, 57 N.Y.2d 230 (1982); Style v Joseph, 32 A.D.3d 212 (1st Dept. 2006); Cruz v Lugo, 67 A.D.3d 495 (1st Dept. 2009); Ikeda v Hussain, 81 A.D.3d 496 (1st Dept. 2011); Sone v Qamar, 68 A.D.3d 566 (1st Dept. 2009); Tuberman v Hall (61 A.D.3d 441 (1st Dept. 2009).* Subjective complaints of pain, alone, will not satisfy the plaintiff's burden of establishing a "serious injury." *Scheer v Koubek, 70 N.Y.2d 678 (1987); Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007).* The Court has held that where "the evidence proffered by a plaintiff is limited to conclusory assertions tailored to meet the statutory requirements or where a doctor's submission is based only on the plaintiff's subjective complaints," summary judgment is warranted. *DiLeo v Blumberg, 250 A.D.2d 364, 365 (1st Dept. 1998).*

To satisfy the "significant disfigurement" category of the Insurance Law §5102(d), the plaintiff must demonstrate, with admissible evidence, that her scar is one that "a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn." *Sidibe v Cordero, 79 A.D.3d 536 (1st Dept. 2010); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989); Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986).*

According to the plaintiff's Bill of Particulars, plaintiff alleges, inter alia, a facial laceration requiring 25 stitches; scarring; headaches; neck pain; back pain; shoulder pain.

In support of their motion, defendants submitted the affirmed report of neurologist, Dr. Jean-Robert Desrouleaux, who examined the plaintiff on November 6, 2014. Upon his examination, Dr. Desrouleaux found that the plaintiff had full ranges of motion of her cervical, thoracic and lumbar spine. He concluded that the plaintiff's alleged cervical, thoracic and lumbar spine injuries had resolved; that the plaintiff's neurological examination was normal; and that she had no neurological disability as a result of the subject accident.

In addition, defendants submitted the affirmed report of plastic surgeon, Dr. Gary Bromley, who examined the plaintiff on September 18, 2014. Dr. Bromley took 4 color photographs of the plaintiff at the time of his examination, which were also submitted by the defendants. Dr. Bromley noted that the plaintiff had a "transverse scar located superior to the

defendants. Dr. Bromley noted that the plaintiff had a "transverse scar located superior to the medial aspect of the right eyebrow," that measured 1 cm in length and 3 mm in width. He reported that the scar was only slightly depressed and blended in fairly well with the surrounding skin and soft tissue. Dr. Bromley opined that further revision may result in some improvement of the scar's appearance and that the scar did not interfere with the plaintiff's ability to participate in her daily activities. The photographs taken by Dr. Bromley reveal that the plaintiff's scar is located just above her right eyebrow and is barely visible.

Defendants also submitted the transcript of the plaintiff's deposition on February 28, 2014. At that time, plaintiff testified that after the accident, she received emergency room treatment at Beth Israel Hospital for her facial laceration. She did not make any other complaints at that time. She was given 20 to 25 stitches by Dr. Joseph Wolf, a plastic surgeon, advised to take over-the-counter pain medication and released. She next saw Dr. Wolf ten days thereafter, at which time he removed the stitches. She did not receive any other medical treatment as a result of the accident and had no future medical appointments at the time of her deposition relative to the subject accident. Although she experienced headaches after the accident, she was no longer experiencing headaches at the time of her deposition. She only missed one day from work as a result of the subject accident. Upon her return, she resumed her full duties as a Senior Account Manager. The plaintiff testified she is embarrassed and upset by her scar as she works directly with clients and attends meetings. She uses makeup to conceal her scar daily. However, since the accident, she has received two promotions. She was a Senior Strategy Manager at the time of her deposition. The plaintiff has also gotten married since the accident. At the time of her deposition, the plaintiff did not have any complaints of pain. She also testified that she did not have any physical limitations as a result of the accident.

Based upon the above-referenced submissions, defendants met their burden of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. *Hutchinson v Beth Cab Corp., 207 A.D.2d 283 (1st Dept. 1994); Saltzman v Gardella's Elite Limousine Service, 2010 NY Slip Op 30204U (Sup. Ct. NY 2010); Lin Dai v Cain Taxi, Inc., 2009 NY Slip Op 33202U (Sup. Ct. NY 2009).*

The burden then shifted to plaintiff to raise a triable issue of fact that she sustained a "serious injury" within the meaning of the Insurance Law. Plaintiff failed to meet this burden. In

opposition to the defendants' motion, plaintiff failed to submit any competent objective medical evidence to demonstrate a "serious injury." Instead, plaintiff submitted unsworn and uncertified medical records from Dr. Wolf and Beth Israel Hospital. It is well settled that a plaintiff must come forth with competent objective medical evidence to support a claim for "serious injury," in opposing a summary judgment motion. *Toure v Avis Rent A Car Sys., Inc., 98 N.Y.2d 345 (2002); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986); Saltzman v Gardella's Elite Limousine Service, 2010 NY Slip Op 30204U (Sup. Ct. NY 2010).*

Lastly, plaintiff also failed to raise any triable issues of fact as to the 90/180 category of the Insurance Law. Plaintiff testified that she only missed one day from work as a result of the accident and that, upon her return to work, she resumed her full duties. *Insurance Law §5102(d); Scheer v Koubek, 70 N.Y.2d 678 (1987); Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007); Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999).*

Accordingly, defendants' summary judgment motion is granted and the plaintiffs' Complaint is hereby dismissed.

This constitutes the Decision/Order of the Court.

Dated: March 17, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.