

Campbell v Wendt

2016 NY Slip Op 30913(U)

May 17, 2016

Supreme Court, New York County

Docket Number: 157639/12

Judge: Leticia M. Ramirez

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

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FRANCES S. CAMPBELL,
Plaintiff(s),

Index #: 157639/12
Mot. Seq: 02

DECISION/ORDER

-against-

GREGORY M. WENDT,
Defendant(s).
-----X

HON. LETICIA M. RAMIREZ

Defendant’s motion, 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) and plaintiff’s cross-motion to strike the report of defendant’s expert witness and to compel defendant’s expert witness to appear for a deposition and provide plaintiff’s MRI films in his possession, custody or control is decided as follows:

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 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), defendant has 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, defendant must submit admissible evidence to demonstrate that there are no material issues of fact that 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 N.Y.2d 320 (1986). If defendant meets his burden, plaintiff must then present admissible evidence demonstrating that she sustained a “serious injury” within the meaning of Insurance Law §5102(d). *Licari v Elliot*, 57 N.Y.2d 230 (1982).

When a plaintiff alleges an aggravation, exacerbation and/or activation of a pre-existing injury or condition, the defendant must make a *prima facie* showing that the subject accident did not cause the aggravation, exacerbation and/or activation or that the aggravation, exacerbation and/or activation did not constitute a "serious injury" in accordance Insurance Law §5102(d). *Suarez v Abe*, 4 A.D.3d 288 (1st Dept. 2004); *Arroyo v MTA*, 2016 NY Slip Op 30182U (Sup. Ct. NY 2016).

In cases involving a claim of aggravation, exacerbation and/or activation of a pre-existing injury or condition, it has been held that a defendant demonstrated entitlement to summary judgment upon submission of his experts' findings of no deficits in range of motion in the subject body part and opinion

that MRI findings were pre-existing and not caused by the subject accident. *Kendig v Kendig*, 115 A.D.3d 438 (1st Dept. 2014); *Nova v Fontanez*, 112 A.D.3d 435 (1st Dept. 2013); *Mitrotti v Elia*, 91 A.D.3d 449 (1st Dept. 2012).

Once a defendant meets his burden, it is incumbent upon plaintiff to demonstrate, with objective competent medical evidence, that the subject accident aggravated, exacerbated and/or activated her pre-existing condition "so severely as to produce a statutory serious injury above and beyond the pre-existing condition." *Suarez v Abe*, *supra*.

Proof of a herniated or bulging disc or radiculopathy, alone, is insufficient to establish a "serious injury." Such proof must be supported by additional competent objective medical evidence demonstrating a resulting significant physical limitation, and its duration. *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Shvartsman v Vildman*, 47 A.D.3d 700 (2nd Dept. 2008); *Tobias v Chupenko*, 41 A.D.3d 583 (2nd Dept. 2007). Subjective complaints of pain, tenderness, weakness, dizziness or headaches, without more, will not satisfy 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); *Casimar v Bailey*, 70 A.D.3d 994 (2nd Dept. 2010). The Court has also 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). In addition, an affirmation from an attorney, with no personal knowledge of the facts, is hearsay, and therefore, has no probative value. *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980).

To establish the existence of a "serious injury" based upon the "significant limitation of use of a body function or system" or "permanent consequential limitation of use of a body organ or member" categories, the law requires more than a mild, minor or slight limitation of use. As such, plaintiff's claim must be supported by admissible medical evidence of a medical injury or condition that has been objectively measured quantitatively or qualitatively. An expert's specification of the numerical percentage of a plaintiff's loss of range of motion, or actual measured degrees of range of motion compared to normal ranges, is sufficient quantitative evidence to demonstrate a "serious injury" claim, as long as the expert also identifies how the measurements were conducted. Alternatively, an expert can use a qualitative assessment of plaintiff's condition, provided that the assessment includes an objective basis and compares plaintiff's limitations to normal function, purpose and use of the affected body organ, member, function or system. *Toure v Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *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).

In this action, where plaintiff is claiming, *inter alia*, of aggravation, exacerbation and/or activation of a pre-existing cervical and lumbar spine condition, pain at the base of her skull and headaches as a result of the subject accident on October 30, 2009, defendant demonstrated entitlement to summary judgment by submitting, *inter alia*, plaintiff's unsworn medical report from Dr. Barbara Schwartz from Manhattan Physical Medicine & Rehabilitation dated December 18, 2012, plaintiff's deposition testimony, and the affirmed reports of Dr. Jean-Robert Desrouleaux and Dr. David Fisher. *Kendig v Kendig*, *supra.*; *Nova v Fontanez*, *supra.*; *Mitrotti v Elia*, *supra.*; *Pommells v Perez*, 4 N.Y.3d 566 (2008); *Newton v Drayton*, 305 A.D.2d 303 (1st Dept. 2003); *Munoz v Hollingsworth*, 18 A.D.3d 278 (1st Dept. 2005); *Jimenez v Polanco*, 88 A.D.3d 604 (1st Dept. 2011); *Jimenez v Nelson*, 88 A.D.3d 604 (1st Dept. 2011); *McArthur v Act Limo, Inc.*, 93 A.D.3d 567 (1st Dept. 2012); *McKelvey v N.Y.C. Transit Auth.*, 28 Misc. 3d 1218A (Sup. Ct. Bronx 2009).

In her report dated December 18, 2012, plaintiff's treating physician, Dr. Schwartz noted that plaintiff has a long-standing history of fibromyalgia for 22 years and has undergone multiple therapies and treatment for her neck and back pain with limited success. She also noted that plaintiff underwent a prior cervical spine MRI on June 24, 2006 that revealed straightening of the cervical spine consistent with muscle spasm; diffuse spondylosis with small disc bulges at C3-4 and C4-5 and left posterolateral herniations at C5-6 and C6-7; impingement on the anterior spinal cord at C6-7; and narrowing of both neural foramen at C2-3 and C6-7. She further noted that plaintiff underwent a prior lumbar spine MRI on October 3, 2006 that revealed diffuse mild spondylosis with small disc bulges at all lumbar levels; diffuse facet hypertrophy with impingement on the lateral recesses bilaterally at L5-S1; extension of disc material into the neural foramen bilaterally at L4-5 and L5-S1 abutting the respectively exiting nerve roots.

During her deposition, plaintiff confirmed that she was diagnosed with fibromyalgia before the subject accident and had neck and back back prior to the subject accident. She also admitted to having pain in her face and skull prior to the accident, but claims that it has worsened since the accident and that she has developed headaches since the accident. In addition, plaintiff, who testified that she had been unemployed since 1989, stated that she was not confined to bed and did not recall being confined to home as a result of the subject accident.

In his affirmed report, Dr. Fisher reviewed the films of plaintiff's cervical spine MRI of June 24, 2006 and lumbar spine MRI of October 3, 2006. He opined that plaintiff's cervical spine MRI revealed

degenerative changes throughout the cervical spine most pronounced at C4-5, C5-6 and C6-7 with a disc herniation at C6-7 and that plaintiff's lumbar spine MRI revealed mild degenerative changes throughout the lumbar spine with mild disc bulges at all levels. Dr. Fisher concluded that both MRIs "clearly reflect a chronic pre-existing condition."

In his affirmed report, Dr. Desrouleaux stated that his examination of plaintiff on January 8, 2015 revealed full ranges of motion of her cervical and lumbar spine. He opined that plaintiff had a normal neurological examination with no neurological disability as a result of the subject accident. He diagnosed plaintiff with resolved post-traumatic headaches, resolved status post cervical and lumbar myofascitis and pre-existing chronic cervical and lumbar pain.

In light of the foregoing, defendant demonstrated entitlement to summary judgment as a matter of law, since he submitted evidence demonstrating that plaintiff's cervical and lumbar spine disc bulges and/or herniations were pre-existing and/or degenerative, that any soft tissue injuries were resolved and that there was no objective evidence to substantiate plaintiff's current subjective complaints of pain and limitation. *Kendig v Kendig, supra.*; *Nova v Fontanez, supra.*; *Mitrotti v Elia, supra.*; *Pommells v Perez, supra.*; *Newton v Drayton, supra.*; *Munoz v Hollingsworth, supra.*; *Jimenez v Polanco, supra.*; *Jimenez v Nelson, supra.*; *McArthur v Act Limo, Inc., supra.*; *McKelvey v N.Y.C. Transit Auth., supra.*

The burden then shifted to plaintiff to raise a triable issue of fact that the subject accident aggravated, exacerbated and/or activated her pre-existing condition "so severely as to produce a statutory serious injury above and beyond the pre-existing condition" or that she otherwise sustained a "serious injury" as a result of the subject accident. *Suarez v Abe, supra.*; *Licari v Elliot, supra.*

Plaintiff failed to meet this burden. In opposition to defendant's motion, plaintiff submitted, *inter alia*, the affirmed report of Dr. Barbara Schwartz dated February 29, 2016. Although Dr. Schwartz noted findings of restricted ranges of motion in plaintiff's cervical and lumbar spine, Dr. Schwartz did not identify the objective medical tests employed in measuring the ranges of motion and did not compare her findings to normal ranges. Therefore, Dr. Schwartz's opinion can only be deemed conclusory and tailored to meet the statutory requirement, thereby rendering her report insufficient to support a claim of "serious injury." *Soho v Konate, 85 A.D.3d 522 (1st Dept. 2011).*; *Bray v Rosas, 29 A.D.3d 422 (1st Dept. 2006).*; *Munoz v Hollingsworth, supra.*; *McKelvey v N.Y.C. Transit Auth., supra.*

The only other medical evidence submitted by plaintiff was the unsworn report of Dr. Schwartz dated December 8, 2009. However, as this report is not in admissible form, it has no probative value. *Quinones v Ksieniewicz, 80 A.D.3d 506 (1st Dept. 2011).* Notwithstanding, Dr. Schwartz also failed to identify the objective medical tests employed in measuring the plaintiff's cervical and lumbar spine

ranges of motion and further failed compare her findings to normal ranges in her report of December 8, 2009.

Next, although plaintiff is alleging pain at the base of her skull and headaches since the subject accident, plaintiff's subjective complaints of pain, without more, do not rise to the level of a "serious injury" in accordance with Insurance Law §5102(d). *Scheer v Koubek*, 70 N.Y.2d 678 (1987); *Lloyd v Green*, 45 A.D.3d 373 (1st Dept. 2007). Particularly, since the plaintiff admitted to having facial and skull pain prior to the subject accident.

Lastly, plaintiff also failed to establish that she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident in accordance with the Insurance Law. The plaintiff, who was unemployed at the time of the accident, does not allege bed confinement and does not recall any home confinement as a result of the subject accident.

Based upon the foregoing, defendant's summary judgment motion is granted in its' entirety and plaintiff's Complaint is hereby dismissed.

Accordingly, plaintiff's cross-motion to strike the report of defendant's expert witness and to compel defendant's expert witness to appear for a deposition and provide the films of plaintiff's MRIs in his possession, custody or control is denied, as moot.

This constitutes the Decision/Order of the Court.

Dated: May 17, 2016
New York, New York


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