

Hardnett v Payne

2016 NY Slip Op 31113(U)

May 17, 2016

Supreme Court, Bronx County

Docket Number: 301459/2014

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

LATARSHA HARDNETT,

INDEX NUMBER: 301459/2014

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

BRIAN PAYNE, CITY BRONX LEASING TWO INC., NOELIA GUERRERO and CITY BRONX LEASING INCORPORATED,

Defendants.

The following papers numbered 1-3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 9/28/15

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within action arises from a two car accident on April 12, 2013 in which plaintiff claims she sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body

organ, member, function or system. Toure, supra.¹

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. Plaintiff alleges to have sustained, in relevant part, L2-3 left foraminal focal disc herniation causing impingement upon the left neural foramen; L3-4 left foraminal focal herniation causing impingement upon the left neural foramen; and L4-5 posterior central and left foraminal focal herniation causing impingement upon the anterior thecal sac and left neural foramen, confirmed by MRI performed on September 13, 2013.

The Court finds that the defendants met their prima facie burden of establishing that plaintiff did not sustain a serious injury by submitting the affirmed report of their medical expert Dr. Naunihal Sachdev Singh who, based upon his physical examination of the plaintiff, found full range of motion in the plaintiff's cervical, thoracic and lumbar spine. Dr. Singh noted that there were no objective neurological findings and any alleged injuries to plaintiff's cervical, thoracic and lumbar spine had resolved. Defendants also submit the affirmed report of Dr. Audrey Eisenstadt, radiologist, who reviewed plaintiff's MRI films and opines that the cervical spine MRI shows degeneration of the L4-5 intervertebral disc level; minimal bulging of disc material at L2-3, L3-4 and L4-5 intervertebral disc levels with extension of disc material into both neuroforamen at L4-5. Dr. Eisenstadt states that the MRI revealed degenerative disc changes and disc desiccation which have no traumatic etiology or causal relationship to the subject accident.

In opposition to the motion, plaintiff submits medical records in admissible form setting forth her medical treatments, including physical examinations and therapy, objective diagnostic testing, including MRIs and the affirmed reports and/or affidavit of her treating physician and medical providers. Plaintiff's submissions raise an issue of fact as to whether she sustained a serious injury as she produced objective, contemporaneous and qualitative medical evidence regarding the injury. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). Moreover, plaintiff's submissions address defendants' contention that plaintiff's injuries are not causally related to the accident, but are degenerative in nature. See,

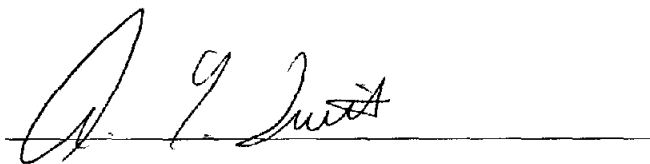
¹The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

Boone v. Elizabeth Taxi, Inc., 993 N.Y.S.2d 302 (1st Dept. 2014). Furthermore, plaintiff has submitted objective medical evidence such as the MRIs which sufficiently establish the existence of a serious injury. Toure, supra; Brown v. Achy, 776 N.Y.S.2d 56 (1st Dept. 2004). The affirmation of plaintiff's treating physician, which is based on his personal examinations and observations of the plaintiff, are acceptable methods to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1st Dept. 1998). Moreover, Dr. Khakhar's opinion that plaintiff's injuries to her cervical and lumbar spine are causally related to the accident and that plaintiff has sustained permanent lower back and neck injuries and it is expected that her limitations in the normal use and function of her lower back and neck will continue based on the fact that plaintiff has continued to demonstrate deficits in mobility, muscle spasms, tenderness and pain for more than two years since her accident.

Defendants, however, make a prima facie showing that plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented him from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident by submitting plaintiff's deposition testimony showing that following the accident, she missed only four days from work. See, Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006). Moreover, plaintiff has offered no evidence showing that she was restricted from performing substantially all of the material acts that constituted her usual and customary daily activities for 90 days during the 180 days following the accident. See, Fernandez v. Niamou, 885 N.Y.S.2d 486 (1st Dept. 2009).

This constitutes the decision and Order of this Court.

Dated: 5/17/16



Hon. Alison Y. Tuitt