Merchants Preferred Ins. Co. v Jones
2016 NY Slip Op 31866(U)
July 27, 2016
Supreme Court, Suffolk County
Docket Number: 11-36003
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 11-36003
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

PUBLISH

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-28-15 & 12-31-15
SUBMIT DATE 7-7-16
Mot. Seq. # 03 - MD
Mot. Seq. # 04 - MG

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MERCHANTS PREFERRED INSURANCE COMPANY A/S/O DONNA M. STRASHEIM and LOUIS W. STRASHEIM,

Plaintiffs,

- against -

JASON A. JONES,

Defendant.

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Upon the following papers numbered 1 to 65 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 (#03) & 19 - 32 (#04) ; ~~Notice of Cross Motion and supporting papers~~ __; Answering Affidavits and supporting papers 12 - 14 (#03) & 33 - 54 (#04) ; Replying Affidavits and supporting papers 15 - 18 (#03) & 55 - 65 (#04) ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

In this proceeding, plaintiffs seek an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and for a trial on damages. The defendant separately moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint on the ground that the plaintiff, Donna M. Strasheim, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d).

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on July 11, 2009. According to the plaintiff, her car was stopped at a red light at the intersection of Route 347 and Route 25 in Brookhaven, New York, when the defendant struck her vehicle from behind. The plaintiff commenced this action by the filing of a summons and complaint on November 21, 2011. Defendant interposed an answer on December 30, 2011. By Order dated April 21, 2014, the caption was amended to reflect Merchants Preferred Insurance Company as subrogor of Donna Strasheim and Louis Strasheim.

Defendant's Motion for Summary Judgment

The defendant moves for an order granting summary judgment in his favor on the ground that the plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, because she

did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. Plaintiff Donna Strasheim's verified bill of particulars dated February 2, 2012 alleges the following injuries: L2-3, L3-4, L4-5 disc herniations; C4-5, C5-6, C6-7 disc herniations; cervical radiculopathy; lumbar radiculopathy; myofascial pain; and aggravation of pre-existing thoracic spine strain/sprain, thoracic subluxation and thoracic spine pain. The plaintiff's second verified bill of particulars dated September 16, 2014 claims that as a result of the accident she was required to undergo a laminectomy with discectomy on June 13, 2012 and that she has a "dropped" left foot with numbness. In opposition the defendant states that the plaintiff did not request any medical assistance at the scene of the accident and "drove her vehicle from the accident scene, and proceeded with her plans of spending the day in Manhattan." He also alleges that she did not seek medical attention until one week after the accident when she was examined by Dr. Groth. Dr. Groth did not recommend surgery at that time but instead referred her for physical therapy and chiropractic treatment. The plaintiff began chiropractic treatment in September 2009 and ended treatment in 2011 when her no-fault benefits were stopped. The plaintiff testified at her examination before trial that there was a three year gap in treatment with Dr. Groth between 2009 and 2012.

The plaintiff testified that during Memorial Day weekend in 2012 her injury was exacerbated when "I went to lift something up and my disk completely herniated, so I needed to see him (Dr. Groth)." She testified that she was lifting a propane tank when she "heard a popping noise in my back", had some "initial swelling and fullness in her lower back and buttock and then throughout the day pain going down my buttock into my leg." She stated that before Memorial Day of 2012 she had "tolerable" stiffness and spasms in her neck and would have to watch her movements with her lower back. She specifically testified that she did "no lifting, no household things, no vacuuming, no grass cutting, [or] anything strenuous". In May or June 2012 Dr. Groth recommended surgery and referred the plaintiff to Dr. Labiak. The plaintiff was examined by Dr. Labiak in June 2012 and underwent surgery on June 13, 2012. The plaintiff had MRIs both prior to and after the exacerbating of her injury. She underwent lumbar MRIs on August 17, 2007 (two years before the subject accident), July 14, 2009 (three days after the subject accident) and May 30, 2012 (three years after the subject accident and days after the exacerbation). The defendant submitted copies of the clinical findings for all three MRIs. It was noted for the July 14, 2009 examination that "correlation is made to the prior lumbar spine MRI obtained on 8-17-07." The impression on the 2009 MRI was that the herniation at L4-5, which was present in the 2007 MRI, "is larger than on the prior MRI from August 2007". The 2012 MRI indicates "L4-5: New internal development of a 1.3 x 0.5 x 1.0 cm (CC x AP x ML) inferiorly migrated left paracentral disc extrusion completely effacing the left lateral recess, with increased compression of the descending left L5 nerve root within the left lateral recess and increased mass effect on the left ventral lateral aspect of the thecal sac."

The plaintiff was examined by Dr. Peter Chiu, Board Certified in physical medicine & rehabilitation, on December 13, 2010. At that examination the plaintiff reported that since the accident her symptoms had become "somewhat better". Dr. Chiu's diagnosis was that her cervical and lumbar spine strain/sprain was resolved. In addition Dr. Chiu noted that "based upon the lack of objective findings on today's examination to support the claimant's subjective complaints further physical therapy and PM&R treatment (office visits) are not medically necessary from a physiatric point of view." Dr.

Chiu additionally noted that "if the history as presented is correct and based on my physical examination today, there is a causal relationship between the accident of 07/11/09 and the alleged injuries sustained." The plaintiff was also examined by Janice C. Salayka, a New York State licensed Chiropractor and Acupuncturer, who performed am independent chiropractic examination on March 2, 2011. Her examination revealed no vertebral tenderness or spasm in the cervical or thoracic/lumbar spine regions and range of motion to be within the normal limits. She noted that "Ms. Strasheim was able to get on and off the examination table without difficulty... Ms. Strasheim easily sat on the examination table, and lay in supine position and rose to seated position with no apparent discomfort." The diagnosis was "post cervical and lumbar sprain- resolved." In addition, the plaintiff was examined by Dr. Vartkes Khachadurian, a Board Certified Orthopaedic Surgeon, on June 14, 2013. He noted that the "plaintiff complained only of her lower back and the left lower extremity and since she gave a history of a new injury in June of 2012, lifting a barbecue cylinder, the claimant's current treatment is for a new injury and not a pre-existing injury... [she] had returned to work after the pre-existing injury and was performing her work without difficulty." The plaintiff submitted papers in opposition to the motion.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instance, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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." (Insurance Law § 5102 [d]).

A defendant seeking summary judgment on the grounds that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material

issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The defendant's submissions in support of the motion are sufficient to establish a prima facie case that the plaintiff did not suffer a serious injury to her spine as a result of the July 11, 2009 accident (*see* ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). The defendant's submissions further show that the plaintiff suffered from a new injury which occurred over Memorial Day weekend in 2012 when she attempted to lift a propane tank.

Moreover, plaintiff's own deposition testimony demonstrates prima facie that she does not have a "90/180" claim (*see* ***Clarke v Dangelo***, 109AD3d1194, 971 NYS2d 774 [4th Dept 2013]; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Pacheo v Conners***, 69 AD3d 818, 894 NYS2d 782 [2d Dept 2010]; *see also* ***Dembele v Cambisaca***, 59 AD3d 352, 874 NYS2d 72 [1st Dept 2009]). Although plaintiff states that her employment was impacted prior to the surgery because she was confined to staying in one place, she did not miss work until she missed one month after the surgery. She testified that she had "to make modification to get things done". She also testified that she was limited in her activities like "no shopping, house cleaning, cooking, that kind of thing" because "I couldn't stand to perform those duties" due to the pain.

Based upon the foregoing, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). In opposition to the defendant's application, the plaintiff submitted the affidavit of Dr. John J. Labiak the Orthopedic Surgeon who performed her surgery. He states that the plaintiff "advised my office that she was involved in a motor vehicle accident in 2009 and that as a result of that accident she sustained herniated nucleus pulposus at L4/L5... she further advised my office that on Memorial Day weekend, two weeks prior to her visit, she simply bent over and had acute increased pain in her lower back and left sided lower extremity." He indicates that he reviewed the MRI from May 30, 2012 and that based upon her symptoms and a review of that MRI he recommended surgery. Dr. Labiak then explains the steps taken prior to and post surgery for the plaintiff's recovery from surgery. Dr. Labiak does not indicate in his report or affidavit whether the plaintiff informed him that she had actually attempted to pick up a propane tank when she re-injured her back or whether she merely told him that she was bending down. He states that her injury is causally related to the motor vehicle accident of July 11, 2009 and that her treatment was necessary and related to the accident. Dr. Labiak indicated that he only reviewed the third MRI performed on the plaintiff's lower back. Dr. Labiak does not opine why he believes that the injury is causally related to the motor vehicle accident and not a result of the plaintiff's attempt to lift a propane tank.

The plaintiff does not provide an affidavit of a treating physician prior to her re-injury of her back on Memorial Day weekend 2012. The Court also notes that the examinations completed by Dr. Chiu and Janice C. Salayka were actually ordered by the plaintiff, Merchants Preferred Insurance

Company and not be the defendant. The reports prior to Memorial Day weekend indicate the existence of herniated disks. The mere existence of a herniated or bulging disc or radiculopathy, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (***Scheker v Brown,*** 91 AD3d 751, 752, 936 NYS2d 283 [2d Dept 2012]; ***Pierson v Edwards,*** 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010], ***Casimir v Bailey,*** 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). In this case, the requisite "objective evidence" is lacking in the plaintiff's opposition to the defendant's motion. Notwithstanding the plaintiff's allegations of continual pain since the subject motor vehicle accident, there is no medical evidence linking her injury and subsequent surgery to the motor vehicle accident which occurred on July 11, 2009, rather than her attempt to lift the propane tank during Memorial Day weekend of 2012. Therefore, the defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Plaintiff's Motion for Summary Judgment

Based upon the foregoing, the plaintiff's motion is denied as moot.

The foregoing shall constitute the decision and Order of this Court.

Dated: July 27, 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____NON-FINAL DISPOSITION