

**Harmon v Lubin**

2012 NY Slip Op 30092(U)

January 17, 2012

Supreme Court, Queens County

Docket Number: 12525/10

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

JONELLE S. HARMON, Index No.: 12525/10  
Plaintiff, Motion Date: 1/12/12  
- against - Motion No.: 13  
Motion Seq.: 2

RICHARD J. LUBIN,  
Defendant.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendant, RICHARD J. LUBIN for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of JONELLE S. HARMON on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5  
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10  
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, JONELLE S. HARMON, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on March 8, 2010, when the plaintiff's vehicle was struck in the rear by the defendant's vehicle on the eastbound Belt Parkway exit ramp for Farmer's Boulevard leading to South Conduit Avenue in Queens County, New York.

The plaintiff commenced this action by filing a summons and complaint on May 18, 2010. Issue was joined by service of defendant's verified answer dated September 22, 2010. The defendant now moves for an order pursuant to CPLR 3212(b),

granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, the defendant submits an affirmation from counsel, Michael P. Ross, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Melissa Sapan Cohn and orthopedic surgeon, Dr. Robert Israel; a copy of the transcript of the examination before trial of plaintiff Jonelle S. Harmon; and a copy of the police accident report (MV-104).

In his verified Bill of Particulars, plaintiff, age 26, states that as a result of the accident she sustained, inter alia, a disc herniation at the L5-S1 level; a disc protrusion at L4-L5 and disc bulges at C4-5 and C5-C6. At the time of the accident, plaintiff was employed as a buyer for the MTA. She states in her bill of particulars that she was confined to bed for one week directly following the accident and confined to her home for two weeks following the accident. Plaintiff also states she missed two weeks from work as a result of the accident.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Robert Israel, a board certified orthopedic surgeon, retained by the defendants, examined Ms. Harmon on July 5, 2011. Plaintiff presented with pain in her neck, lower back and both shoulders. Dr. Israel performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbar spine and right and left shoulders. He concluded that the plaintiff had a resolved sprain of the cervical spine, resolved sprain of the lumbar spine and a resolved sprain of the right and left shoulders. He states that based upon his examination, the plaintiff has no disability as a result of the accident in question.

Dr. Melissa Sapan Cohn, a board certified radiologist reviewed the MRI studies of the plaintiff's cervical spine and lumbosacral spine. She found that there was no evidence of disc bulges or herniations present on either study.

Plaintiff's examination before trial was held on April 13, 2011. She testified that she left the scene of the accident in an ambulance. She was transported to Jamaica Hospital where she was treated and released the same day. Plaintiff subsequently sought treatment from Dr. Rose at the Ace Chiropractic Medical Group. She continued chiropractic treatment with Dr. Rose for nine months. The first month she was treated three of four times a week and after that approximately twice a week. She also saw a psychologist, Dr. Fleiss once or twice due to anxiety and nervousness about driving. She stated that she can no longer sit for long periods of time and that she still has pain in her left shoulder and lower back.

Defendant's counsel contends that the medical reports of Drs. Cohn and Israel as well as the plaintiff's deposition testimony are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney Michael P. Ross, Esq., submits his own affirmation as well as the affidavit of chiropractor Roland Rose; an affidavit from the plaintiff dated December 30, 2011; the affirmation of Dr. William Weiner, D.O., and the affirmation of Dr. Joon Kim.

Dr. Weiner, in an affirmed report states that he reviewed the MRI studies of the plaintiff's cervical spine and lumbar spine in which he observed disc bulges as C4-C5, C5-C6, L2-L3, L4-L5 and a disc herniation at L5-S1.

In his affidavit dated December 28, 2011, Dr. Roland Rose, states that he first examined the plaintiff on March 10, 2010, two days following the accident. His objective physical examination revealed significant quantified range of motion limitations of the cervical and lumbar spines. He states that he treated the plaintiff until December 2010 when

she discontinued treatment because she had reached maximum medical improvement for her condition. He states that he re-evaluated the plaintiff on October 4, 2011 at which time she complained of continued pain to her lumbar spine. Dr. Ross's range of motion testing on that day showed limitations of range of motion of the lumbar spine. He concluded that the plaintiff suffered permanent restriction of body movements, which will inhibit her ability to carry on with daily tasks. He states that her injuries are causally related to the accident of March 8, 2010 and are permanent in nature.

Dr. Kim states that he examined the plaintiff on October 13, 2011 and November 11, 2011 and found quantified limitations of range of motion of the left shoulder. He found that plaintiff sustained a loss of use of the cervical and lumbar spines and left shoulder which are casually related to the accident in question.

In her affidavit plaintiff states that she stopped treatment with Dr. Rose because the therapy was not doing anything to alleviate her pain and Dr. Rose told her that she had reached maximum medical improvement for her injuries.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other

words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Drs. Israel and Cohn and defendant's deposition testimony stating that she only missed two weeks from work was sufficient to meet its prima facie burden by demonstrating 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 Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Weiner, Rose and Kim attesting to the fact that the plaintiff had significant limitations in range of motion of the lumbar spine and left shoulder both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in her treatment by submitting her own affidavit stating that the treatments were no longer alleviating her pain. In addition Dr. Rose opined that any further treatments would be palliative in nature(see Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]; Shtesl v Kokoros, 56 AD3d 544 [2d Dept. 2008])).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 17, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**