

Brandon v Blowers

2012 NY Slip Op 31414(U)

May 24, 2012

Sup Ct, New York County

Docket Number: 101138/2009

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice

PART 22

TERRI BRANDON and CHERYL BRANDON

INDEX NO. 101138/2009

vs.

MOTION DATE _____

KARI A. BLOWERS, MAXWELL J. RAZDOW,
AMARY B. COULIBALY and JAMES A.
LEASING

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for SUMMARY JUDGMENT

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits — Exhibits 1

Answering Affidavits — Exhibits _____ 2

Replying Affidavits _____ 4

FILED

MAY 29 2012

Cross-Motion: Yes No

NEW YORK

Upon the foregoing papers, it is ordered that this motion COUNTY CLERK'S OFFICE

In this action to recover for personal injuries arising out of a motor vehicle accident, Defendants Amary Coulibaly and James A. Leasing (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Terri Brandon and Cheryl Brandon's (collectively "Plaintiffs") Complaint on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Co-defendants Kari A. Blowers and Maxwell J. Radzow (collectively "Co-defendants") cross move for the same relief, relying upon Defendants' submissions. Under New York Insurance Law §5102(d), 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 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.

"[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, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Plaintiff Cheryl Brandon

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including cervical and lumbosacral radiculopathy, bilateral muscle spasms in lumbar area radiating to both legs and generalized anxiety. Plaintiff's Supplemental Bill of Particulars alleges injuries including Grade I anterolisthesis of L4 on L5, L3-L4 and L4-L5 disc bulges, L5-S1 disc herniation, C3-C4 and C4-C5 through C6-C7 disc bulges. In support of this motion, Defendant submits the expert reports of Dr. R.C. Krishna, Dr. S.W. Bleifer and Dr. Sheldon Feit. Dr. Krishna performed a neurological examination of Plaintiff on June 9, 2010. He conducted range of motion testing using an inclinometer and found no limitations in Plaintiff's range of motion for her cervical and thoracolumbar spine. Dr. Krishna concluded that Plaintiff may have sustained a cervical and lumbar strain injury, but that those injuries had resolved. He did not find any neurological indication for disability. Dr. Bleifer conducted an orthopedic examination of Plaintiff on June 8, 2010. He performed range of motion testing and found no limitations in Plaintiff's range of motion for her cervical spine, shoulders and lumbar spine. Dr. Bleifer concluded that Plaintiff had sustained a cervical and lumbosacral sprain, both which had resolved. Dr. Feit reviewed Plaintiff's cervical spine MRI film. He identified bulging discs at C3-C4, C4-C5, C5-C6 and C6-C7, degenerative spondylosis and no evidence of herniations. Dr. Feit reported that the bulging discs are not posttraumatic, but degenerative in nature. Dr. Feit also reviewed Plaintiff's lumbar spine MRI films and concluded that the two MRIs revealed pre-existing degenerative changes. Further, he specified that the disc bulges identified at L4-L5 and L5-S1 are degenerative in nature. Defendants have satisfied their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits the expert reports of Dr. Stanley Liebowitz and Dr. Ronald Wagner. Dr. Liebowitz's affirmation begins by stating "I have been treating the plaintiff Cheryl Brandon for various injuries..." However, the next paragraph states that "[t]his affirmation is based on the medical file maintained by my office on Ms. Terri Brandon..." As such, Dr. Liebowitz's report has zero probative value and cannot rebut Defendants' *prima facie* case as to serious injury. Dr. Wagner reviewed Plaintiff's July 6, 2008 cervical spine and lumbar spine MRI films. He reported posterior disc bulges from C4-C5 through C6-C7 and C3-C4. Dr. Wagner also found posterior disc bulges at L3-L4 and L4-5, L5-S1 disc herniation and straightening of the normal lumbar lordosis. Additionally, Dr. Wagner reviewed Plaintiff's June 29, 2011 lumbar spine MRI film. He reported L3-L4 disc bulge without interval change, new L4-L5 disc herniation, foraminal disc bulge at L4-L5. Dr. Wagner further noted that the previously identified L5-S1 disc herniation had resolved. Dr. Wagner did not opine as to causation of his radiological findings and as such his report is insufficient to rebut Defendants' *prima facie* case (*Nieves v Castillo*, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; *Gibbs v Hee Hong*, 63 AD3d 559, 559, 881 NYS2d 415 [2009]).

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyles*, 79 NY2d 955 [1992]). Plaintiff has not submitted any evidence to rebut Defendants' *prima facie* case.

Further, Plaintiff simply did not address the affidavit of Defendants' radiologist, Dr. Feit, stating that the disc bulges revealed on an MRI films were the result of a degenerative condition unrelated to the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). In any event, even if Plaintiff's alleged limitations were attributable to disc bulges that are not degenerative in nature, "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], *citing Pommells*, 4 NY3d at 574). Plaintiff offered no such objective evidence.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed and home for one week and that she was incapacitated from working for one week. Though Plaintiff testified regarding activities that she can no longer engage in, Plaintiff has not sufficiently shown that her curtailment of these activities was medically determined (*see Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; *see Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]). Accordingly, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Plaintiff Terri Brandon

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including C4-C5, C5-C6 and C6-C7 herniated discs, cervical radiculopathy, L4-L5 bulging disc, lumbosacral radiculopathy, bilateral muscle spasms in lumbar area radiating to both legs, and generalized anxiety. Plaintiff's Supplemental Bill of Particulars alleges additional injuries including a C3-C4 disc bulge. In support of this motion, Defendants submit the expert reports of Dr. R.C. Krishna, Dr. S.W. Bleifer and Dr. Robert Tantleff.

Dr. Krishna performed a neurological examination of Plaintiff on June 9, 2010. He reported a history of a prior accident in 2005 where she injured her neck and back. Dr. Krishna conducted range of motion testing using an inclinometer. He found no limitations in range of motion of Plaintiff's cervical and thoracolumbar spine. Dr. Krishna concluded that Plaintiff had a normal examination and that she may have sustained a cervical and lumbar strain injury, which has resolved. Dr. S.W. Bleifer conducted an orthopedic examination on June 8, 2010. He conducted range of motion testing and found no limitations to Plaintiff's cervical spine, shoulders and lumbar spine. Dr. Bleifer concluded that Plaintiff had sustained cervical and lumbosacral sprains, which have resolved. Dr. Tantleff reviewed Plaintiff's lumbar spine MRI films and reported degeneration and desiccation throughout the lower thoracic and lumbar region consistent with spondylosis and longstanding chronic degenerative discogenic disc disease. He conclude that the MRI findings are degenerative and unrelated to the accident. Defendants have satisfied their burden of establishing prima facie that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits the expert reports of Dr. Stanley Liebowitz, Dr. Glen Schwartz, Dr. Ronald Wagner and Dr. Ronald Roskin. Dr. Liebowitz first treated Plaintiff on

June 23, 2008. At that examination, he conducted range of motion testing and found limitations in Plaintiff's cervical and lumbar range of motion. Dr. Liebowitz stated that he referred Plaintiff to physical therapy, which she continued with for you and half years. He stated that she stopped treating because any further treatment would not help. Dr. Liebowitz recently examined Plaintiff on October 10, 2011. He reported limitations in Plaintiff's cervical and lumbar spinal motion. Dr. Liebowitz concluded that Plaintiff's injuries were caused by the motor vehicle accident and are permanent in nature. Specifically, Dr. Liebowitz states that "there has been a trauma to her spine which has caused her vertebrae to be mis-aligned, with nerves irritated and various soft tissues affected."

Dr. Schwartz reviewed Plaintiff's lumbar spine MRI film. He reported an L4-L5 disc bulge and facet arthropathy at L3-L4 and L5-S1. Dr. Wagner reviewed Plaintiff's cervical spine MRI film and reported disc herniations of C4-C5, C5-C6 and C6-C7. He also reported a C3-C4 disc bulge, ventral cord abutment at C4-C5 and C5-C6, and foraminal narrowing at C4-C5. Dr. Roskin reviewed Plaintiff's lumbar spine MRI film taken on September 7, 2005, prior to the present accident. He reported that the MRI was normal. Dr. Roskin also reviewed the August 24, 2005 MRI film of Plaintiff's thoracic spine and reported that it was normal.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eylar*, 79 NY2d 955 [1992]). Dr. Liebowitz provided objective evidence of Plaintiff's injuries both contemporaneous with the accident and based on a recent examination. Though Defendants' have sufficiently raised causation concerns regarding Plaintiff's prior accident and degeneration, Plaintiff has adequately rebut these issues through Dr. Liebowitz's affirmation and by the submission of MRI reports predating the present accident. Accordingly, Plaintiff has rebut Defendants' *prima facie* case.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed and home for ten days and that she was incapacitated from working for ten days. Though Plaintiff testified regarding activities that she can no longer engage in, Plaintiff has not sufficiently shown that her curtailment of these activities was medically determined (see *Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; see *Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]). Accordingly, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is hereby,

ORDERED that Defendants' motion and Co-defendants' cross motion for summary

judgment is denied as to Plaintiff Terri Brandon's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion and Co-defendants' cross motion for summary judgment is granted as to Plaintiff Cheryl Brandon's claim under permanent consequential limitation, significant limitation and 90/180 categories of Insurance Law §5102(d) and Plaintiff Cheryl Brandon's complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Defendants' motion and Co-defendants' cross motion for summary judgment is granted as to Plaintiff Terri Brandon's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days, and upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in caption herein.

This constitutes the decision and order of the court.

Dated: MAY 24 2012
New York, New York

 George J. Silver , J.S.C.
George J. Silver, J.S.C.

GEORGE J. SILVER

FILED

MAY 29 2012

NEW YORK
COUNTY CLERK'S OFFICE