

Patel v Gill

2013 NY Slip Op 30472(U)

February 22, 2013

Supreme Court, Queens County

Docket Number: 428/2011

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

CHETANABEN PATEL,
Plaintiff,

Index No.: 428/2011
Motion Date: 01/10/13

- against -

Motion No.: 8

RAVINDER SINGH GILL and SAROOP SINGH
SANDHU,

Motion Seq.: 2

Defendants.

- - - - - x

The following papers numbered 1 to 20 were read on this motion by defendants RAVINDER SINGH GILL and SAROOP SINGH SANDHU for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104; and the cross-motion of the plaintiff for an order granting summary judgment in favor of the plaintiff on the ground that she has met the requirements of Insurance Law §§ 5102 and 5104 as a matter of law:

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In this negligence action, the plaintiff, CHETANABEN PATEL, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on November 20, 2009, between the plaintiff's vehicle and the vehicle owned by defendant RAVINDER SINGH GILL and operated by defendant, SAROOP SINGH SANDHU. The accident took place on the westbound lanes of the Grand Central Parkway at or near the intersection of 188th Street in Queens County, New York. Plaintiff's vehicle was struck in the rear by the taxi cab operated by defendant Sandhu when plaintiff's vehicle was stopped in traffic.

The plaintiff commenced this action by filing a summons and complaint on January 6, 2011. Issue was joined by service of defendants' verified answer dated January 14, 2011. Plaintiff's motion for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability was granted by this Court by decision and order dated October 18, 2011. A note of issue was filed by plaintiff on April 2, 2012 and the matter is now on the calendar of the Trial Scheduling Part on May 2, 2013.

Defendants now move for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendants submit an affirmation from counsel, Cary S. Nosowitz, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical reports of board certified radiologist, Dr. David A. Fisher, board certified neurological surgeon, Dr. Ashok Anant; uncertified hospital records from the emergency room at New York Hospital Queens; the affirmed medical report of board certified orthopedic surgeon, Dr. Lisa Nason; and the report of bio-mechanical engineer, Gordon D. Moskowitz, Ph.D. who states that in his opinion the forces and speeds of the subject accident could not have caused the injuries alleged in the verified bill of particulars.

In her verified bill of particulars, the plaintiff, age 44, states that as a result of the accident she sustained, inter alia, disc herniations at C6-7, disc bulges at C4-5, C5-6, L4-5, L5-S1 and a partial vertebrectomy at C5, C6 and C7 as well as a discectomy and fusion at C5-6 and C6-7 performed on September 16, 2010. Plaintiff states that she was confined to her bed for 3 days immediately following the accident and one week immediately following the surgical procedure. Plaintiff states that she was confined to her home for 13 months as a result of the accident. The plaintiff contends that she sustained a serious injury as defined in Insurance law §5102(d).

Dr. David A. Fisher, a radiologist reviewed the plaintiff's MRI studies. As to the cervical spine he states that the MRI that was taken 11/30/09, 10 days following the accident showed that the vertebral bodies were normal and disc spaces well maintained and that there was no evidence of herniation or significant annular bulge. The second MRI, taken after the plaintiff's surgery, showed that plaintiff underwent an anterior spinal fusion of the C5/6 and C6/7 level. In Dr. Fisher's opinion, there was no indication for this surgery on the initial post-accident

MRI study.

With respect to the MRI study of the lumbar spine taken on 11/30/09, the radiologist states that there is no evidence of herniation or significant annular bulge. With respect to the MRI study of the lumbar spine taken on 3/24/11 the radiologist states that this study is normal as well. He states that there is no radiographic evidence of traumatic or causally related injury to the lumbar spine on either examination

Plaintiff was examined by defendant's retained neurologist Dr. Ashok Anant on March 20, 2012. Plaintiff explained that at the time of the accident she had pain in her neck and lower back. She underwent chiropractic treatments with Dr. Gillman for 1½ years. Because of persistent pain she then underwent spinal surgery with Dr. Babu on September 16, 2010. She told Dr. Anant that she used to work at Walgreen's but because of the accident she has not been able to return to work. She presented with neck pain, left shoulder pain, and stated that there was no improvement after the surgery. Upon her objective range of motion testing, Dr. Anant found that the plaintiff had significant limitations of range of motion of the cervical spine and lumbar spine. She stated that in her opinion moderate symptom magnification was present. She stated that the range of motion limitations of the cervical spine were due to the cervical fusion procedure and the lumbar range of motion movement was limited in her opinion by symptom magnification. She states that she could not complete the evaluation without reviewing records from Dr. Babu including his operative and examination reports. She states that she is unable to arrive at a conclusion regarding the plaintiff's final diagnosis, prognosis and relationship to the automobile accident based upon her review of the submitted reports. However, in her addendum dated May 18, 2012, she states that after reviewing additional records including the MRI studies and reports from Dr. Fisher, her diagnosis is cervical and lumbar strain which lasts six weeks. She also states that she does not find any objective evidence that the plaintiff is disabled and again asserts that the plaintiff magnified her symptoms. She also states that the spinal surgery was not causally related to the automobile accident.

On December 29, 2011, plaintiff underwent an independent orthopedic examination performed by Dr. Lisa Nason. Her objective and comparative range of motion testing of the cervical spine, bilateral shoulders, left elbow and lumbar spine showed no limitations of range of motion. Her impression was status post cervical discectomy, instrumentation and fusion, clinically healed; alleged injury to bilateral shoulders, resolved; alleged injury to left elbow, resolved; and alleged injury to the lumbar

spine, resolved. She states that there is no evidence of residuals or permanency and the plaintiff is able to return to work and continue with her activities of daily living without restriction.

The report of Dr. Moskowitz who performed a biomechanical analysis was not affirmed and therefore not in admissible form.

In her examination before trial, taken on November 30, 2011, the plaintiff stated that she left the scene of the accident in an ambulance and was transported to the emergency room at New York Hospital in Queens County where she was examined and discharged the same day. She then commenced chiropractic care with Dr. Gillman where she was treated for pain in her neck, back and left leg. She treated with Dr. Gillman for a year and a half. She also received physical therapy at New York Medical and Diagnostic center. She stated that she then began treating at Queens physical therapy where she still goes twice a week. She testified that she had surgery to her neck in September 2010 after which she had additional physical therapy. She testified that she currently also sees Dr. Bhatt for treatment of her pain. She stated that at the time of the accident she was a manager at Walgreens and that she wanted to return to work after the accident but because of her continuous pain she could not return. The plaintiff has not had any other employment since the accident. She stated that after the accident she was confined to her home for three weeks. She stated that she still has pain in her neck and back on a daily basis.

Defendants' counsel contends that the affirmed medical reports of Drs. Fisher, Nason and Anant are sufficient to establish, prima facie, that the plaintiff has not sustained a fracture, a permanent loss of a body organ, member, function or system; that she has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Theresa J. Viera, Esq., cross-moves for an order granting plaintiff summary judgment on the threshold issue of physical injury. In support of the opposition and cross-motion plaintiff submits certified medical records from New York Hospital Queens; certified medical records from New York Medical and Diagnostic; certified and affirmed records from Dr. Bhatt; certified medical records from Dishy

Diagnostic; certified reports from Dr. Babu; an affirmation of Dr. Babu; and plaintiff's affidavit dated October 4, 2012.

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]).

Where defendant's 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 defendants failed to meet their prima facie burden of showing 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]). Defendants failed to establish, prima facie, that plaintiff did not sustain a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories as a result of the accident (see Insurance Law § 5102 [d]).

As stated above, in his affirmed medical report, Dr. Anant stated that when he examined the plaintiff's lumbar spine and cervical spine, plaintiff exhibited significant range of motion limitations. Despite these objective findings he concluded that the physical examination did not reveal objective evidence of a disability. He indicated that the plaintiff's range of motion was subjective and that plaintiff voluntarily chose to limit her range of motion. Contrary to Dr. Anant's findings, Dr. Nason did not find any limitations in the plaintiff's range of motion the cervical spine or lumbar spine, Here, the defendants submitted contrary findings from their expert doctors and moreover, Dr. Anant failed to explain or substantiate, with any objective

medical evidence, the basis for his conclusions that the limitations exhibited by plaintiff were magnified or were self-controlled (see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Quiceno v Mendoza, 72 AD3d 669 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]). Therefore, in view of the contrary findings of the defendants' independent examining physicians, this Court finds that Dr. Nason's and Dr. Anant's reports are insufficient to eliminate all triable issues of fact (see Raguso v Ubriaco, 97 AD3d 560 [2d Dept. 2012]; Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]). Dr. Anant's findings alone raise an issue of fact as to whether the plaintiff suffered a significant limitation of use of a body function or system (see Williams v Fava Cab Corp., 90 AD3d 912 [2d Dept. 2011]; Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Britt v Bustamante, 77 AD3d 781 [2d Dept. 2010]).

In addition, the plaintiff's bill of particulars clearly sets forth that the plaintiff was unable to return to work as a result of the injuries she sustained in the accident. However, neither Dr. Nason nor Dr. Anant related their findings to the 90/180 category of serious injury for the period of time immediately following the subject accident. Thus, the defendant's motion papers failed to adequately address the plaintiff's claim, which was set forth in the bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (see Trivedi v Vural, 90 AD3d 1031 [2d Dept. 2011]; Che Hong Kim v Kossoff, 90 AD3d 969 [2d Dept. 2011]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Udochi v H & S Car Rental Inc., 76 AD3d 1011 [2d Dept. 2010]; Strilcic v Paroly, 75 AD3d 542 [2d Dept. 2010]; Bright v Moussa, 72 AD3d 859 [2d Dept. 2010]).

As the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Held v Heideman, 63 AD3d 1105 [2d Dept. 2009]; Landman v

Sarcona, 63 AD3d 690 [2d Dept. 2009]; Alam v Karim, 61 AD3d 904 [2d Dept. 2009]; Liautaud v Joseph, 59 AD3d 394 [2d Dept. 2009]).

Likewise the plaintiff's motion for summary judgment is denied. Although the plaintiff submitted the affirmed medical report of Dr. Bhatt dated December 14, 2009, five days post - accident indicating that the plaintiff had limited range of motion of the cervical and lumbar spine and shoulders which he stated was caused by the subject accident, the plaintiff failed to present an affirmed medical report containing objective proof from a recent examination showing that limitations were significant. The affirmed report of Dr. Babu, dated September 28, 2012, does not refer to a recent examination of the plaintiff nor does it contain a discussion of objective testing which he performed in a recent examination. Thus, plaintiff failed to provide any evidence in admissible form that the defendant had any limitations of range of motion in a recent examination. Without a medical report in admissible form indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to demonstrate, prima facie that the plaintiff sustained a serious injury (see Kreimerman v Stunis, 74 AD3d 753 [2d Dept. 2010]; Diaz v. Lopresti, 57 AD3d 832 [2d Dept. 2008]; Marziotto v. Striano, 38 AD3d 623 [2d Dept. 2007] Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]). Further, the plaintiff failed to submit affirmed medical reports which in which the plaintiffs physicians addressed the 90/180 category (see Rivera v. Bushwick Ridgewood Props., 63 AD3d 712 [2d Dept. 2009]).

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

ORDERED, that the defendant's motion for an order dismissing the plaintiff' complaint is denied, and it is further,

ORDERED that the plaintiff's motion for an order granting summary judgment in favor of the plaintiff on the threshold issue of physical injury is denied.

Dated: February 22, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.