

Hicks v Gelbien

2015 NY Slip Op 31590(U)

August 20, 2015

Supreme Court, Queens County

Docket Number: 17432/2013

Judge: Robert J. McDonald

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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

MARYANN HICKS, Index No.: 17432/2013
Plaintiff, Motion Date: 07/01/15
- against - Motion No.: 28
MEYER GELBIEN, Motion Seq No.: 2
Defendant.

- - - - - x

The following papers numbered 1 to 7 read on this motion by defendant MEYER GELBIEN for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of plaintiff MARYANN HICKS on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102(d) and 5104(a).

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....1 - 4
Affirmation in Opposition-Exhibits.....5 - 6
Reply Affirmation.....7

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is a personal injury action in which plaintiff seeks to recover damages for injuries she allegedly sustained on May 30, 2012 in a motor vehicle accident which took place within the parking lot on the premises designated as 260 West Sunrise Highway near the entrance located on Mills Road, in Nassau County, New York. Plaintiff alleges that as a result of the accident she sustained injuries to her cervical spine and lumbar spine including disc herniations and disc bulges. Plaintiff also alleges that she was limited in her daily activities for at least four months following the accident.

Plaintiff commenced this action by filing a summons and complaint on September 9, 2013. Defendant joined issue by service of an answer dated November 8, 2013. Plaintiff asserts that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained 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 her 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. Defendant now moves for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendant submits an affirmation from counsel; a copy of the pleadings; plaintiff's bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on May 1, 2014; a copy of the affirmed medical report of orthopedic surgeon Eduardo V. Alvarez, M.D.; and a copy of the affirmed report of radiologist Sheldon P. Feit, M.D..

On July 12, 2014, Dr. Alvarez performed an independent orthopedic medical examination. Plaintiff informed Dr. Alvarez that as a result of the accident she injured her neck, back and left arm. She also reported that she continued to undergo physical therapy and chiropractic adjustments about once a month and continued a home exercise program. Dr. Alvarez identifies the medical records he reviewed and states that he tested plaintiff's range of motion using an inclinometer. He found that plaintiff had no limitations in range of motion of the cerviothoracic spine, lumbosacral spine, shoulders, elbows and wrists. He diagnosed plaintiff with resolved cervical spine sprain/strain, resolved lumbosacral spine sprain/strain, and resolved shoulder contusion/sprain. Dr. Alvarez concludes that there is no objective evidence of any ongoing orthopedic disability and plaintiff may return to her usual and customary activities of daily living with no restrictions.

Defendant also submits the independent radiology review of Dr. Feit. Dr. Feit found disc bulges at C3-C4, C4-5, C5-C6 and C6-C7. He also found a small herniation at C3-C4. Dr. Feit concludes that the MRI of the cervical spine reveals pre-existing degenerative change, not posttraumatic changes. Dr. Feit also reviewed the MRI of plaintiff's left shoulder which revealed no recent rotator cuff tear or fracture. Although Dr. Feit found

significant atrophy of the supraspinatus and infraspinatus muscles, he opines that such is the consequence of hypertrophic change at the acromioclavicular joint. Dr. Feit also opines that none of the findings regarding plaintiff's left shoulder appear to be related to the subject accident. Dr. Feit reviewed the MRI of the lumbosacral spine and found bulging discs at L5-S1 and L4-L5 and a mild disc bulge at L3-L4. Dr. Feit concludes that the disc bulges are not posttraumatic, but rather degenerative in nature.

Defendant's counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff 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 plaintiff, who was not working at the time of the accident and who was not confined to her bed after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

In opposition plaintiff submits an affirmation from her counsel; her own affidavit; the certified medical records of Kieran Gorman, D.C.; the affirmed medical report of orthopedic surgeon Mark Bursztyn, M.D.; the certified MRI reports; and the affirmed medical report of Sebastian Lattuga, M.D..

At her examination before trial, plaintiff stated that after the accident, she complained of pain in her neck, left arm and left leg. She stated that prior to the subject accident she had never injured her left shoulder, neck or back, or suffered any injuries to those areas after the accident. She treated with Dr. Gorman, a chiropractor, for two and a half years. She had an MRI performed of her arm, lower back and left shoulder. She received epidurals to her lower back and her neck. She did not have any future appointments scheduled at the time of her deposition and she stopped treating because she "felt better". At the time of the accident, plaintiff was retired. Her daily activities involved gardening, cleaning her home, cooking, laundry and grocery shopping. Plaintiff testified that after the accident, she was limited in her ability to perform said activities.

Eight days after the accident, plaintiff presented to Dr. Gorman and complained of pain to her neck, shoulders, mid and lower back, left leg and left thigh. Dr. Gorman conducted range of motion testing of plaintiff's cervical spine and lumbar spine and found limited ranges of motion. Dr. Gorman opined that

plaintiff suffered from cervical radiculopathy, cervical sprain/strain, lumbar radiculopathy, lumbar sprain/strain, internal derangement of both shoulders, myofascitis and myospasms. Plaintiff continued to receive treatment until March 26, 2013. She began treating again on April 23, 2015.

Two weeks after the accident, plaintiff presented to Dr. Bursztyn, an orthopedic surgeon, who conducted range of motion testing on plaintiff's left shoulder and found reduced ranges of motion. Plaintiff was referred for MRIs of her left shoulder and lumbar spine. The MRIs revealed a full thickness tear in her shoulder, herniations along plaintiff's neck and lower back, and nerve damage.

Six weeks after the accident, plaintiff presented to Dr. Lattuga, an orthopedic surgeon. Limited range of motion was discovered in plaintiff's lumbar spine and plaintiff received epidural injections in her lumbar spine. Plaintiff also went for an MRI of her cervical spine.

On April 30, 2015, Dr. Burszytn re-evaluated plaintiff's left shoulder and found a continued limited range of motion. He opined that the injuries sustained are permanent in nature and were caused by the subject accident. Plaintiff also presented for a recent examination on May 20, 2015 with Dr. Lattuga. Dr. Lattuga conducted range of motion testing and found limited ranges of motion in plaintiff's cervical spine and lumbar spine. Dr. Lattuga also reviewed the MRIs of plaintiff's cervical spine and lumbar spine, and confirmed that plaintiff was suffering from herniations and disc bulges. He also found a decrease in motor strength in the cervical and lumbar region of her back. Dr. Lattuga opines that plaintiff's injuries are permanent and constitute a significant qualitative limitation and restriction of use and activity of her neck and back. Dr. Lattuga notes that as a result of her injuries, plaintiff has had to modify her activities of daily living. He states that the subject accident, not degenerative disease or a pre-existing condition, is the competent producing factor of plaintiff's 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 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 the 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 competent proof submitted by defendant, including the affirmed medical reports together with plaintiff's testimony, is sufficient to meet defendant's prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that plaintiff raised a triable issue of fact by submitting the affirmed medical reports attesting to the fact that plaintiff sustained herniated and bulging discs as a result of the accident and finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that plaintiff's limitations are permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]). As such, plaintiff demonstrated an issue of fact as to whether she 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 AD3d 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 light of this finding, this Court need not address the 90/180 category.

Plaintiff also adequately explained any gap in treatment by acknowledging that she temporarily ceased treatment because it became too painful for her to sit for long periods of time while driving or taking public transportation to the various doctors. Plaintiff did continue with a home exercise program. Plaintiff also affirms that she is currently seeking treatment again.

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

ORDERED, that the motion by defendant MEYER GELBIEN for an order granting summary judgment dismissing the complaint of plaintiff MARYANN HICKS is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for November 16, 2015.

Dated: August 20, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.