Field v Dobson
2010 NY Slip Op 30693(U)
March 26, 2010
Supreme Court, Suffolk County
Docket Number: 08-21576
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 08-21576
CAL. No. 09-02212-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-10-09 (#001)
MOTION DATE 12-11-09 (#002)
ADJ. DATE 1-11-10
Mot. Seq. # 001 - MD
002 - MD

----------X

HELENE FIELD,

Plaintiff,

- against -

STEPHANIE DOBSON,

Defendant.

----------X

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Upon the following papers numbered 1 to 36 read on this motion for preclude and this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 16 - 29 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 30 - 32; 33 - 34 ; Replying Affidavits and supporting papers 35 - 36 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for, inter alia, an order vacating the note of issue and her motion for summary judgment dismissing the complaint are consolidated for purposes of this determination; and it is

ORDERED that defendant's motions are denied.

Plaintiff Helene Field commenced this action to recover damages for personal injuries allegedly suffered in a motor vehicle accident that occurred on Montauk Highway in the Town of Babylon on December 6, 2006. The accident allegedly happened when a vehicle driven by defendant Stephanie Dobson struck the rear end of a vehicle driven by plaintiff, which was stopped at the intersection of Montauk Highway and Nehring Avenue, waiting to make a left turn. By her bill of particulars, plaintiff alleges that she suffered serious injuries as a result of the accident, including cervical disc bulges at levels C3-C4, C4-C5, and C5-C6; sprains and strains in the cervical, thoracic and lumbar regions; and internal derangement of the left shoulder. Plaintiff alleges that she was unable to work for one week due to her injuries, and that she remains partially incapacitated. Further, in response to a demand by

defendant that she particularize in what respect she sustained a "serious injury" as such term is defined under Insurance Law § 5102, plaintiff alleges she suffered a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically-determined injury of a nonpermanent nature that prevented him from performing his usual and customary activities for at least 90 days of the 180 days immediately following the accident.

On October 6, 2009, a compliance conference was held by this Court. At such conference, counsel for the parties represented that the disclosure process was complete and, by their signatures, consented to an order certifying that the action was ready for trial. Three days later, on October 9, 2009, plaintiff filed a note of issue and certificate of readiness.

Defendant now moves, among other things, for an order precluding plaintiff from testifying or presenting medical evidence at trial based on her alleged failure to comply with defendant's demand for disclosure. Defendant also seeks an order vacating the note of issue and striking the action from the trial calendar on the ground that the pretrial disclosure process is not complete, and extending the time for filing a motion for summary judgment. Defendant alleges that plaintiff failed to comply with a demand for production of the files of One Beacon America Insurance and Liberty Mutual, no fault insurance carriers with whom plaintiff allegedly filed a claim following a motor vehicle accident that occurred on November 27, 2006. An affirmation by defense counsel in support of the motion asserts defendant "cannot adequately prepare and evaluate [her] defense" without such insurance claim files. The Court notes that attached to the moving papers is a notice of discovery and inspection, dated July 6, 2009, demanding that plaintiff execute "HIPAA compliant authorizations for the no-fault claim file from Liberty Mutual." In opposition, plaintiff argues that defendant, having certified this matter is ready for trial, waived any claim to further discovery.

Defendant also moves for summary judgment dismissing the complaint on the ground plaintiff did not suffer a "serious injury" withing the meaning of Insurance Law § 5102 (d) due to the subject accident. Defendant's submissions in support of the motion include copies of the pleadings, the bill of particulars, a transcript of plaintiff's deposition testimony, and an affirmed medical report prepared by Dr. Anthony Spataro. At defendant's request, Dr. Spataro, an orthopedic surgeon, conducted a physical examination of plaintiff in May 2009, and reviewed medical records related to the injuries alleged in this action. Plaintiff opposes the motion for summary judgment, arguing that defendant's submissions are insufficient to establish a prima facie case that her alleged injuries do not meet the "serious injury" threshold under the No-Fault Law.

The Uniform Rules for Trial Courts (22 NYCRR) §202.7(c) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Further, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). In addition, 22 NYCRR §202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it

appears that a material fact in the certificate of readiness is incorrect."

Defendant's motion for an precluding plaintiff from presenting evidence at trial order vacating the note of issue and other related relief is denied, as the affirmation of good faith submitted with the moving papers fails to refer to any actual conversations with opposing counsel evincing a bona fide effort by defendant to resolve the disclosure dispute (*see* ***Natoli v Milazzo***, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]; ***Chervin v Macura***, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006] ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Diel v Rosenfeld***, 12 AD3d 558, 784 NYS2d 379 [2d Dept 2004]). The Court notes that even if a proper affirmation of good faith had been submitted, defendant failed to explain why she waited until after the filing of the note of issue to seek relief for plaintiff's alleged failure to comply with her disclosure demands, and failed to show how the case is not ready for trial (*cf.* ***High Point of Hartsdale I Condominium v AOI Constr., Inc.***, 31 AD3d 711, 818 NYS2d 477 [2d Dept 2006]; ***Perla v Wilson***, 287 AD2d 606, 732 NYS2d 35 [2d Dept 2001]).

As to the motion for summary judgment, Insurance Law § 5102 (d) defines "serious injury" 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 plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [2d Dept 1991]). As explained by the Court of Appeals in ***Dufel v Green*** (84 NY2d 795, 622 NYS2d 900 [1995]), "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2d Dept 2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2d Dept 2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [3d Dept 2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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 seeks 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***, *supra*). 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***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]).

Here, defendants' submissions are insufficient to establish a prima facie case of entitlement to summary judgment as a matter of law based on a lack of serious injury (*see* ***Chun Ok Kim v Orourke***, 70 AD3d 995, 893 NYS2d 892 [2d Dept 2010]; ***Landman v Sarcona***, 63 AD3d 690, 880 NYS2d 168 [2d Dept 2009]; ***Kasper v N & J Taxi, Inc.***, 60 AD3d 910, 876 NYS2d 120 [2d Dept 2009]; ***Hurtte v Budget Roadside Care***, 54 AD3d 362, 861 NYS2d 949 [2d Dept 2008]; ***Wright v AAA Constr. Servs., Inc.***, 49 AD3d 531, 855 NYS2d 149 [2d Dept 2008]). The report of Dr. Spataro states, in relevant part, that range of motion testing revealed normal joint function in plaintiff's lumbar spine, but restricted joint function in her cervical spine. More particularly, it states that measurement of the motions in plaintiff's cervical spine demonstrated 30 degrees of left and right lateral bending (normal 40 degrees), 65 degrees of right and left rotation (normal 70 degrees), 60 degrees of forward flexion (normal 60 degrees), and 30 degrees of extension (normal 30 degrees). Although characterized by Dr. Spataro as only a "slight" restriction in cervical movement, the finding by defendant's medical expert that plaintiff had 25% restriction in lateral flexion approximately 2½ years after the subject accident demonstrates a triable issue of fact as to whether plaintiff suffered a significant limitation of spinal joint function due to the accident (*see* ***Kjono v Fenning***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; ***Landman v Sarcona***, *supra*; ***Jenkins v Miled Hacking Corp.***, 43 AD3d 393, 841 NYS2d 317 [2d Dept 2007]). The Court notes Dr. Spataro does not indicate in his report whether active or passive range of motion testing was conducted, or how the reported degrees of joint function in plaintiff's spine were measured. It also appears from his report that the only orthopedic/neurological tests performed by Dr. Spataro during his examination of plaintiff were range of motions tests and a Spurling's (foraminal compression) test, which is used to detect cervical nerve root disorder. Thus, Dr. Spataro's conclusions that plaintiff suffered only sprains to her spine and left shoulder due to the subject accident, that such injuries resolved with "no residuals" to the lumbar spine or shoulder, and that plaintiff is not orthopedically disabled are insufficient to satisfy defendant's burden on the motion (*see* ***Chun Ok Kim v O'Rourke***,

supra; ***Landman v Sarcona***, *supra*; ***Jenkins v Miled Hacking Corp.***, *supra*; *see also* ***Exilus v Nicholas***, 26 AD3d 457, 809 NYS2d 458 [2d Dept 2006]; ***Zavala v DeSantis***, 1 AD3d 354, 766 NYS2d 598 [2d Dept 2003]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Accordingly, defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

Dated: 3/26/10

THOMAS F. WHELAN, J.S.C.