

Dunn v Ventura

2010 NY Slip Op 32446(U)

August 10, 2010

Sup Ct, Nassau County

Docket Number: 018722/08

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 5
NASSAU COUNTY**

JACQUELINE M. DUNN,

Plaintiff,

-against-

**INDEX NO.: 018722/08
MOTION SEQ. NO.: 002**

**ARIEL VENTURA and CARMEN Z.
VENTURA,**

MOTION DATE: 5/10/10

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affidavit in Opposition.....2
Reply Affirmation.....3

The motion by defendants ARIEL VENTURA and CARMEN Z. VENTURA for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff JACQUELINE M. DUNN, age 17, alleges that on June 17, 2007, at approximately 4:15 p.m., she was the operator of a motor vehicle owned by her mother which came into contact with a motorcycle owned by defendant CARMEN Z. VENTURA and operated by defendant ARIEL VENTURA. The accident occurred on the eastbound lanes of the Long Island Expressway, approximately three hundred feet east of Willis Avenue, Town of North Hempstead. Defendants now move for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a fracture (4), permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated December 8, 2009, of orthopedist Lee M. Kupersmith, MD, covering an examination of that date, and an affirmed report of radiologist Stephen W. Lastig, MD, reviewing x-ray studies of plaintiff's left shoulder and left clavicle. In reply, defendants also submit records from the radiology department of North Shore University Hospital ("North Shore"), progress notes from North Shore and the clinical abstract covering North Shore's discharge diagnosis of plaintiff on June 19, 2007.

Using a goniometer, Dr. Kupersmith reported that physical examination of plaintiff's thoracic and lumbar spines, left shoulder, right ankle and right foot revealed normal range of motion results, comparing the results to norms. Dr. Kupersmith's other reported findings include supraspinatus strength of 5/5 bilaterally, 5/5 strength in several areas of the right ankle and foot, negative straight leg raising tests (although the Court notes that Dr. Kupersmith failed to quantify said results or compare them to normal) and no sensory deficits in the upper or lower extremities. With respect to plaintiff's claim that she sustained a left clavicle fracture, Dr. Kupersmith reports that there is no evidence in the records of North Shore, where plaintiff was taken from the scene of the accident and subsequently admitted, that plaintiff suffered from a left clavicle fracture. Dr. Kupersmith noted that plaintiff was seen in follow-up on July 16, 2007 by Dr. Greco who conducted x-ray studies of plaintiff's left shoulder and left clavicle that were negative. However, due to an inconsistent notation by Dr. Greco indicating the existence of a fracture, Dr. Kupersmith "request[ed] the opportunity to review all x-rays studies of the left shoulder and left clavicle that were performed on [plaintiff]," "before commenting any further on the alleged clavicle fracture." Dr. Kupersmith also noted that plaintiff "missed approximately 2 weeks of school after the accident." Dr. Kupersmith diagnosed "left shoulder strain, resolved; right foot and ankle contusion, resolved; thoracic sprain/strain, resolved; and lumbosacral sprain/strain, resolved" and concluded that plaintiff "has no objective evidence of an ongoing orthopedic disability."

Although Dr. Kupersmith did not examine the radiological studies of plaintiff's left shoulder and left clavicle, defendants also submit the report of radiologist Dr. Lastig who

reviewed such studies as follows: x-ray study of plaintiff's left shoulder conducted on June 17, 2007 at North Shore, and x-ray studies of plaintiff's left shoulder and left clavicle conducted on July 16, 2007 at East Meadow Family Practice Associat[es] ("East Meadow") where Dr. Greco is affiliated. Dr. Lastig opined that the above studies reveal no evidence of acute fracture or dislocation.

As is relevant to the injuries claimed by plaintiff in her bill of particulars, defendants submit in reply the following uncertified reports from North Shore: (1) reports covering x-rays of plaintiff's right foot and right ankle performed on June 18, 2007, revealing "no evidence of acute fracture"; "mild widening of the medial tibiotalar joint which may represent ligamentous injury"; (2) report covering x-ray of plaintiff's left shoulder performed on June 17, 2007, revealing a "normal left shoulder" and "no evidence of fracture or dislocation"; (3) report of cervical spine CT scan conducted on June 17, 2007, revealing no evidence of a fracture; (4) report of cervical spine MRI conducted on June 18, 2007, revealing "no evidence of ligamentous edema, "normal alignment" and "no significant spinal canal stenosis or foraminal stenosis"; (5) progress notes of June 18, 2007, revealing no clavicle fracture; and (6) discharge notes of June 19, 2007, stating, "patient's radiologic studies were negative on admission; however, the patient continued to complain of neck tenderness. Her C-collar was left in place and a MRI was done. MRI of the C-spine was negative"; "the patient was discharged in stable condition with no complications."

The Court notes at the outset that the report of a physician or osteopath, or a hospital record, which is not affirmed or certified, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **Resek v. Morreale**, 2010 WL 2403076; **Vasquez v. Doe # 1**, 73 AD3d 1033; **Vilomar v. Castillo**, 73 AD3d 758; **Lozusko v. Miller**, 72 AD3d 908; **Keith v. Duval**, 71 AD3d 1093; **Varveris v. Franco**, 71 AD3d 1128; **Little v. Locoh**, 71 AD3d 837. The Court notes, however, that the uncertified reports of the department of radiology of North Shore covering various x-rays, MRIs and CT scans, progress notes and the discharge diagnosis abstract were submitted by defendants in support of their motion for summary judgment, and as such, may be considered by the Court. *See* **Kearse v. NYC Transit Authority**, 16 AD3d 45; **Meely v. 4G's Truck Renting Co., Inc.**, 16 AD3d 26; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, 182 AD2d 268. *See generally*, **Ryan v. Santana**, 71 AD3d 1537; **Dietrich v. Puff Cab Corp.**, 63 AD3d 778; **Cariddi v. Hassan**, 45 AD3d 516; **Elder v. Stokes**, 35 AD3d 799; **Positko v. Krawiec**, 6 AD3d 517.

Defendants also submit the deposition testimony of plaintiff conducted on September 21, 2009. Plaintiff testified that after the accident, she was taken by ambulance to North Shore and was discharged on June 20, 2007 (Deposition testimony, pp. 80-81, 85). Plaintiff testified that upon discharge, she was provided with a sheet and was ordered to stay on bed

rest for two weeks and to seek treatment from a chiropractor (Deposition testimony, pp. 87-89), although she also testified that the “doctor in the hospital” advised her to seek physical therapy treatments (Deposition testimony, p. 89). Plaintiff stated that she missed two weeks of school and could not graduate from high school as she was unable to walk down the aisle, or take her Math Regents on time (Deposition testimony, pp. 14-16). Plaintiff testified that the week she was released from the hospital, she saw Dr. Greco, her primary care doctor, who took x-rays of her left collar bone, right ankle and right knee (Deposition testimony, pp. 90-93). Plaintiff also testified that at a follow-up visit, Dr. Greco took additional x-rays of her collarbone (Deposition testimony, pp. 93-94). Plaintiff asserted that she underwent treatment five times beginning on July 27, 2007 with a Dr. Lippe, the last time in 2007, with chiropractor Dr. Finkelstein whom she saw the last time “a couple of months ago,” and with chiropractor Dr. Diamond, but did not treat with any medical provider for six months after finishing the spring 2008 semester of college (Deposition testimony, pp. 96-101, 105, 109). Plaintiff also testified that within the prior month, she only suffers from back pain (deposition testimony, p. 112) and can no longer sit or stand for a “certain amount of period of time” or snowboard and ski (Deposition testimony, pp. 112-114).

The Court finds that the reports of defendants’ examining physicians, taken together, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an “objective basis” exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff JACQUELINE M. DUNN did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff argues that there exists a factual issue as to whether plaintiff suffered from an avulsion fracture to her left clavicle so as to preclude the granting of summary judgment to defendants. The Court notes that the only medical evidence submitted by plaintiff is an affirmation of Dr. Gina C. Greco, dated April 30, 2010. Dr. Greco affirms the following:

1. That I first saw the patient, JACQUELINE DUNN on July 16, 2007, following her auto accident of June 17, 2007.
2. The patient presented with pain in her left shoulder. She had been diagnosed with an avulsion fracture to her left clavicle by North Shore University Hospital.
3. X-ray taken by my office on the date of the patient’s visit (approximately one month post accident) confirmed a healed avulsion fracture of the left clavicle.

Plaintiff also submits her affidavit, sworn to on May 6, 2010, attesting that North Shore advised her and her mother that she sustained a fracture to her left clavicle and that Dr. Greco confirmed said fracture.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not she sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. **House v. MTA Bus Company**, 71 AD3d 732; **Feyler v. Ketelsen**, 72 AD3d 738. The Court finds that, although Dr. Greco states that North Shore diagnosed plaintiff with a left clavicle fracture and that x-rays taken in her office confirmed a healed avulsion fracture of plaintiff’s left clavicle, Dr. Greco failed to express an opinion as to the cause of such alleged fracture. *See* **Knox v. Lennihan**, 65 AD3d 615; **Ferber v. Madorran**, 60 AD3d 725; **Garcia v. Lopez**, 59 AD3d 593; **Luizzi-Schwenk v. Singh**, 58 AD3d 811; **Penalosa v. Chavez**, 48 AD3d 654; **Collins v. Stone**, 8 AD3d 321. In addition, the Court notes that Dr. Greco’s affirmation is not in strict compliance with **CPLR §2106** as she fails to affirm her statements to be *true* under the penalties of perjury. *See generally* **Arkin v. Resnick**, 68 AD3d 692; **Offman v. Singh**, 27 AD3d 284. *Cf* **Jones v. Schmitt**, 7 Misc3d 47.

Further, the Court finds plaintiff’s affidavit is self serving and insufficient to raise an issue of fact. *See* **Vilente v. Miterko**, 73 AD3d 757; **Lozusko v. Miller**, 72 AD3d 908; **Stevens v. Sampson**, 72 AD3d 793; **Keith v. Duval**, 71 AD3d 1093; **Singh v. City of New York**, 71 AD3d 1121; **Larson v. Delgado**, 71 AD3d 739; **Acosta v. Alexandre**, 70 AD3d 735.

Plaintiff has also failed to submit competent medical evidence that the injuries that she sustained rendered her unable to perform all of her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident. Plaintiff testified at her deposition that she missed only two weeks of school, and has otherwise failed to submit any competent evidence to satisfy this category of serious injury. *See* **Kreimerman v. Sunis**, 902 NYS2d 180 (no official cite available); **Clarke v. Delacruz**, 73 AD3d 965; **Catalano v. Kopman**, 73 AD3d 963; **Nieves v. Michael**, 73 AD3d 716; **Bleszcz v. Hiscock**, 69 AD3d 890; **Yunatanov v. Stein**, 69 AD3d 708; **McMullin v. Walker**, 68 AD3d 943; **Knox v. Lennihan**, 65 AD3d 615; **Blasse v. Laub**, 65 AD3d 509; **Berson v. Rosada Cab Corp.**, 62 AD3d 636; **Kin Chong Ku v. Baldwin-Bell**, 61 AD3d 938; **Ly v. Holloway**, 60 AD3d 1006.

Based on the foregoing, it is

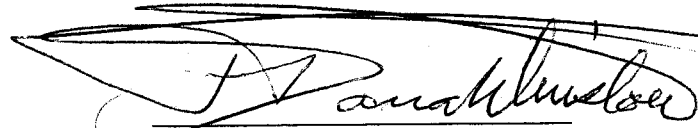
ORDERED, that the motion by defendants ARIEL VENTURA and CARMEN Z.

VENTURA for summary judgment dismissing the complaint of plaintiff JACQUELINE M. DUNN pursuant to CPLR §3212, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

This constitutes the Order of the Court.

Dated:

August 18, 2010



J.S.C.

ENTERED

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