

Wallace v Napolitano
2011 NY Slip Op 30942(U)
March 24, 2011
Supreme Court, New York County
Docket Number: 407004/07
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

Wallace, Greta

INDEX NO.

487604/07

MOTION DATE

v.
Napolitano, Phillip

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

add 6/23 motion are

Upon the foregoing papers, It is ordered that this motion ~~is~~ *be* granted

per attached decision

FILED

APR 05 2011

NEW YORK COUNTY CLERKS OFFICE

This constitutes the Decision and Order of the Court.

Dated: 3/24/11

New York, New York

[Signature]

J.S.C.

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT POST

Check if appropriate: REFERENCE SETTLE/SUBMIT ORDER/JUDGMENT

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

GRETA WALLACE,

Plaintiff,

Index No. 407004/07

-against-

PHILIP S. NAPOLITANO, SONDA TOURS, INC.,
and ROBERT L. CASH,

FILED

APR 05 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X

Emily Jane Goodman, J.S.C.:

In this action arising from a motor vehicle accident, defendants Philip S. Napolitano and Sonda Tours, Inc. (motion seq 002) and defendant Robert L. Cash (motion seq 003) (collectively defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, due to plaintiff Greta Wallace's alleged failure to meet the threshold requirements for a "serious injury" under New York Insurance Law (Insurance Law) § 5102 (d). Plaintiff cross-moves for summary judgment (1) on liability for the accident, and (2) on the issue of serious injury.

The accident in question occurred on August 3, 2005. Plaintiff claims to have incurred injury to her neck, lower back and right shoulder when the vehicle in which she was riding as a passenger allegedly came into contact with another vehicle.

"[A]n overriding purpose of the No-Fault Law was to eliminate from courts common-law tort actions involving minor

personal injuries that fall beneath a defined threshold." *Van Nostrand v Froehlich*, 44 AD3d 54, 60 (2d Dept 2007), citing *Licari v Elliott*, 57 NY2d 230, 236 (1982). As such, courts are "responsible for vetting serious injury automobile cases by application of basic summary judgment principles to avoid unnecessary jury trials where the injury is clearly minor." *Van Nostrand v Froehlich*, 44 AD3d at 60; *Epstein v Butera*, 155 AD2d 513, 515 (2d Dept 1989) (the issue of "serious injury" must be decided "in the first instance"). Consequently, the courts "weed out" claims that do not involve serious injuries. *Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 350 (2002).

Following basic summary judgment tenets, a defendant seeking dismissal must come forward with proof that the plaintiff did not suffer a serious injury, through sworn and admissible medical evidence, such as the affidavit of a physician. See *Gaddy v Eyler*, 79 NY2d 955 (1992). The plaintiff must then produce sufficient admissible proof of a serious injury. *Henkin v Fast Times Taxi, Inc.*, 307 AD2d 814 (1st Dept 2003). Evidence in the form of physicians' reports must be "properly subscribed and affirmed." *Burgos v Vargas*, 33 AD3d 579, 580 (2d Dept 2006).

Of the injuries which qualify as "serious injuries" under Insurance Law § 5102 (d), plaintiff is alleging that she suffered a:

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.

In plaintiff's bill of particulars, plaintiff claimed that the following injuries are permanent:

Traumatic cervical myofasciitis with clinical evidence of right radiculopathy and with aggravation of a pre-existing cervical syndrome; Traumatic lumbrosacral myofasciitis with clinical evidence of bilateral radiculopathy, with symptomatic disc bulges L4-L5 and L5-S1 and with aggravation of a pre-existing lumbrosacral syndrome; Subluxation AC joint right shoulder with impingement; cervical radiculopathy; lumbar radiculopathy.

Notice of Motion, Ex. C, at 4.

In her amended bill of particulars, plaintiff added that she suffered "cerebral concussion, mild glenohumeral and acromioclavicular joint osteoarthritis, the latter with extensive cystic change, mild bony impingement upon the distal supraspinatus, tendinosis of subjacent bursal surface fibers of the supraspinatus as well as insertional humeral surface fibers, type II S.L.A.P. lesion with anterosuperior extension." Notice of Motion, Ex. E, at 4-5. In her amended bill of particulars, plaintiff claims that she was admitted to the hospital for two days; was confined to bed for a week; and was confined to her home for a total of three weeks.

To establish that plaintiff has failed to allege any cognizable injury under section 5102 (d), defendants produce four medical reports duly signed and affirmed by three doctors: Dr. Ravi Tikoo, a Board Certified neurologist, who examined plaintiff on August 14, 2007 (Notice of Motion, Ex. J); Dr Joseph Y. Margolis, a Board Certified orthopedic surgeon, who examined plaintiff on September 17, 2007 (*id.*, Ex. K); and Dr. Stephen W. Lastig, a Board Certified radiologist, reviewing an August 16, 2005 lumbar MRI (*id.*, Ex. L), and a report of Dr. Lastig reviewing a July 12, 2007 MRI of plaintiff's right shoulder. *Id.*, Ex. M.

Plaintiff's complaints, as presented to Dr. Tikoo, were pain in her neck, right shoulder and back, resulting in difficulty and pain while bending, lifting objects, and sitting or standing for prolonged periods of time. Dr. Tikoo, after conducting a neurological examination, concluded that plaintiff had suffered sprains and soft tissue injuries that had resolved themselves. He stated in his report that

Based on today's clinical evaluation and the claimant's reported history, it is my opinion with a reasonable degree of medical certainty that my neurological exam of [plaintiff] was essentially normal. Despite her subjective complaints, there were no objective findings to substantiate these complaints. [Plaintiff] does not need any further treatment of diagnostic testing. Maximal medical improvement has been reached. She is able to work in her normal capacity.

It is my opinion that she does not have significant clinical evidence of neuropathy, radiculopathy, or disc

herniation. Furthermore, [plaintiff] is not disabled from a neurological basis.

Ex. J, at 3.

In his report, Dr. Margolis reviewed plaintiff's medical history, and took range of motion tests of her cervical spine, shoulder and lumber spine. He concluded that plaintiff had normal range of motion in all these areas, and that "there was no residual objective orthopedic findings noted on examination today." Ex. K, at 3.

Dr. Lastig, in his interpretation of plaintiff's lumbar MRI, found that plaintiff had evidence of "degenerative disc disease with disc desiccation at both L4-L5 and L5-S1 levels." Ex. L, at 2. He found that the "minimal smooth posterior annular bulging at the L4-L5 level is most likely degenerative in origin and therefore unrelated to the accident of 8/3/05," and that he "disagr[eed] with the original radiologist's interpretation" that there was "an annular bulge as the L5-S1 level," or a "'possible small tear' at the L5-S1 level." *Id.*

In reviewing the MRI of plaintiff's right shoulder, Dr. Lastig found that there was (1) no evidence of a rotator cuff tear; (2) a Type II SLAP lesion; (3) no evidence of osseous injury; (4) supraspinatus tendinosis; (5) acromioclavicular joint osteoarthritis; (6) lateral downsloping of the acromion ("[c]linical correlation is recommended to evaluate for impingement syndrome"); and (7) glenohumeral joint

osteoarthritis. Ex. M, at 2.

Based on these reports, defendants have established, by admissible evidence, a prima facie case showing that plaintiff has not suffered a serious injury as above defined.

In response, in her cross motion, plaintiff provides (1) two reports from Dr. Leonard R. Harrison, an orthopedic surgeon, dated March 2, 2006 and October 6, 2008, which he affirms in a separate document dated October 2008.¹ Notice of Cross Motion, Ex. H. Further, plaintiff provides an affidavit of Dr. Ronald J. Lambert, a chiropractor, referring to 17 annexed reports, dated from September 15, 2005 to September 26, 2006, recording his treatment of plaintiff (*id.*, Ex. J), and the affirmation of Dr. Benjamin Yental, dated September 27, 2008, confirming the information contained in a letter report dated December 13, 2005. *Id.*, Ex. K. Each of plaintiff's physicians' reports, in the form of letters, are affirmed by a separate affirmation incorporating the reports. Thus, defendants' argument that plaintiff's physicians' reports are not in admissible form is not viable.

In his report dated October 6, 2008, Dr. Harrison repeats the diagnosis from his initial visit with plaintiff immediately after the accident, as (1) traumatic cervical myofasciitis with clinical evidence of right radiculopathy and with possible

¹No date is provided on the copy of the affirmation provided to the court.

aggravation of a pre-existing cervical syndrome; (2) traumatic lumbosacral myofasciitis and lateral radiculopathy, with symptomatic disc bulges L4-L5 and L5-S1 and with possible aggravation of pre-existing lumbosacral syndrome; and (3) subluxation AC joint right shoulder, with impingement. He noted that, as of 2008, plaintiff "remained symptomatic," with "significant partial permanent disabilities of her cervical spine, lumbosacral spine and right shoulder. She remains a potential [surgical] candidate as regards her right shoulder." *Id.* at 2.

Along with plaintiff's subjective complaints, Dr. Harrison noted an abnormal lower degrees of flexion and rotation of plaintiff's cervical spine compared to normal flexion and rotation; decreased motion in flexion and abduction in plaintiff's right shoulder; and limitations in plaintiff's flexion and extension in plaintiff's lumbosacral spine. He found that a "neurological examination shows decreased sensation along the distal aspect of the right forearm extending onto the dorsum of the right thumb with decreased sensation about the lateral aspect of both calfs [*sic*]." *Id.* In sum, Dr. Harrison confirmed, by objective testing, his earlier diagnosis of "significant partial permanent disabilities of the cervical spine, lumbosacral spine and right shoulder." *Id.*

Plaintiff's second neurologist, Dr. Yental, in his 2005

report, related the results of range of motion and muscle strength tests, testing specifically, by goniometer, for abnormalities in flexion, extension, lateral flexion and rotation of plaintiff's cervical spine, lumbosacral spine and right shoulder. In each test, Dr. Yental found objective loss of range of motion.

In summation, Dr. Yental wrote that "[c]onsidering the patient's symptomology, results of tests, examination and past experience with similar cases, this weakness may well predispose these areas to further problems for aggravation or trauma which might not have bothered the patient prior to the accident." Ex. K., at unnumbered p. 5.

In May 2007, after an emergency room visit on January 28, 2007 for "intolerable back pain" (Aff. of Stephen Louros, Notice of Motion, at 10), for which plaintiff was given a "painful steroid injection" (Aff. of plaintiff, at 2), plaintiff sought the advice of Dr. Arden M. Kaisman, who is Board Certified in anesthesiology and pain management. Dr. Kaisman affirmed the contents of his 2007 examination of plaintiff in an affirmation dated September 19, 2008. Cross Motion, Ex. M. Dr. Kaisman also performed range of motion tests, finding objective proof of loss of range of motion in the afflicted areas. He diagnosed plaintiff as suffering from "bulging disc at L4-L5 and L5-S1 with a lumbar radiculopathy and myofascial pain syndrome." *Id.* at

unnumbered p. 2.

In opposing the motions, plaintiff has not established a question of fact as to having suffered a "permanent loss of use of a body organ, member, function or system." Insurance Law § 5102 (d). Nothing in any of her physicians' reports supports such a drastic limitation in plaintiff's functioning.

Nor has plaintiff raised an issue of fact as to her claim as to having suffered a serious injury under the 90/180 day requirement, because she cannot travel as much as she used to, cannot work full time, "cannot play with my grandson as I did before the incident. I cannot exercise, I cannot jog, and I cannot lift heavy bags. I used to go to yoga and dancing frequently many times a month, but I can no longer do so now." Plaintiff's Aff., at 2.² Defendants have demonstrated that plaintiff was confined to her home for only three weeks, and then returned to work. Plaintiff's "self-serving affidavit describing limitations on recreational and other activities is not supported by her medical records" for purposes of the 90/180-day requirement. *Evans v Beebe*, 267 AD2d 828, 829 (3d Dept 1000).

Thus, plaintiff has not established a "a medically determined injury or impairment of a non-permanent nature" preventing her from "performing *substantially* all of the material

²While plaintiff alleges to have had to cut down on such activities as traveling for her work, she continued to do some traveling.

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 [emphasis added]." Insurance Law § 5201 (d).

However, an issue of fact is raised for trial as to whether plaintiff suffered a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" as required to meet the standard of serious injury under Insurance Law § 5201 (d).

In order to prove the extent or degree of physical limitation, an experts designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact [citations omitted].

Toure v Avis Rent A Car Systems, Inc., 98 NY2d at 350-351.

Plaintiff, through the production of affirmed physicians' reports involving qualitative assessments of plaintiff's injuries, has raised factual questions as to whether she suffered a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." Therefore, defendants' motion for summary judgment on the issue of serious injury is denied, as is plaintiff's cross

motion for the same relief.

The part of plaintiff's cross motion seeking summary judgment on the issue of liability is likewise denied, due to unresolved questions of fact as to the nature of the accident.

Accordingly, it is

ORDERED that the motion brought by defendants Philip S. Napolitano and Sonda Tours, Inc. (motion seq 002) for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion (motion seq 002) brought by plaintiff Greta Wallace on her complaint is denied, and it is further

ORDERED that the motion brought by defendant Robert L. Cash (motion seq 003) for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties appear for a pre-trial conference on April 21, 2011.

This Constitutes the Decision and Order of the Court.

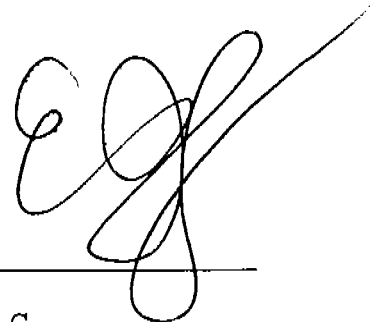
Dated: March 24, 2011

FILED

APR 05 2011

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ENTER:



EMILY JANE GOODMAN
J.S.C.