

**Hayes v Vasconez**

2011 NY Slip Op 31673(U)

June 21, 2011

Supreme Court, Queens County

Docket Number: 3875/2009

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

NICOLE M. HAYES, Index No.: 3875/2009
Plaintiff, Motion Date: 04/14/11
- against - Motion No.: 21
EMEL VASCONEZ, RAFAEL RIVERA, JR. and Motion Seq.: 3
DANAE T. DIXON-RIVERA,

Defendants.

- - - - - x

The following papers numbered 1 to 20 were read on this motion by defendant EMEL VASCONEZ, for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant EMEL VASCONEZ dismissing the plaintiff's complaint and any cross-claims filed against him:

Papers Numbered

Defendant Vasconez's Notice of Motion-Affidavits-Exhibits...1 - 5
Plaintiff's Affirmation in Opposition .....6 - 8
Defendant Rivera's Affirmation in Support of
Plaintiff's Motion.....9 - 11
Defendant Vasconez's Affirmation in Reply to Plaintiff.....12 - 14
Defendant Vasconez's Affirmation in Reply to Rivera.....15 - 17
Defendant Rivera's Affirmation in Reply.....18 - 20

This is a personal injury action in which plaintiff, Nicole M. Hayes, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on May 15, 2006, at approximately 6:00 p.m. on Front Street, near its intersection with Hempstead Avenue in Hempstead, New York.

At the time of the accident, the vehicle owned and operated by defendant, Emel Vasconez, was proceeding eastbound on Front Street. The vehicle owned by defendant, Rafael Rivera and operated by

defendant, Danae T. Dixon-Rivera, was proceeding across Front Street from a parking lot on the north side to a gas station on the south side. Defendant Vasconez contends that the accident occurred when Rivera attempted to cross all four lanes of Front Street to get to the gas station on the opposite side and collided with Vasconez's vehicle which was proceeding with the right of way on Front Street. The plaintiff, who was a front seat passenger in the Rivera vehicle, contends that as a result of the accident she sustained physical injuries.

Plaintiff commenced an action against the drivers of both vehicles by filing a summons and complaint on February 18, 2009. Issue was joined by service of defendant Vasconez's verified answer with cross-claim dated July 8, 2009. The deposition of the plaintiff and the deposition of defendant Vasconez were completed prior to the submission of the instant motion. However, the deposition of Rivera did not take place until March 10, 2011. Although Vasconez moved to strike the answer of the Rivera defendants or to preclude them from testifying at trial for failure to appear for a court-ordered deposition, that branch of the motion was withdrawn by Vasconez's counsel Alex Fooksman, Esq. pursuant to a stipulation entered into before Referee Florio on January 14, 2011 (see Fooksman reply affidavit dated 2/16/11).

Counsel for defendant Vasconez, now moves for an order pursuant to CPLR 3212(b) granting summary judgment in favor of Vasconez and dismissing the plaintiff's complaint and all cross-claims on the ground that Vasconez is not liable for damages as the evidence shows that Vasconez's actions at the time of the accident were neither negligent nor the proximate cause of the accident. In support of the motion for summary judgment, counsel submits his own affidavit, a copy of the pleadings and a copy of Vasconez's deposition testimony as well as the deposition testimony of the plaintiff, Nicole M. Hayes.

Vasconez also moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that plaintiff Nicole M. Hayes did not suffer a serious injury as defined by Insurance Law § 5102. Defendants Rafael Rivera and Danae T. Dixon-Rivera filed an affirmation in support of the threshold motion.

In her examination before trial, taken on July 6, 2010, Ms. Hayes, age 32, a sales representative with Verizon, testified that on the date of the accident, May 15, 2006, she was a front seat passenger in a Ford SUV driven by her co-worker defendant Danae Dixon-Rivera. Ms. Rivera was driving plaintiff to a gas station on Front Street to pick up her car. Ms. Hayes testified that Ms.

Rivera proceeded through a Dunkin' Donuts parking lot which had an exit onto Front Street. The gas station was directly across from the Dunkin' Donuts parking lot on the south side of Front Street. Hayes testified that "instead of going around corners, we went across the highway." The highway they were cutting across was Front Street which, in that location, was four lanes with two lanes of traffic going in each direction and a double yellow line separating the two directions of traffic. Rivera crossed the first two westbound lanes through traffic that was stopped. She then crossed the double line, stopped and inched forward into the eastbound lane. As soon as she crossed into the eastbound lane, the Vasconez vehicle, traveling on Front Street collided with their vehicle. The front of the Vasconez vehicle hit the passenger side of the Rivera vehicle. Ms. Hayes testified that as a result of the impact, her right knee hit the door of the vehicle. When the police arrived at the scene the plaintiff declined treatment and went home. She did not go to work the following day and testified that she stayed home from work for two or three weeks.

A day after the accident plaintiff sought medical treatment at Park Pain Relief Therapy PC for pain in her mid and lower back, her right shoulder and her right knee. She received physical therapy and acupuncture treatments for her back and knee and had MRI studies done on her knee and back. The plaintiff ended all treatment at Park after three or four months when her no fault insurance was terminated. She testified that although she had private health insurance through her job at Verizon, she believed that insurance would not pay for car accidents. She did not receive any further treatment for her injuries. At the time of the deposition she testified that she still had pain in her back and knee from sitting too long or playing golf, playing handball, working out or lifting.

The deposition of defendant Emel Vasconez, was taken on August 10, 2010. He testified that on the date of the accident he was operating a 1992 Toyota Camry. He had just turned from Hempstead Turnpike onto the left lane of Front Street and was traveling in an eastbound direction at a rate of 20 miles per hour. He stated that a split second before the impact he observed the Rivera vehicle coming in a southbound direction and crossing Front Street perpendicular to his vehicle. The Rivera vehicle struck his vehicle on the left front.

In her verified Bill of Particulars, plaintiff states that as a result of the accident she sustained, inter alia, a tear of the posterior horn of the lateral meniscus, mild tendonosis of supraspinatus tendon, right shoulder contusion, right knee contusion, cervical spine sprain, thoracic sprain and lumbar spine

sprain. She states that at the time of the accident she was employed as a special assistant at Verizon and missed approximately three weeks from work as a result of the injuries she sustained in the accident.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff 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.

Ms. Hayes, was examined by Dr. Zimmerman, defendant's orthopedist on July 18, 2006, two months after the accident. In his affirmed report, he states that the plaintiff presented with pain in her neck, middle back and lower back. In his examination, Dr. Zimmerman performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in her lumbar spine, cervical spine, right shoulder, left shoulder, right knee and left knee. Dr. Zimmerman's final diagnosis was cervical spine sprain/strain-resolved; lumbar spine sprain/strain-resolved; right knee sprain - resolved; and shoulder complaints which are cervical in origin. He stated that there was no evidence of a causally related disability and no need for further physical therapy.

Ms. Hayes was examined again on October 6, 2009, by orthopedist Dr. Ronald Light on behalf of defendant Rivera. In his affirmed report, Dr. Light states that on the date of the examination the plaintiff had no specific complaints to report. In his objective examination he reported that the plaintiff had full range of motion in the cervical spine and in the left and right shoulders. He states that "although an MRI of the plaintiff's right knee in 2006 disclosed a posterior horn tear of the lateral meniscus, at this time the patient did not report any complaints, nor did she exhibit any clinical findings referable to this MRI study." He stated that in his opinion the injuries sustained by the plaintiff in the accident healed and are non-permanent in nature.

Defendant's counsel contends that the deposition testimony of Ms. Hayes as well as the medical report of Dr. Zimmerman are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function

or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff 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.

In opposition, plaintiff's attorney, Scott L. McCann, Esq., submits his own affirmation as well as the affidavit of Nicole Hayes dated March 16, 2011; the affirmed medical report of Dr. Michael Tugetman and the affirmed report of radiologist, Dr. Charles DeMarco. The plaintiff has also submitted the unaffirmed medical reports and records of South Queens Imaging PC, Dr. Tugetman, Dr. Abraham, Dr. Casson, Dr. Cooper, Dr. Ishrat Khan, Park Neurological Services, P.C., South Queens Acupuncture, PC. and Pain Relief Medical Therapy PC.

In her affidavit, Ms. Hayes states that on May 17, 2006 she first sought medical attention from Dr. Ishrat Khan and Dr. Abraham at Pain Relief Medical Therapy, PC and treated with them for eight months. She states that Dr. Abraham conducted a physical examination which revealed restricted range of motion of her neck, back, shoulders and knees. She states that she underwent physical therapy at Pain Relief Medical Therapy three times per week for approximately eight months. She states that she was treated by Dr. Tugetman who performed range of motion testing of her right shoulder, lumbar spine and right knee on February 28, 2011. She states that his tests revealed significant limitations of range of motion related to the accident of May 15, 2006. She states that she still suffers on a daily basis from severe pain and stiffness in her right knee, right shoulder and back. The plaintiff also testified that from the date of the accident up to and including the present she is unable to perform and no longer able to partake in her usual and customary daily activities including exercising, jogging, walking medium-long distances, walking up and down stairs, and playing golf, tennis and handball.

In his affirmation dated March 16, 2011, Dr. Tugetman states that he reviewed the records of Drs. Abraham and Dr. Khan. He provides the results of Dr. Abraham's range of motion testing on May 17, 2006 and Dr. Khan's findings as to range of motion testing performed on June 8, 2006 which showed significant range of motion limitations of the plaintiff's cervical spine, lumbar spine and knees. Dr. Tugetman also affirms that Ms. Hayes underwent physical therapy for three months following the accident. Dr. Tugetman examined Ms. Hayes himself for the first time on February 28, 2011 and found that she had substantially restricted range of motion of the right shoulder, lumbar spine and right knee. Based upon his

examination and his review of the unaffirmed records of Dr. Abraham and Dr. Ishtar, he states that the plaintiff suffered a significant limitation of use of motion of her lumbar spine, right shoulder and right knee which are causally related to the accident in question and which are permanent in nature. He also states that as a result of his injuries, the plaintiff's ability to exercise is restricted in that she is restricted in her ability to exercise, play golf, tennis and handball.

The plaintiff also submits an affirmed medical report of Dr. Charles DeMarco a radiologist dated November 15, 2010 stating that he conducted an MRI of plaintiff's lumbar spine on June 16, 2006 and found posterior disc bulges causing impingement of the spinal canal at L4-L5 and L5-S1. He also performed an MRI on plaintiff's right knee on July 7, 2006 and found that plaintiff suffered from a tear of the posterior horn of the lateral meniscus.

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]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' 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 proof submitted by the defendant, including the affirmed medical report of Dr. Zimmerman was sufficient to meet its

prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident. The objective range of motion tests performed by defendant's orthopedist indicated that the plaintiff had full range of motion in her lumbar spine, cervical spine, right shoulder, left shoulder, right knee and left knee (see Ranford v Tim's Tree & Lawn Serv., 71 AD3d 973 [2d Dept. 2010]). Dr. Zimmerman found that all of plaintiff's range of motion tests were within normal limits and that plaintiff was not disabled.

Plaintiff's testimony that she returned to work at Verizon after three weeks established that her alleged injuries did not prevent her from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident (see Richards v Tyson, 64 AD3d 760[2d Dept. 2009]; Geliga v Karibian, Inc., 56 AD3d 518 [2d Dept. 2008]; Sanchez v Williamsburg Volunteer of Hatzolah, Inc., 48 AD3d 664 [2d Dept. 2008]).

In opposition, the plaintiff failed to raise a triable issue of fact (see Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]). Although Dr. Tugetman reported limitations in range of motion of the plaintiff's right shoulder and lumbar spine in his examination of February 28, 2011, Dr. Tugetman also states in his affirmation that plaintiff only received physical therapy for three months following the accident and then stopped. There is no explanation by Dr. Tugetman as to why, despite the permanent nature of the injuries and the fact that plaintiff had private insurance, Ms. Hayes stopped treatments at that time and why there was a gap in treatment of over four years until the time he saw her in February 2011. While a gap in or cessation in treatment is not necessarily dispositive as the law does not require a record of needless treatment in order for a plaintiff's case to survive a summary judgment motion, a plaintiff who suspends therapeutic measures while claiming a serious injury, must offer a reasonable explanation for having done so. Here the plaintiff merely stated that she believed that her private insurance would not cover injuries sustained in an automobile accident but she did not attempt to submit any claims to her private carrier (see Pommells v Perez, 4 NY3d 566 [2005]; Krieger v Diallo, 62 AD3d 504 [1st Dept. 2009]; Moore v Sarwar, 29 AD3d 752 [2nd Dept. 2006]; Mohamed v Siffraïn, 19 AD3d 561 [2d Dept. 2005]; Ketz v Harder, 16 AD3d 930[3d Dept. 2005]).

Therefore, this court finds that neither the plaintiff nor her doctor adequately explained the gap in the plaintiff's treatment



(see Haber v Ullah, 69 AD3d 796 [2d Dept. 2010]; Milosevic v Mouladi, 72 AD3d 1036 [2d Dept. 2010]; Rivera v. Bushwick Ridgewood Props., 63 AD3d 712 [2d Dept. 2009]; cf. Gaviria v. Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v. Tortori, 62 AD3d 637 [2d Dept. 2009]; Shtesl v. Kokoros, 56 AD3d 544 [2d Dept. 2008]).

The balance of the medical reports of the plaintiff's treating physicians were unaffirmed and, thus, insufficient to raise a triable issue of fact (see Grasso v Angerami, 79 NY2d 813 [1991]; Mora v Riddick, 69 AD3d 591 [2d Dept. 2010]; Patterson v NY Alarm Response Corp., 45 AD3d 656 [2d Dept. 2007]; Rodriguez v Cesar, 40 AD3d 731 [2d Dept. 2005]).

Moreover, although Dr. Tugetman reported that the plaintiff had restriction in range of motion following the accident in July 2006. His opinion was based upon the testing done by Drs. Abraham and Ishtar. The reports of Drs. Ishtar and Abraham upon which he relied were unaffirmed reports contained in the records of Pain Relief Medical Therapy PC. Although Dr. Tugetman conducted his own recent evaluation in February 2011, his report as to plaintiff's contemporaneous testing is without probative value as it was clearly based upon the unaffirmed reports of other treating physicians (see Kreimerman v Stunis, 74 AD3d 753 [2d Dept. 2010]; Vilomar v Castillo, 73 AD3d 758 [2d Dept. 2010]; Malave v. Basikov, 45 AD3d 539 [2d Dept. 2007]; Furrs v Griffith, 43 AD3d 389 [2d Dept. 2007]; Phillips v Zilinsky, 39 AD3d 728 [2d Dept. 2005]; Therefore, the plaintiff has failed to provide any findings in admissible form that were sufficiently contemporaneous with the subject accident as to limitations in range of motion (see Lewars v Transit Facility Mgt. Corp., 2011 NY Slip Op 4427 [2d Dept. 2011]; Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]; Washington v Mendoza, 57 AD3d 972 [2d Dept. 2008]; Leeber v. Ward, 55 AD3d 563 [2d Dept. 2008]).

With respect to the 90/180 category, the plaintiff failed to raise a question of fact as she returned to work full time three weeks after the accident. Plaintiff's assertion that she is limited in her ability to play sports and has difficulty with household chores, "while suggestive of discomfort, does not suggest the inability to perform substantially all of her usual and customary daily activities" (see Cantave v Gelle, 60 AD3d 988 [2d Dept. 2009]; Sands v Stark, 299 AD2d 642 [2d Dept. 2002]; Ingram v Doe, 296 AD2d 530 [2d Dept. 2002]; Slasor v Elfaiz, 275 AD2d 771 [2d Dept. 2000]). The plaintiff did not demonstrate that she has been curtailed from performing her activities to a great extent rather than some slight curtailment.

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

ORDERED, that the motion of defendant EMEL VASCONEZ, for summary judgment is granted and the complaint of plaintiff, Nicole M. Hayes is dismissed as against defendant EMEL VASCONEZ. Upon searching the record the plaintiff's complaint is also dismissed against defendants RAFAEL RIVERA, JR. and DANAE T. DIXON-RIVERA for the same reasons (see CPLR 32312 [b]) and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the motion by Emel Vasconez for an order granting summary judgment on the issue of liability on the ground that Vasconez was not at fault in the happening of the subject accident is denied as academic in view of the court's determination as to the issue of serious injury under Insurance Law § 5102(d).

Dated: June 21, 2011  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**