

Brutus v Litt

2011 NY Slip Op 32231(U)

August 1, 2011

Sup Ct, Suffolk County

Docket Number: 24357/2007

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Ruth Brutus,

Plaintiff,

-against-

Debra Litt and Marc Anthony Bynum,

Defendants.

Motion Sequence No.: 002; MG;
CDISPO

Motion Date: 5/4/11
Submitted: 12/6/11

Index No.: 24357/2007

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 25 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 16; Answering Affidavits and supporting papers, 17 - 22; Replying Affidavits and supporting papers, 23 - 25.

This is an action to recover damages for injuries allegedly sustained by plaintiff on August 3, 2006 in an automobile accident. Plaintiff contends that she was an operator of a motor vehicle on Route 110 at or near its intersection with Conklin Street, Farmingdale, New York, when it was rear ended by an automobile owned by defendant Debra Litt and operated by defendant Marc Anthony Bynum. The complaint alleges that plaintiff sustained serious injuries as defined in the Insurance Law §5102. Specifically, the bill of particulars alleges that plaintiff sustained the following injuries: bulging discs at C3-C4 through C5-C6; cervical radiculopathy; lumbar radiculopathy; cervical and lumbar sprain/strains; depression; headaches; and, that any "preexisting conditions were latent, inactive and dormant and were exacerbated and activated" by this accident. The bill of particulars alleges that plaintiff sustained a serious injury within the meaning of the

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Insurance Law in that she suffered a permanent injury which has resulted in the loss of use of a bodily member or bodily organ, function or system, and/or a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the first 180 days immediately following the occurrence of the injury or impairment. In addition, plaintiff maintains that she was confined to bed for approximately 15 weeks and home for approximately 20 weeks, "except for essential and necessary excursion for required purposes" and that she was totally disabled for approximately 15 weeks and partially disabled from the date of accident to date.

Defendant now moves for an order pursuant to CPLR §3212 dismissing the complaint on the ground that the plaintiff's injuries do not meet the serious injury threshold requirement under Insurance Law Section 5102. In support of the motion, defendant submits, *inter alia*, the pleadings, the bill of particulars in connection with the referenced lawsuit ("the Litt action"), the bill of particulars in connection with a prior accident and lawsuit¹ ("the Hertel action"), transcript of the plaintiff's examination before trial in connection with the Litt action, transcript of plaintiff's examination before trial in connection with the Hertel action, unsworn report by Robert Diamond, M.D. and sworn reports by S. Farkas, M.D. and by Sondra J. Pfeffer, M.D.

During the course of the Litt examination before trial, plaintiff testified that at the scene of the accident she felt back pain (but did not remember if it was upper, middle, or lower back pain) and neck pain (but did not remember if it was any particular portion of her neck). She "thinks" her left arm hurt (but did not remember if it was her elbow, forearm or wrist which pained her). Plaintiff testified that upon leaving the scene of the Litt accident she went to her attorney's office in New York City in connection with an appointment regarding the April 29, 2006 Hertel action. She stated at the deposition that she saw a chiropractor, Dr. Michelle Lester, after the August accident whom she had been seeing as a result of the April accident. She recalled that she had been receiving treatments three times per week after the April collision but that it may have decreased to two times per week at or about the time of the August collision. She was prescribed no medications as a result of the August accident but was still taking muscle relaxants which had been prescribed after the April accident. In April 2006 she had been working in medical billing 12 to 20 hours per week, 2 to 3 days per week and attending Suffolk County Community College 5 days per week totaling 22 hours per week. After the April 29, 2006 accident she missed 2 to 3 days of school and "probably" worked less hours. As to the August accident, plaintiff indicated that she was on summer break and did not think she lost any time from school in September 2006. Since the August accident she has worked part time at Ducks Stadium and Commack Multiplex movie theaters in seasonal and part

¹ Plaintiff was the driver of an automobile which was involved in an accident on April 29, 2006, approximately three months prior to the accident which is the subject of the within action. She commenced an action in Supreme Court, Suffolk County to recover damages for injuries she allegedly sustained in connection with the April collision under Index No. 27644/07 against defendant Melissa Hertel.

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time positions. She now works full time at Touro College. She set forth that she does not have a great deal of difficulty doing things in any aspect of her life that she could do before the August 3, 2006 accident but that she cannot lift heavy things and has pain sitting down. She was able to attend a body toning class in the Fall 2007 semester at Suffolk County Community College.

During the course of the Hertel examination before trial, plaintiff testified that she injured her neck, left shoulder and back in the April accident and that she suffered from headaches after that accident. Plaintiff stated that she “re-injured her back” in the August accident but that she did not re-injure any other parts of her body including her neck, shoulder and head. She did not think that she received treatments for neck pain after the August accident. Plaintiff asserted that there were no activities in which she is unable to participate as a result of the April accident, but that she is unable to lift heavy things or sit for too long. The bill of particulars dated June 18, 2008 prepared by plaintiff in connection with the Hertel action specified that plaintiff sustained each of the injuries indicated above in reference to the Litt action except that she allegedly sustained lumbosacral radiculopathy (as opposed to lumbar radiculopathy which she allegedly sustained as a result of the August 3, 2006 accident) and bulging discs at L3-L4, L4-L5 and L5-S1 (which are not contained in the bill of particulars prepared in connection with the Litt action). Plaintiff asserted that the injuries she suffered as a result of the April accident were serious injuries within the meaning of the Insurance Law in that the injuries were permanent; disabling for a period in excess of 90 out of the first 180 days following the April occurrence; a significant limitation of use of a bodily function or system; a significant disfigurement; and a permanent consequential limitation of use of a bodily organ and/or member.

Under the Insurance Law, “[s]erious injury” means 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” (Insurance Law § 5102 [d]). In order to recover under the “permanent loss of use” category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (see, Oberly v. Bangs Ambulance Inc., 96 NY2d 295 [2001]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102 (d), the initial burden is on the defendants to present evidence, in competent form, showing that plaintiff has no cause of action (see, Kuchero v. Tabachnikov, 54 AD3d 729 [2nd Dept., 2008]). Once defendants have met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (see, Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]).

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On December 2, 2009, S. Farkas, M.D., examined plaintiff and concluded that she had a resolved cervical sprain and a resolved lumbar sprain. He found no orthopedic disability and determined that plaintiff was able to perform the usual duties of her occupation and was able to carry out the daily activities of living, without restriction. During his examination he quantified the ranges of motion in the lumbar and cervical spine using a goniometer and compared his findings with normal ranges of motion, concluding that plaintiff had no limitations. He noted equal sensation in both upper and lower extremities. Dr. Sondra J. Pfeffer, a radiologist, reviewed MRI films of plaintiff's cervical and lumbar spine taken before and after the August accident. She concluded that the MRI examinations of plaintiff's cervical spine revealed that the cervical MRI performed prior to the August accident showed subtle disc desiccation at C2-3, C3-4, C4-5 and C5-6, with minimal posterior disc bulging at C5-6 and diminution of cervical lordosis and cervical extension, raising the possibility of muscle spasm. She noted that the cervical MRI obtained after the August accident revealed interval stability of incipient degenerative disc disease with no evidence of trauma related discogenic injury and that there was appropriated cervical lordosis and cervical extension. With regard to the pre August accident lumbar MRI, Dr. Pfeffer noted mild leftward curvature of the mid-lumbar vertebral column, in addition to diminution of lumbar left lateral bending (which, she indicated, may be attributable to muscle spasm although it did raise the possibility of mild structural levoscoliosis). She found that there were no fractures, subluxations, contusions, disc herniations, or pathologic disc bulges of the lumbar spine. With regard to the post August accident lumbar MRI, Dr. Pfeffer averred that the appearance of the lumbar spine was unchanged from the previous MRI and that there was no evidence of recently sustained discal or vertebral injury at any level. Defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law by establishing that plaintiff did not sustain serious injuries due to the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345, 352 [2002]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see, Gaddy v. Eyler, 79 NY2d 955, 582 [1992]).

In opposition to the motion, plaintiff submits, *inter alia*, affirmed reports of Samuel Mayerfield, M.D., Robert Diamond, M.D. and Paul Lerner, M.D. and a sworn report of Michelle J. Lester, D.C. The affirmation of Dr. Mayerfield consists of his reports of an MRI of the lumbar spine performed on October 28, 2006 where he opined that there was no interval change from a prior MRI of July 1, 2006 and noted posterior disc bulging at L3/4, L4/5 and L5/S1 indenting the thecal sac without central canal or foraminal stenosis. (which were not delineated in plaintiff's bill of particulars in reference to the Litt accident). The affirmation of Dr. Diamond consists of his report of an MRI of the cervical spine performed on September 21, 2006 where he affirmed that there was no significant change seen in the C3/4 through C5/6 posterior minimal subligamentous disc bulges. He noted that the findings were compatible with posterosuperior nasopharyngeal adenoidal hyperplasia, left maxillary sinusitic change and that the recumbent positional sequence demonstrated straightening of the normal cervical lordosis. Dr. Lerner found, as a result of his examination performed on March 21, 2011, that there were limitations in the cervical and lumbar spine ranges of motion as compared to normal findings as performed with an inclinometer and arthroidal protractor and his impression was that plaintiff suffered from cervical strain with disc bulges and lumbar strain with disc bulges. He determined that the conditions and impairments were causally related to the August 3, 2006 motor vehicle accident and that they represented a traumatic

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exacerbation of a prior injury with a worsened range of motion of the cervical spine and increased pain in both the cervical spine and lumbar spine. Dr. Lerner only reviewed the post August 3, 2006 MRI reports, reports from a "Dr. Russ and a chiropractic report 10/5/06. Acupuncture chiropractic notes. Report from Dr. Futoran 8/31/06. Prior report from 12/2/09", none of which have been submitted as part of the opposition to the motion and none of which pre-date the August 3, 2006 accident. Finally, the report of Dr. Lester indicates that she treated plaintiff in connection with injuries she sustained in a motor vehicle accident on August 3, 2006. Dr. Lester does not indicate which instrument, if any, was used in her determination that the ranges of motion findings for the cervico-thoracic and thoraco-lumbar spine were limited as compared to the ranges of motion of a normal finding. She opined that the plaintiff's injuries were the result of the August 3, 2006 accident and that the plaintiff exacerbated the neck and back symptoms that she experienced in her April 29, 2006 motor vehicle accident. Dr. Lester did not provide notes or any findings or tests performed by her after the April 29, 2006 motor vehicle accident and prior to seeing the plaintiff on August 4, 2006, although plaintiff testified that she was treated by Dr. Lester after the April accident. Dr. Lester failed to quantify the change in the range of motion or to compare any change in the range of motion from the time of the April 2006 accident to the time of the August 2006 accident.

Plaintiff testified at her examinations before trial that she continued working at her part time jobs, that she was able to and did, in fact, attend school in September following the August accident and that she works full time in the bursar's office at Touro College. Her testimony which indicated that she was receiving chiropractic care in connection with the April 2006 accident up until the time of the August 2006 accident belies the contention in her bill of particulars that any conditions which may have been exacerbated by the August accident were "latent, inactive and dormant."

Plaintiff Brutus failed to raise a triable issue of fact (see, Baez v. Rahamatali, 6 NY3d 868 [2006]; Gaddy v. Eyler, 79 NY2d 955, 582 [1992]). The MRI reports prepared by Drs. Mayerfield and Diamond fail to demonstrate that the injuries allegedly sustained by plaintiff were causally related to the August 3, 2006 accident and the findings of Dr. Lerner were based upon the unsworn medical reports of others (see, Kreimerman v. Stunis, 74 AD3d 753 [2nd Dept., 2010]; Friedman v. U-Haul Truck Rental, 216 AD2d 266 [2nd Dept., 1995]), as well as upon the plaintiff's own subjective complaints of discomfort and pain (see, Davis v. New York City Tr. Auth., 294 AD2d 531 [2nd Dept., 2002]; Barrett v. Howland, 202 AD2d 383 [2nd Dept., 1994]). Plaintiff has failed to offer any proof to support the conclusion that she sustained a permanent injury as she expressly alleged in her bill of particulars (see, Oberly v. Bangs Ambulance Inc., 96 NY2d 295 [2001]). Further, the plaintiff failed to submit competent medical evidence and the plaintiff's testimony at her two depositions failed to show that the injuries she allegedly sustained in the accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see, Dunbar v. Prahovo Taxi, Inc., 84 AD3d 862 [2nd Dept., 2011]; Bell v. Rameau, 29 AD3d 839 [2nd Dept., 2006]; Albano v. Onolfo, 36 AD3d 728 [2nd Dept., 2007]).

Accordingly, it is

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ORDERED that the motion by defendants for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law §5102 (d) is granted.

Dated: August 1, 2011

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION