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Williams v Precil
2006 NYSlipOp 50490(U)
Decided on March 27, 2006
Appellate Term, Second Department
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Decided on March 27, 2006

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

PRESENT: : PESCE, P.J., WESTON PATTERSON and RIOS, JJ
2005-1166 Q C.

Lornette Williams, Appellant,

against

Jean R. Precil, ELRAC, INC. and LEOUENTA MARSHALL, Respondents.

Appeal from an order of the Civil Court of the City of New York, Queens County (Bernice Dawn Siegal, J.), entered May 5, 2005. The order granted the motion by defendant Jean R. Precil and the cross motion by defendants Elrac, Inc. and Leouenta Marshall for summary judgment, and denied plaintiff's cross motion for summary judgment on the issue of liability.

Order affirmed without costs.

The affirmed medical reports submitted by defendants made out a prima facie case that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d). One of the doctors conducted tests and found plaintiff's range of motion of her cervical and lumbar

spines to be fully within normal limits. The burden, therefore, shifted to the plaintiff to raise a triable issue of fact that she sustained a serious injury (*see Gaddy v Eyer*, 79 NY2d 955 [1992]).

The plaintiff unsuccessfully opposed the motion. The plaintiff's doctor submitted two affirmations. The first one was based on an examination performed the day after the automobile accident. In it, the doctor failed to specify the objective tests he performed in arriving at his conclusion concerning restrictions in the range of motion of plaintiff's cervical spine (*see Mohammed v Gonzalez*, 1 AD3d 328 [2003]). The second affirmation, dated more than three and a half years later, specified degrees of the range of motion the doctor found in the plaintiff's lumbar and cervical spines but failed to compare these findings to the normal range of motion, thereby leaving the court to speculate as to the meaning of those figures. In addition, the [*2]plaintiff's physician failed to adequately set forth the objective medical tests he performed to arrive at his general conclusion that the plaintiff sustained a loss in the movement of the cervical and lumbar regions of her spine (*see Jackson v Colvert*, 24 AD3d 420 [2005]). Thus, the proof failed to objectively demonstrate that the plaintiff sustained a permanent consequential or significant limitation of use of her lumbar and/or cervical spines as a result of the accident (*see Manceri v Bowe*, 19 AD3d 462 [2005]). Finally, the plaintiff did not present competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the accident (*Jackson v Colvert*, 24 AD3d 420, *supra*).

Pesce, P.J., Weston Patterson and Rios, JJ., concur.

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Supreme Court of the City of New York
County of Queens

Index Number 1853/04
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Part 32

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Corvette Williams
Claimant(s)/Plaintiff(s)/Petitioner(s)
against
Jean R. Precil, Elrac, Inc
and Leouenta Marshall
Defendant(s)/Respondent(s)

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits..... <u>X-1001</u>	<u>2</u>
Replying Affidavits.....	_____
Exhibits.....	_____
Other.....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion to _____

is as follows:

The motion by defendant Jean R. Precil (Precil) for summary judgment dismissing the complaint, as well as cross-claims interposed against him, upon the grounds that plaintiff cannot meet the requisite threshold of establishing that she sustained a "serious injury", as defined in Insurance Law § 5102(d), allegedly arising out of a motor vehicle accident occurring on May 29,2001; the cross-motion by plaintiff for summary judgment dismissing, primarily as to liability, the affirmative defenses set forth in the answers of the defendants herein; and the cross-motion of the defendants Elrac, Inc. and Leouenta Marshall (Elrac and Marshall) for summary judgment dismissing the complaint, as well as any cross-claims against them, upon " threshold " grounds, are disposed of as follows.

As the establishment of the above-mentioned " threshold " is a prerequisite to recovery in a personal injury action seeking " non-economic " loss under No-Fault (Insurance Law § 5104(a)), such as the within action, notwithstanding any negligence liability on the part of a defendant, the court will first address the " threshold" motion by defendant Precil and the " threshold" cross-motion by defendants Elrac and Marshall.

The motion by defendant Precil and the cross-motion by defendants Elrac, both for summary judgment dismissing the complaint and cross-claims upon " threshold " grounds, are both granted as follows.

With respect to the motion by Precil, said defendant has submitted in support thereof, the pleadings herein including plaintiffs' verified bill of particulars; the certified transcript of plaintiff's April 19, 2004 examination before trial (EBT), wherein she stated that she was home and missed one week from her

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job as a paralegal after the accident, that she sought treatment by Dr. Nathaniel Shafer and approximately one month later, started receiving chiropractic treatments and physical therapy at a medical facility until November, 2001, when her No-fault benefits were cut off, that she still has a stiff neck and shoulder pain in cold weather, uses Motrin and a heating pad, has problems moving her neck and no longer goes to her gym or dances as she did before; and the affirmed report of Dr. Burton S. Diamond, a neurologist, based on his independent medical examination (IME) of plaintiff on June 8, 2004, wherein he found, upon examination which included straight leg raising, that plaintiff had full range of motion (ROM) of her neck and lower back, had sustained cervical and lumbar sprains which were resolved, that the exam was normal, that there was no evidence of any disability and that no household help was necessary.

In support of their "threshold" cross-motion, defendants Elrac and Marshall also submitted the affirmed report of Dr. Leon Sultan, based primarily on his orthopedic IME of plaintiff on October 13, 2004. In his report, Dr. Sultan, who noted the results of certain X-ray and MRI reports that he reviewed, found upon straight leg raising and other tests, that plaintiff showed intact or unimpaired (to wit, normal) ROMs of her shoulders and cervical and thoracolumbar spines and that there were no objective clinical signs of ongoing disability or functional impairment related to the accident.

The court finds that the foregoing shows prima facie that the plaintiff cannot meet the requisite threshold of establishing that she sustained a serious injury as defined under § 5102(d). Therefore, the burden shifts to the plaintiff to raise a triable question of fact on the "threshold" issues (see *Gaddy -v- Eyler* 79 NY 2nd 955 [1992]).

In opposition to both Precil's motion and Elrac's and Marshall's cross-motion, plaintiff submits several medical, including MRI and X-ray, reports, none of which are affirmed or otherwise sworn to; and two affirmations from plaintiff's treating physician- Dr. Nathaniel Shafer, one dated July 17, 2001 and based primarily on his examination of plaintiff on May 30, 2001 and the more recent second one based on an examination of plaintiff on January 6, 2005.

With respect to the plaintiff's proof, the unaffirmed reports contained in the opposition papers are, for the most part, inadmissible (see *Pagano -v- Kingsbury* 182 AD 2nd 268 [2nd Dept. 1992]). However, it has been held that unaffirmed medical reports may be considered if referred to in the affirmation of a defendant's examining physician (*Brown -v- Achy* 9 AD 3rd 30 [1st Dept. 2004]). Such reference, however, must be more than merely a passing reference without any comment (see *Positko -v- Krawiec* 6 AD 3rd 517 [2nd Dept. 2004]; *Ayzen -v- Melendez* 299 AD 2nd 381 [2nd Dept. 2002]). In this case, an X-ray report and two MRI reports submitted by plaintiff in her opposition were also, together with their results of the underlying X-ray and MRIs, referred to by Dr. Sultan in his affirmation and, therefore, are admissible. However, the findings stated therein - of an "essentially normal MRI of the brain" and, as to the cervical MRI- "minimal *** disc bulges without compressive change"- add little to plaintiff's claim of having sustained a serious injury.

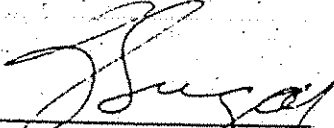
With respect to Dr. Shafer's affirmation as to his May, 2001 examination, he found, upon testing, "decreased" ROMs of plaintiff's upper extremities and cervical and lumbar spines, which he found to be causally connected by the accident. However, he failed to properly specify, either qualitatively or quantitatively, the extent of the restrictions (see *Toure -v- Avis Rent A Car Systems, Inc.* 98 NY 2nd 345 [2002]). As such, there is an absence of objective medical proof showing any initial ROM restrictions contemporaneous with the accident (see *Nemchyonok -v- Ying* 2 AD 3rd 421 [2nd Dept. 2003]). Additionally, upon his recent examination, while Dr. Shafer did specify his findings upon ROM testing of plaintiff's cervical and lumbar spines, he failed to state what the normal ROMs should be and to compare his findings to the normal ROMs (see *Toure*, supra).

Therefore, upon the foregoing, the court finds that plaintiff has failed to raise a triable issue of fact as to whether she sustained a "serious injury" under § 5102(d).

Accordingly, the motion by defendant Precil and the cross-motion by defendants Elrac and Marshall for summary judgment are both granted and the complaint against all the defendants herein, as well as all cross-claims interposed against the defendants, are dismissed.

In view of the above dismissals upon "threshold" grounds, the cross-motion by plaintiff for summary judgment on the issue of liability is denied as moot.

May 3, 2005
Date


Judge, Civil Court