

Decided on July 18, 2008

Supreme Court, Queens County

Sylvia Myers and MARIE MCPHERSON, Plaintiffs,
against
Con Edison and ARTHUR FOERDERER, Defendants.

2723/04

Joseph P. Dorsa, J.

By notice of motion, plaintiffs seek an order of the Court, allowing plaintiffs to re-file their note of issue.

Defendants oppose and cross-move to dismiss plaintiffs' complaint and any and all cross-claims, pursuant to CPLR § 3404 for failure to restore the case to the calendar within one year, or alternatively to grant defendants summary judgment and dismissal pursuant to CPLR § 3212, on the grounds that both plaintiffs failed to sustain a serious injury within the meaning of NY Insurance Law § 5102(d).

Plaintiffs reply to the opposition to their motion and oppose defendants cross-motion.

The underlying cause of action is a claim by both plaintiffs for personal injuries alleged to have been sustained in a motor vehicle accident on February 13, 2003, on Jamaica Avenue at or near the intersection of 221st Street in Queens County, NY [*2]

On July 11, 2006, the note of issue in this action was vacated in the pretrial conference part, according to a civil case management print out of the actions taken by the Court in this matter.

The same Court records indicate that the note of issue which was vacated was filed on March 15, 2006. By this motion filed with the Queens County Clerk's office on November 9, 2007, originally returnable on December 12, 2007, plaintiff seeks to restore this action to the trial calendar by filing a new note of issue.

"When a plaintiff withdraws the note of issue or when the note of issue has been vacated, the case reverts to its status as a pre-note case (*see Carte v. Segall*, 134 AD2d 396, 397 (1987)). This is not the equivalent of marking a post-note case off the trial calendar (*see Reitman v. St. Francis Hosp.*, 2 AD3d 429, 430 (2003))." *Andre v. Bonetto Realty Corp.*, 32 AD2d 973, 974-975, 822 NYS2d 292 (2d Dep't 2006).

"Thus, a motion to restore to active status in such circumstances should be granted (*see Badillo v. Sheepshead Rest. Assoc.*, 296 AD2d 514, 515 (2002); *Jiles v. New York City Tr. Auth.*, 290 AD2d 307 (2002))." *Id.* at 975.

Accordingly, plaintiffs' motion seeking an order allowing them to file a new note of issue is granted and that portion of defendants' cross-motion seeking dismissal of the complaint pursuant to CPLR § 3404 is denied.

Plaintiffs are directed to file the note of issue in this action within twenty (20) days of the date of this order.

In support of their motion for summary judgment and dismissal on the grounds that plaintiffs failed to sustain a serious injury, defendants submit the affirmed report of Dr. Steven Ender, based upon an examination of Sylvia Myers on December 21, 2005; and, the affirmed report of Dr. Erik J. Entin, of plaintiff, Marie McPherson, based upon an examination conducted on December 20, 2005.

Dr. Ender, as noted above, examined Sylvia Myers on December 21, 2005. Ms. Myers reported to Dr. Ender that she still experiences intermittent back pain and midline, low back pain. Dr. Ender reported range of motion findings compared to "normal" with regard to plaintiff's muscular skeletal condition, finding each exactly normal. He did not, however, name or describe the objective measures used to arrive at his conclusions. *Schacker v. County of Orange*, 33 AD3d 903, 822 NYS2d 777 (2d Dep't 2006). With regard to plaintiff Myer's claim of injury in the ninety/one [*3]hundred eighty category, *Museau v. NYC Transit Auth.*, 34 AD3d 772, 823 NYS2d 908 (2d Dep't 2006), Dr. Ender simply notes that plaintiff did not miss any time from work as a registered nurse. Finally, Dr. Ender expresses no opinion as to causality of what he characterizes as "resolved cervical and lumbosacral paraspinal muscle strain."

Dr. Entin examined plaintiff, Marie MacPherson, on December 20, 2005. He reports that plaintiff MacPherson initially complained of neck and upper back pain following the accident, but that as of the date of his examination plaintiff "states that the neck and upper back pain have resolved." Dr. Entin conducted no range of motion examination, other than straight leg raising bilaterally which he found negative to ninety degrees.

Although he reviewed, among other things, the MRI report of February 27, 2003 of plaintiff's cervical spine, he made no comment on the findings of Dr. Robert Scott Schepp, the radiologist who supervised and reviewed said findings. Dr. Schepp found plaintiff to have "diffuse posterior bulging discs deforming the thecal sac and spinal cord" at C3-4, C4-5, C5-6, and C6-7. Dr. Schepp also reported a slight anterior superior wedge compression fracture of the C5 vertebral body. Moreover, Dr. Entin expressed no opinion regarding the causality of injuries about which Ms. MacPherson did complain.

In her affidavit attached to plaintiffs' opposition to defendants' cross-motion, plaintiff maintains that as of February 29, 2008, the date of the affidavit, she was still experiencing neck pain and was having difficulty "lifting, carrying things, sleeping, mopping, standing for long periods of time, wearing heels, dancing, doing her hair, and lying in the same position for long periods of time."

In response to the defendants' motion to dismiss, plaintiff MacPherson provided the affirmed report of Dr. Eric Hausknecht, who both treated Ms. MacPherson and examined her as recently as March 11, 2008. Among other observations, Dr. Hausknecht reported that plaintiff had cervical derangement with disc bulges from C3-4 through C6-7 disc bulges with associated spinal cord deformity and left C5-6 radiculopathy.

Dr. Hausknecht observed further that although there is evidence of pre-existing degenerative joint disease (common for her age), she was, previous to the accident asymptomatic. Dr. Hausknecht found the accident of February 13, 2003 to be "substantial contributing factor to her condition."

On a motion for summary judgment the defendant has the [*4]burden of coming forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiff has not suffered a "serious injury." *See Pagano v. Kingsbury*, 182 AD2d 268 (2d Dep't 1992). If the defendant fails to meet this burden, the motion will be denied; and in such instances the merits of plaintiff's claim will not be examined. *Jones v. Jacob*, 1 AD3d 485 (2d Dep't 2003); *D'Onofrio v. Arsenault*, 35 AD3d 646 , 828 NYS2d 117 (2d Dep't 2006); *see also Bozza v. O'Neill*, 43 AD3d 1094 , 1096, 842 NYS2d 88 (2d Dep't 2007).

In *Faun Thai v. Butt*, 34 AD3d 447 , 448, 824 NYS2d 131 (2d Dep't 2006), the Court found that defendants failed to meet their prima facie burden where their physicians' experts "...failed to set forth the objective test or tests performed to support their conclusions (*see Ilardo v. New York City Tr. Auth.*, 28 AD3d 610 , 611 (2004); *Kelly v. Rehfeld*, 26 AD3d 469 , 470 (2006); *Nembhard v. Delatorre*, 16 AD3d 390 , 391 (2005); *Black v. Robinson*, 305 AD3d 438, 438 (2003)) that plaintiff exhibited a full or normal range of motion. *Faun Thai v. Butt* at 448.

Finally, in numerous instances, the Appellate Division, Second Department has concluded that defendants failed to meet their prima facie burden where the defendant's physician's experts examined the plaintiff or plaintiffs a year or more after the accidents and did not address their claims of serious injury based on the "ninety/one hundred eighty" category contained in their bill of particulars. (*See Faun Thai v. Butt, supra* ; *Volpetti v. Yoon Kap*, 28 AD3d 750 , 751, 814

NYS2d 236 (2006); *Nakanishi v. Sadaqat*, 35 AD3d 416 , 417, 826 NYS2d 373 (2006); *Deville v. Barry*, 41 AD3d 763, 764, 839 NYS2d 216).

The defendants failed to establish their prima facie entitlement to summary judgment as against Sylvia MacPherson. The evidence submitted in support of the motion failed to demonstrate that the plaintiff's injuries were not causally related to the accident, or that they were not serious, within the meaning of Insurance Law § 5102(d); *Tricarico v. Vicale*, 5 AD3d 761 (2d Dep't 2004); *Jones v. Jacob*, 1 AD3d 485 , 486 (2003); *Shin v. Torres*, 295 AD2d 495, 496 (2002). *Wadford v. Gruz*, 35 AD3d 416, 826 NYS2d 373 (2d Dep't 2006).

Likewise, the Court finds that the defendants failed to establish their prima facie entitlement to judgment as a matter of law with regard to plaintiff, Marie MacPherson, by showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident. *See Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *Gaddy v. Eycler*, 79 NY2d 955 (1992); *D'Onofrio v. [*5]Arsenault*, 35 AD3d 646 , 828 NYS2d 117 (2d Dep't 2006).

This is true in spite of defendants' apparent reliance on plaintiff MacPherson's alleged subjective report that her "neck and upper back pain have resolved." *Mejia v. DeRose*, 35 AD3d 407 , 825 NYS2d 722 (2d Dep't 2006).

Defendants' expert, Dr. Entin, reviewed plaintiff MacPherson's MRI reports, among others, but failed to address the objective findings therein, indicative of a serious injury. *Wadford v. Gruz*, 35 AD3d 258, 826 NYS2d 57 (2d Dep't 2006).

Accordingly, defendants' cross-motion to dismiss plaintiffs' complaints on the grounds that they (each) failed to suffer a serious injury within the meaning of NY Insurance Law § 5102(d) is denied.

Dated: Jamaica, New York

July 18, 2008

JOSEPH P. DORSA

J.S.C.