

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Spence v. Mikelberg

66 A.D.3d 765 (N.Y. App. Div. 2009) · Decided October 13, 2009

SUMMARY

The Appellate Division, Second Department, affirmed an order granting the defendant summary judgment in a personal-injury action. The court held that the plaintiff failed to raise a triable issue of fact concerning a serious injury under Insurance Law § 5102(d), because her medical evidence lacked objective testing and her affidavit was insufficient.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Mastro, J.P.; Dillon, J.; Dickerson, J.; Belen, J.; Lott, J.
JURISDICTION	New York
DECIDED	October 13, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiff appealed from an order granting the defendant's motion for summary judgment dismissing a personal-injury complaint for failure to establish a serious injury under Insurance Law § 5102(d).
STANDARD OF REVIEW	Whether the defendant established prima facie entitlement to summary judgment and whether the plaintiff raised a triable issue of fact in opposition.
PRECEDENTIAL VALUE	Published New York Appellate Division decision
PARTIES	Spence v. Mikelberg

TOPICS

- personal injury
- insurance
- appellate procedure
- standard of review

PRACTICE AREAS

- personal injury
- insurance
- civil procedure

QUESTIONS PRESENTED

1. Whether the defendant established prima facie entitlement to summary judgment by showing that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d).
2. Whether the plaintiff's treating orthopedist's affirmation and the plaintiff's affidavit raised a triable issue of fact concerning serious injury.
3. Whether the plaintiff submitted competent medical evidence showing inability to perform substantially all usual and customary daily activities for at least 90 of the first 180 days after the accident.

HOLDINGS

1. Summary judgment dismissing the complaint was proper because the defendant met her prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and the plaintiff failed to raise a triable issue of fact.
2. The treating orthopedist's affirmation did not raise a triable issue because it reported limitations without setting forth objective testing performed to reach those conclusions.
3. The plaintiff failed to submit competent medical evidence demonstrating that the alleged injuries prevented her from performing substantially all of her usual and customary daily activities for at least 90 of the first 180 days after the accident.

KEY QUOTATIONS

“The defendant met her prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).” (765)

“However, Dr. Berkowitz’s affirmation failed to raise a triable issue of fact.” (765)

“The plaintiff failed to submit competent medical evidence demonstrating that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident” (766)

FACTUAL BACKGROUND

The plaintiff sought damages for personal injuries allegedly sustained in an automobile accident. The defendant submitted evidence addressing whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). In opposition, the plaintiff relied primarily on an affirmation from treating orthopedist Dr. Dov Berkowitz and the plaintiff's own affidavit, but the medical affirmation did not identify objective testing supporting the reported limitations and the submissions did not establish a qualifying 90/180-day limitation.

PROCEDURAL HISTORY

The Supreme Court, Queens County, granted the defendant's motion for summary judgment and dismissed the complaint. The Appellate Division affirmed the order with costs.

DISPOSITION

affirmed

CASES CITED

- Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002)
- Gaddy v. Eyler, 79 N.Y.2d 955, 956-957 (1992)
- Sapienza v. Ruggiero, 57 A.D.3d 643 (2008)
- Budhram v. Ogunmoyin, 53 A.D.3d 640, 641 (2008)
- Piperis v. Wan, 49 A.D.3d 840, 841 (2008)
- Murray v. Hartford, 23 A.D.3d 629 (2005)
- Nelson v. Amicizia, 21 A.D.3d 1015, 1016 (2005)
- Maffei v. Santiago, 63 A.D.3d 1011 (2009)
- Thomas v. Weeks, 61 A.D.3d 961 (2009)
- Luizzi-Schwenk v. Singh, 58 A.D.3d 811 (2009)
- Gochmour v. Quaremba, 58 A.D.3d 680 (2009)
- Sutton v. Yener, 65 A.D.3d 625 (2009)
- Roman v. Fast Lane Car Serv., Inc., 46 A.D.3d 535 (2007)
- Sainte-Aime v. Ho, 274 A.D.2d 569 (2000)

OPINION

PER CURIAM.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Satterfield, J.), dated November 17, 2008, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Ordered that the order is affirmed, with costs. The defendant met her prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

In opposition, the plaintiff failed to raise a triable issue of fact. The only medical submission by the plaintiff in opposition to the defendant's motion was the affirmation of Dr. Dov Berkowitz, the plaintiff's treating orthopedist.

However, Dr. Berkowitz's affirmation failed to raise a triable issue of fact. While Dr. Berkowitz noted limitations during testing of the plaintiff, he failed to set forth any objective testing he did in order to arrive at those conclusions (see *Sapienza v Ruggiero*, 57 AD3d 643 [2008]; *Budhram v*

Ogunmoyin, 53 AD3d 640, 641 [2008]; Piperis v Wan, 49 AD3d 840, 841 [2008]; Murray v Hartford, 23 AD3d 629 [2005]; Nelson v Amicizia, 21 AD3d 1015, 1016 [2005]).

In addition, the plaintiffs affidavit was insufficient to raise a triable issue of fact (see Maffei v Santiago, 63 AD3d 1011 [2009]; Thomas v Weeks, 61 AD3d 961 [2009]; Luizzi-Schwenk v Singh, 58 AD3d 811 [2009]; Gochnour v Quaremba, 58 AD3d 680 [2009]).

The plaintiff failed to submit competent medical evidence demonstrating that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see Sutton v Yener, 65 AD3d 625 [2009]; Roman v Fast *766Lane Car Serv., Inc., 46 AD3d 535 [2007]; Sainte-Aime v Ho, 274 AD2d 569 [2000]).

Mastro, J.P., Dillon, Dickerson, Belen and Lott, JJ., concur. [See 2008 NY Slip Op 33332(U).]