



SHEILA C. WHITEFORD v. HELEN C. SMITH ET AL.

564 N.Y.S.2d 806 (1990) | Cited 0 times | New York Supreme Court | December 27, 1990

Plaintiff commenced this action to recover for injuries sustained in a November 1986 automobile accident on State Route 145 in the Town of Cairo, Greene County. The complaint contains allegations that plaintiff's injuries are permanent and rendered her "unable to pursue her normal and regular customary activities for at least ninety (90) days out of the succeeding one hundred eighty (180) days from [the accident]". After issue was joined, defendants moved for summary judgment on the ground that plaintiff failed to meet the threshold statutory requirement of demonstrating serious injury pursuant to Insurance Law § 5102 (d). Supreme Court denied the motion and this appeal followed.

We affirm. As a preliminary matter, we reject defendants' argument that summary judgment by order of no opposition should have been granted because of the unexplained late service of plaintiff's opposition papers. "There is ample authority under CPLR 2214 (c) to overlook late service of a notice or paper if the court determines that no prejudice will ensue" (2A Weinstein-Korn-Miller, NY Civ Prac any later service of papers and, unlike Matter of Gustina (135 A.D.2d 1124, lv dismissed 72 N.Y.2d 840), the record indicates that plaintiff sought and was granted an extension to respond to defendants' motion (cf., Johnson v Golub Corp., 152 A.D.2d 803, 804). Accordingly, we find no abuse of the court's discretion in accepting the late papers (see, Rivers v Butterhill Realty, 145 A.D.2d 709, 710).

We must also reject defendants' contention that, as a matter of law, plaintiff's injuries do not constitute serious injuries pursuant to Insurance Law § 5102 (d). Defendants' argument is based on assertions that the physicians' affidavits submitted by plaintiff in opposition contain "language designed specifically by plaintiff's attorney to mimic the statutory definition of serious injury." That language, defendants contend, is purely conclusory and does not coincide with the physicians' contemporaneous office records that defendants submitted in support of their motion for summary judgment. In our view, the opinions expressed in the physicians' affidavits are sufficiently based on their examination and treatment of plaintiff after the accident to create triable issues of fact as to the seriousness of plaintiff's injuries. Defendants' concerns raise questions of affiant credibility that are not properly resolved on a motion for summary judgment (see, Glick & Dolleck v Tri-Pac Export Corp., 22 N.Y.2d 439, 441; Vasilatos v Chatterton, 135 A.D.2d 1073, 1074; King v Clark, 120 A.D.2d 880, 881). Accordingly, Supreme Court properly denied the motion for summary judgment.

Disposition

Order affirmed, with costs.

