

Reichelt v Troise

2007 NY Slip Op 30772(U)

April 16, 2007

Supreme Court, Suffolk County

Docket Number: 0008576/2005

Judge: John J.J. Jones

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SHORT FORM ORDER

INDEX NO.: 008576/2005
SUBMIT DATE: 1/31/2007
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 11/28/2006
MOTION NO.: MD

-----X
DANIELLE REICHELT and ROBERT REICHELT,
:
Plaintiffs,
:
-against-
:
PHILIP TROISE and CRAIG BALSAMO,
:
Defendants.
-----X

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Upon the following papers numbered 1 to 25 read on this application for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-21; Replying Affidavits and supporting papers 22-25; Other ; it is

ORDERED that this motion by defendants, Philip Troise and Craig Balsamo, for an order granting summary judgment dismissing the complaint on the ground that the plaintiff, Danielle Reichelt, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by Danielle Reichelt as the result of a motor vehicle accident on August 19, 2003. According to the plaintiff's deposition testimony, her vehicle was struck in the rear by the defendants' vehicle, but she was able to operate the vehicle

after the impact. Later that day, she drove to the hospital emergency room where x-rays were negative. She subsequently sought chiropractic treatment and was referred for an MRI of the cervical spine, which reportedly showed the following:

Cervical spondylosis. Associated posterior central disc herniation C4-5. Left paracentral disc herniation C5-6 and right posterolateral disc herniation C6-7. Associated Mass effect as described.

It is alleged in the bill of particulars that plaintiff sustained herniated discs at C4-5, C5-6 and C6-7, with other soft tissue injuries, as well as “aggravation, activation and/or exacerbation” of a pre-existing arthritic condition and degenerative disc disease of the cervical spine. She claims to have been incapacitated from her employment and intermittently confined to home for two months.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of “serious injury” sufficient to satisfy the statutory requirements (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; *Brown v Stark*, 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of “serious injury” under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (*Licari v Elliott*, *supra*, at 57 NY2d 238; *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A “serious injury” is defined as 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 constitutes 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]).

Defendants submitted numerous documents in support of their motion, including the affirmed report of a radiologist who reviewed an MRI study of the plaintiff's cervical spine taken on October 25, 2005, two years following the accident. The study reportedly showed mild disc desiccation at C2-3, mild disc desiccation at C3-4 with minimal posterior annular bulging, mild-to-moderate disc desiccation at C4-5 with narrowing and anterior disc bulging with endplate spurring, moderately severe disc desiccation and narrowing at C5-6 with endplate spurring and left anterior cord flattening, and moderately severe disc desiccation and narrowing at C6-7 with anterior disc bulging and

posterior disc-osteophyte formation extending far laterally to the right, resulting in right anterior cord flattening in addition to right lateral recess stenosis. In the opinion of the radiologists, such findings confirmed the “pre-existing nature of discogenic disease.” Defendants also submitted the report of Dr. Finkel, an orthopedic surgeon who examined the plaintiff on July 20, 2006, at which time there was some limitation of motion of the cervical spine. Right rotation was 60/70 degrees, left rotation was 50/70 degrees, forward flexion was 45/45 degrees, and extension was 25/30 degrees. There was no evidence of neurological deficit in either upper extremity, but there were subjective complaints of tenderness on palpation at the base of the neck on the left, but no clinical palpable paraspinal spasm. There was full range of motion of the lumbar spine and straight leg raising, deep tendon reflexes and neurological testing of both lower extremities were unremarkable. The orthopedist concluded that there were no objective findings of injury or disability.

Plaintiff submitted numerous medical records and reports in opposition to the motion, including the affirmed report of a consulting neurologist who examined her on September 9, 2003. Examination of the cervical spine revealed mild suboccipital tenderness and multiple areas of tenderness along the cervical spine, more so on the left side, with paraspinal muscle spasm. Motor examination revealed mild weakness on the left hand grasp and straight leg raising was zero to 75 degrees on the right, and zero to 60 degrees on the left. The neurologist concluded that the plaintiff was suffering from traumatic cervical and lumbar myofascial pain with radiculitis. An examination conducted on October 7, 2003 revealed “mild to moderate improvement,” but at a later examination on November 4, 2003, the plaintiff continued to complain of left side radicular neck pain. Motor examination revealed a mild weakness on the left side triceps and hand grasp, and sensory examination was decreased on light touch and pin prick on the left side at the C6 dermatome. It was reported that an EMG/NCV study of the upper extremities conducted on October 7, 2003 revealed a left side C5-6 radiculopathy.

A report dated December 10, 2006 by Dr. Ordway, an orthopedist, indicated that plaintiff was seen on June 29, 2005 and March 15, 2006 “with essentially the same clinical presentation” and that his reading of an MRI confirmed compression of the right side of the cord and nerve roots exiting at C6-7. There was an objective finding of spasm in the right trapezius muscle group with a depressed right brachioradialis reflex, in addition to complaints of radiating pain of right sided C6-7 down the mid-scapular line into the shoulder. In his opinion, plaintiff suffered an exacerbation of an underlying degenerative condition which was asymptomatic prior to the accident. He concluded that she has a “permanent, partial, moderate degree of impairment” that is causally related to the underlying accident.

Such evidence, coupled with the additional medical evidence before this Court,

is sufficient to raise a triable issue of fact (see *Mela v Gentile*, 306 AD2d 388, 761 NYS2d 482 [2d Dept 2003]; see also *Singh v Varano*, 306 AD2d 340, 760 NYS2d 545 [2d Dept 2003]).

DATED: 16 April 07


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION