Dewar v Martin
2007 NY Slip Op 31209(U)
May 4, 2007
Supreme Court, Queens County
Docket Number: 0024402/2004
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

LORACE DEWAR,	Index No. 24402/04
Plaintiff, -against-	Motion Date February 13, 2007
ANDREA L. MARTIN, LINVAL MARTIN, LAWRENCE PUCCIO AND KAREN METCALF,	Motion Cal. No. 12
Defendants.	Motion Seq. No. 1

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In this action, plaintiff seeks to recover damages for personal injuries alleged to have been sustained as the result of a motor vehicle accident which occurred on November 19, 2003 at the intersection of 120th Avenue and 223rd Street in Queens County.

Defendants Lawrence Puccio (Puccio) and Karen Metcalf (Metcalf) move for an order dismissing the complaint and directing that summary judgment be entered pursuant to CPLR 3212 in their favor on the ground that the injuries sustained by plaintiff do not meet the requisite definition of “serious injury”, as set forth in Article 51 of the Insurance Law of the State of New York. Dismissal of the complaint and all cross-claims is sought on the ground that there are no triable issues of fact as against them.

Defendants Andrea L. Martin (A. Martin) and Linval Martin (L. Martin) cross-move for dismissal of the complaint based upon plaintiff’s failure to sustain a serious injury.

Contentions of the Parties

Defendants assert that plaintiff's bill of particulars sets forth the following injuries: Disc bulge at L3-L4, L4-L5 and L5-S1; cervical/lumbosacral derangement; cervical/lumbosacral radiculopathy; left knee/right knee derangement.

Defendants submit the affirmation of their examining neurologist Dr. Edward M. Weiland stating that there are no objective findings as to permanency or disability. He sets forth specific objective tests which had negative results and quantifies the range of motion tests as all normal.

The affirmation of Dr. Louis J. Lombardi, an orthopedic surgeon, states that he found no evidence of any permanent functional deficits of the cervical or lumbar spines. He further states that plaintiff's knees revealed full range of motion without objective clinical evidence of any functional deficits. He sets forth specific objective tests and their negative results and quantifies plaintiff's normal range of motion.

The plaintiff's MRI's as to her right and left knees and lumbar spine were read by Dr. Stanley Sprecher, a radiologist. The right knee was normal. The left knee had a pre-existing abnormality of Grade IV changes of chondromalacia patella which pre-dated the accident. It was otherwise normal. The lumbar spine showed disc degeneration at L2-3, L4-5 and L5-S1 which represented a long standing degenerative process predating the accident and unrelated to it.

Defendants Puccio and Metcalf also submit two deposition transcripts of plaintiff and the transcript of defendant Lawrence Puccio on the issue of no triable issue of fact as against them on the issue of liability. Plaintiff testified that she was traveling on 120th Avenue which had no traffic device or stop sign for vehicles traveling in her direction. There is a stop sign for vehicles on 23rd Street at the intersection. Three vehicles were involved in this accident. The one vehicle that came in contact with plaintiff's vehicle was traveling on 223rd Street. The third vehicle was traveling on 120th Avenue in the opposite direction to plaintiff. She testified that the van which was traveling on 120th Avenue did not hit her vehicle.

Defendant Puccio testified that he was the operator of the van on 120th Avenue. There were no traffic control devices on 120th Avenue. He saw defendant A. Martin's vehicle come down 223rd Street, run a stop sign and hit plaintiff's vehicle. Both vehicles then spun around and made contact with his car. Defendants Puccio and Metcalf argue that they are not liable for the accident but rather that defendant A. Martin's conduct was the sole proximate cause of the accident.

Plaintiff opposes the motion and cross-motion as to threshold. Plaintiff submits the affidavit of Dr. Lennie Hobenson, an osteopath, who first saw her on November 25, 2003. Based upon his examination, he found the following: "range of motion of cervical spine was decreased in flexion sidebending secondary to pain and muscle spasm; Spurling Test was positive on the left; there was tenderness and muscle spasms to upper trapezius paraspinal muscles; sensation was decreased in right C6-C7 dermatomes; physical examination of the lumbar spine revealed moderate to severe paraspinal muscle tenderness and muscle spasms on palpation; Straight Leg Raising test supine was positive at 6 degrees on the left and 45 degrees on the right; sensation was decreased in L4-L5-S1 dermatomes; examination of the knees revealed bruises on the right and the left knee; subpatellar swelling in the right and the left knee; McMurray's test was positive in both knees; there was crepitus and stiffness in the right knee and decreased muscle strength in the lower extremities. He diagnosed her with chest wall contusion, cervical sprain and strain, lumbar sprain and strain, right knee contusion, internal derangement of the knees.

Plaintiff also submits an affirmation by Dr. Mark Shapiro, a radiologist, who examined plaintiff's MRI films and determined the following: "Lumbar Spine - abnormal signal and broad based disc bulges at L2-L3, L4-L5, and L5-S1; Left Knee - bone bruise of the medial tibial plateau, an occult fracture cannot be excluded. Abnormal signal in the posterior horn of the medial meniscus, a tear cannot be excluded. Grade IV changes of chondromalacia patella. Joint effusion. Right Knee - Abnormal signal in the posterior horn of the medial meniscus, a tear cannot be excluded."

Plaintiff also submits the affirmation of Dr. Leo Batash who initially saw plaintiff on March 17, 2004. Based upon his physical examination he sets forth quantified losses of range of motion in the cervical and

lumbosacral spines and left and right knees. He initially diagnosed traumatic cervical sprain and lumbosacral sprain/radiculopathy with disc bulge at L3-L4, L4-L5 and L5-S1 levels and bilateral knee derangement/meniscopathy. He subsequently examined her on July 12, 2004, on two other occasions and for the final time on September 21, 2005 again finding specific quantified loss of range of motion in the same areas. He states that she sustained up to a 25% loss and limitation of use of both lower extremities and a permanent consequential limitation of use and a significant limitation of use of her knees as a result of the subject accident. An affirmation by Dr. Mehran Manouel is also submitted who initially examined plaintiff on May 12, 2004 and re-examined her on October 4, 2004. He states that she has suffered a partial permanent disability of the lumbar spine, right knee and left knee and a partial permanent consequential limitation of use of her lumbar spine, right knee and left knee.

Defendants A. Martin and L. Martin oppose that branch of defendants' motion seeking dismissal based on lack of liability of defendants Puccio and Metcalf. Plaintiff joins in such opposition. It is argued that a deposition transcript of defendant A. Martin shows that there are issues of fact with respect to liability. Defendant A. Martin testified that she took Francis Lewis Boulevard to 120th Avenue to make a left turn. She did not encounter any stop signs on 120th Avenue before the accident. She stated that there was an accident between her vehicle which was traveling on 120th Avenue and a vehicle traveling on 223rd Street. She first had contact with a van which was defendant Puccio's vehicle. Her vehicle was impacted twice. The first impact spun her around and then her vehicle was hit again. Every driver in this action is asserting that they were traveling on 120th Avenue.

Decision of the Court

The motion by defendants Lawrence Puccio and Karen Metcalf is denied. The cross-motion by defendants Andrea L. Martin and Linval Martin is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In this case the evidence submitted by defendants establishes a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d). The burden then shifted to plaintiff to raise a triable issue of fact which would warrant denial of the motion on the threshold issue. This court finds that plaintiff has sustained her burden. The affidavit and affirmations of plaintiff's treating osteopath and physician as well as the radiologist set forth a factual issue based on objective medical proof as to the existence of a serious injury sustained by plaintiff. Specific objective tests were conducted and the negative results thereof are provided to the court. Toure v. Avis Rent A Car Sys., 98 NY2d 345 at 353.

As to liability, defendants Puccio and Metcalf sustained their burden of demonstrating their entitlement to judgment as a matter of law. However, in opposition to the motion, the deposition testimony of defendant A. Martin raises issues of fact with respect to how this accident actually occurred and the proximate cause thereof. Questions of credibility have been raised as well which require resolution at trial.

Accordingly, the motion by defendants Lawrence Puccio and Karen Metcalf is denied. The cross-motion by defendants Andrea L. Martin and Linval Martin is denied.

Dated:May 4,2007

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HON. DAVID ELLIOT