

Carrillo v DiPaola

2007 NY Slip Op 33058(U)

September 24, 2007

Supreme Court, Nassau County

Docket Number: 5044-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

EDWIN CARRILLO and JULIA CARRILLO,

Plaintiff(s),

-against-

ROBERT A. DIPAOLOA,

Defendant(s).

ORIGINAL RETURN DATE: 07/02/07
SUBMISSION DATE: 08/16/07
INDEX No.: 5044/06

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4

This motion [sequence #1] by defendant Robert D. DiPaola for an order pursuant to CPLR 3212 and Insurance Law § 5102(d), 5104(a) dismissing the complaint on the ground that plaintiffs did not sustain a “serious injury” as required by Insurance Law § 5104(a) and defined by Insurance Law § 5102(d) is granted.

This cross-motion [sequence #2] by plaintiff Edwin Carrillo for an order pursuant to CPLR § 3212 granting him summary judgment dismissing defendant DiPaola’s counterclaim against plaintiff Edwin Carrillo is granted.

In this action, plaintiffs seek to recover damages for personal injuries they allegedly sustained in a motor vehicle accident on October 8, 2005. Defendant seeks summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a “serious” injury as required by Insurance Law § 5104(a) and defined by Insurance Law § 5102(d).

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (Sheppard-Mobley v King, 10 AD3d 70,

74 (2d Dept. 2004), *aff'd.* as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (Sheppard-Mobley v King, *supra*, at p. 74; Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., *supra*, at p. 324).

In New York, a party may not recover for non-economic loss in an action arising out of negligence in the use or operation of a motor vehicle absent evidentiary proof of “serious injury” as that term is defined in the Insurance Law § 5102(d) (see, Insurance Law § 5104(a)). “Serious injury” is defined in § 5102(d) of the Insurance Law as: “(1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body function or system; (8) significant limitation of use of a body organ or member; or (9) a medically determined injury or impairment of a non-permanent nature which prevents plaintiff from performing substantially all of their customary daily activities for not less than 90 days during the 180 days immediately after the [accident].”

A total loss of use of a body part, organ, member, function or system is necessary to establish a “permanent loss of use of a body organ, member, function or system” (Amato v Fast Repair, Inc., 42 AD3d 477 (2nd Dept. 2007), citing Oberly v Bangs Ambulance Inc., 96 NY2d 295, 299 (2001); Candia v Omonia Cab Corp., 6 AD3d 641, 642 (2nd Dept. 2004)). A slight, minor or mild restriction in movement will not support claims for a “significant limitation of use of a body function or system” or a “permanent consequential limitation of use of a body organ or member.” (Amato v Fast Repair, Inc., *supra*, citing Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 353 (2002); Licari v Eliot, 57 NY2d 230, 236 (1982)). A recent medical examination is required to sustain a claim that plaintiff sustained permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; and/or significant limitation of use of a body organ or member (Ali v Mirshah, 41 AD3d 748 (2nd Dept. 2007) citing Mejia v DeRose, 35 AD3d 407 (2nd Dept. 2006); Laruffa v Yui Ming Lau, 32 AD3d 996, 997 (2nd Dept. 2006); Elgendy v Nieradko, 307 AD2d 251 (2nd Dept. 2003); see also, Amato v Fast Repair, Inc., *supra*).

Plaintiff Edwin Carrillo alleges that he sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body function or system; a significant limitation of use of a body organ or member; and, a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately after the accident. More specifically, he alleges that he suffered:

“Disc herniation L5-S1; disc bulge L2-3; disc bulge L3-4; disc bulge L4-5; disc bulge C2-3 with ventral CSF impression; disc

RE: CARRILLO v. DIPAOLA

Page 3.

bulge C3-4 with ventral CSF impression; central canal stenosis; disc bulge C4-5 with ventral CSF impression and central canal stenosis; cervical radiculopathy; lumbar radiculopathy; straightening of the cervical curvature; kyphosis of lumbar curvature."

After the accident, Edwin was treated at the emergency room of St. Francis Hospital where he was diagnosed with a low back strain. Two days later, Edwin was seen by Dr. Perris, who treated him for approximately six-and-a-half months.

In support of his motion to dismiss Edwin's complaint, defendant has submitted the affirmed reports of radiologist Dr. Stephen W. Lastig; orthopedic surgeon Dr. John C. Killian; and, neurologist Dr. Maria DeJesus.

Dr. Lastig attests to having examined the MRI of Edwin's lumbar spine which was performed on November 1, 2005 and the MRI of Edwin's cervical spine which was performed on October 31, 2005. Dr. Lastig concluded that these studies reflected that Edwin had pre-existing degenerative changes which were not caused by the accident. More specifically, with regard to his review of the films of the November 1, 2005 lumbar spine MRI, Dr. Lastig observed that plaintiff had "degenerative disc disease with disc desiccation . . . at the L5-S1 level," with a "shallow broad-based midline disc protrusion at L5-S1," with no evidence of spinal stenosis. Dr. Lastig concluded that the lumbar spine MRI study showed "evidence of degenerative disc disease with disc desiccation at the L5-S1 level" and "a shallow broad-based midline disc protrusion at L5-S1" that was "most likely degenerative in origin and therefore, unrelated to the accident of October 8, 2005." With regard to his review of the films of the October 31, 2005 cervical spine MRI, Dr. Lastig observed that plaintiff had "multilevel degenerative disc disease and multilevel disc desiccation" and "mild degenerative spondylosis" with "minimal smooth posterior annular bulges . . . seen at the C4-5 and C5-6 levels." Dr. Lastig concluded that the cervical spine MRI study showed "evidence of multilevel degenerative disc disease and multilevel disc desiccation" and that "the minimal smooth annular bulges at the C4-5 and C5-6 levels are degenerative in origin and therefore, unrelated to the accident of October 8, 2005." He concluded that there were no findings in the studies which were causally related to the accident of October 8, 2005.

Dr. Killian attests that he examined Edwin on February 21, 2007. He found that despite complaints of pain, Edwin had full range of motion of his cervical and lumbar spines. He found that: "[t]he physical examination of his spinal column was remarkable for subjective complaints of tenderness and subjective complaints of pain with the spinal motions which were unaccompanied by objective findings including restricted motion or muscle spasm." He concluded:

There were no positive objective physical findings in this examination to confirm this claimant's subjective complaints. Based on this examination I would conclude that he has fully recovered from any injuries sustained as a result of the 10/8/05 accident. He

has no residual causally related impairment or disability. He is capable of working at his normal capacity and performing all of his usual activities of daily living without limitations due to problems caused by injuries from this accident. There is no need for further orthopedic evaluation, follow-up or treatment for injuries sustained as a result of this accident.”

Dr. DeJesus attests that she examined Edwin on February 8, 2005. She, too, found that Edwin had full range of motion in his neck and lumbar spine. She diagnosed plaintiff with “status-post cervical and lumbar sprain/strain, resolved,” and concluded that “it is my professional opinion that the claimant has recovered from any neurological injuries he may have sustained. Although the claimant complained of tenderness and decreased sensation in the right lower extremity, these are subjective rather than objective findings. Based on my examination, there is no indication of a neurological disability. It is my professional opinion that this claimant can work and perform all of his usual daily activities without any neurological limitations.”

Defendant has also submitted a report by Edwin’s treating physician Dr. Joseph Perez, M.D. At Edwin’s final examination on May 16, 2006, Dr. Perez found that there was no loss of range of motion of Edwin’s cervical or lumbar spines. Defendant also notes that there is nothing to indicate that Edwin could not perform substantially all of the material acts which constituted his usual customary daily activities for 90 of the 180 days immediately following the accident. In fact, Edwin returned to work only days after the accident.

Defendant has established that Edwin did not suffer a serious injury thereby shifting the burden to plaintiff to establish the existence of a material issue of fact.

In opposition, defendant Edwin has submitted an Affirmation of his treating doctor, Dr. Joseph Perez. Dr. Perez notes that Edwin’s MRIs, the accuracy of which have been attested to by a radiologist Dr. Robert Diamond, revealed that he had a disc herniation of his lumbar spine at L5-S1 and lumbar bulges at L2-3, L3-4 and L4-5 and cervical curvature of his cervical spine as well as posterior disc bulges at C2-3 through C5-6. Dr. Perez states that he stopped treating Edwin on May 16, 2006 because he had reached maximum medical benefit and any further treatment would have been palliative in nature. Dr. Perez states that he re-examined Edwin on June 29, 2007 and found continued worsened limitations of motion in his cervical and lumbar spines. As for defendant’s experts’ conclusions that Edwin’s problems were degenerative in nature, Dr. Perez notes that Edwin was completely asymptomatic prior to the accident and that the clinical presentation that he subsequently displayed including sensory deficits and spasm were consistent with a trauma-related injury. Dr. Perez opines that he believes that Edwin has a permanent disability that is expected to worsen over time. Dr. Perez also relates Edwin’s difficulties with chores and lifting heavy items to his injuries.

The conclusions reached by Dr. Perez as a result of his June 29, 2007 examination which was obviously conducted in response to this motion are clearly refuted by the conclusions he reached

as a result of his May 16, 2006 examination, i.e., that there was no limitations in the range of motion of Edwin's cervical and lumbar spines. Given the absence of any reconciliation of the different findings, the doctors's recent findings fail to defeat this motion (see, Gilroy v Duncombe, 274 AD2d 548 (2nd Dept. 2000); see also, Magarin v Kropf, 24 AD3d 733 (2nd Dept. 2005); Powell v Hurdle, 214 AD2d 720 (2nd Dept. 1995); Antorino v Mordes, 202 AD2d 528 (2nd Dept. 1994)).

Plaintiff Edwin's claim that his injuries constituted a medically determined injury which prevented him from performing substantially all of the material acts which constitute his usual customary daily activities for 90 of the 180 days immediately following his accident fails. He returned to work only days after the accident (Amato v Fast Repair, Inc., supra, citing Letellier v Walker, 222 AD2d 658 (2nd Dept. 1995); see also, Thompson v Abbasi, 15 AD3d 95 (1st Dept. 2005); Candia v Omonia Cab Corp., supra).

Plaintiff Julia Carrillo alleges that she sustained:

"Disc herniation L1-2 with thecal sac impression; disc herniation L2-4 with ventral thecal sac impression; disc herniation L5-S1 with anterolisthesis; disc herniation T7-8 with ventral thecal sac impression; C3-4 disc herniation narrowing the right foraminal; C5-6 disc herniation with ventral CSF impression, ventral cord impression and central canal stenosis; disc herniation C6-7 with stenosis; C4-5 disc bulge with ventral CSF impression; T12-L1 posterior disc bulge; tear of the medial meniscus; tear of the medial collateral ligament of the left knee; tear of the lateral meniscus of the left knee; tear of the anterior cruciate ligament of the left knee; tear of the posterior cruciate of the left knee; chondromalacia of the left knee; cervical radiculopathy."

After the accident, Julia was treated at the emergency room of St. Francis Hospital. After x-rays and a CAT scan of her head were performed, she was diagnosed with a left shoulder contusion and a left knee superficial abrasion. Two days later, Julia was seen by Dr. Perris, who treated her for approximately six months.

In support of his motion to dismiss Julia's complaint, defendant has submitted the affirmed reports of orthopedic surgeons Dr. Wayne Kerness and Dr. John C. Killian and neurologist Dr. Maria DeJesus.

Dr. Kerness attests that he examined Julia on December 19, 2005. He concluded that Julia had full range of motion of her left shoulder and lumbar spine. However, he found that her left knee did not have full range of motion. Right and left flexion was limited to 125° with 135° being normal and right and left extensions were 0° with 0-5° being normal. Dr. Kerness found that there was a cause and effect relationship between Julia's complaints and the motor vehicle

accident. He diagnosed Julia with a status-post lumbar sprain/strain which was resolved; a status-post left shoulder sprain/contusion which was resolved; and, a status-post left knee sprain/contusion which was resolved. He concluded that she had no disability or limitation in her activities of daily life.

Dr. Killian attests that he examined Julia on February 12, 2007. He found that Julia displayed limitations in the range of motion of her cervical and lumbar spines. More specifically, Dr. Killian found that with respect to Julia's cervical spine, "flexion and extension were mildly limited at 35 degrees (normal 45 degrees), right and left rotation were mildly limited at 70 degrees (normal 90 degrees) and right and left lateral flexion were mildly limited at 35 degrees (normal 45 degrees)." With respect to Julia's lumbar spine, Dr. Killian found "extension was to 20 degrees (normal 40 degrees), right and left rotation were to 20 degrees (normal 30 degrees) and right and left lateral flexion were to 20 degrees (normal 35 degrees)." As for Julia's left shoulder, Dr. Killian found she had full range of motion despite complaints of pain. As for Julia's left knee, Dr. Killian found, *inter alia*, that "when she was sitting on the edge of the table with her legs dangling her left knee could easily be flexed to 110 degrees (normal 140 degrees) but when she was in a supine position and attempts were made to flex her knee she would allow 40 to 50 degrees of flexion before refusing to allow it to be bent further complaining of severe pain." Dr. Killian also reviewed Julia's MRI reports and MRIs. He concluded that Julia exhibited "extensive degenerative disc disease in her left knee which predated [the] accident and various abnormalities . . . which are commonly seen in the presence of degenerative disease." He also found that MRIs of her cervical and lumbar spines showed "extensive disc changes and various degenerative problems which would be expected in an individual her age." He found that an MRI of her left shoulder showed "various abnormalities which are degenerative in nature and were not caused by injuries from this accident." In conclusion, despite the limitations in Julia's range of motion, Dr. Killian found that the restriction of movement in Julia's cervical and lumbar spines are to be expected in a woman of her age, i.e., 70 years old. He noted that "[t]here was no muscle spasm to indicate residua from an acute injury. The neurological examination was normal. Her complaints of pain with straight leg raising on the left in the supine position were contradicted by negative straight leg raising in the sitting position. The shoulder examination was remarkable for subjective complaints of tenderness which were too diffuse to indicate specific pathology and complaints of pain with all of the shoulder motions which were unaccompanied by objective findings to indicate any significant shoulder derangement. The left knee examination was remarkable for subjective complaints of tenderness and an apparent restriction of motion which was inconsistent and obviously volitional. Provocative tests for an internal derangement were negative. There was no atrophy to indicate disuse and there was no asymmetry in the gait or in the functional activities demonstrated." Thus, he concluded that Julia had "mild impairment of her neck and back due to age related degenerative disease and that there were no positive objective physical findings in the examinations of her shoulder or knee to confirm her subjective complaints or to indicate any residual impairment of those areas or disability from injuries from those areas. She is capable of continuing to perform all of her usual activities without limitations due to injuries from the 10/8/05 accident."

RE: CARRILLO v. DIPAOLO

Page 8.

Defendant's counterclaim as against plaintiff seeks contribution from Edwin should defendant be found liable to plaintiff Julia Carrillo. Having found defendant entitled to dismissal of plaintiffs' complaint in its entirety, dismissal of defendant's counterclaim is likewise granted.

All dismissals are without costs.

This decision constitutes the order and judgment of the court.

Dated: 9-24-07

HON THOMAS P. PHELAN
[Signature]
J.S.C.

ENTERED

SEP 28 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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