

Ford v Piechowski

2007 NY Slip Op 33305(U)

October 2, 2007

Supreme Court, Suffolk County

Docket Number: 0026045/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
 POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
 Justice of the Supreme Court

MOTION DATE 5-30-07
 ADJ. DATE 8-13-07
 Mot. Seq. # 001 - MD

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MADLINE FORD,	:	SIBEN & SIBEN, LLP	
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	Plaintiff,	:	90 East Main Street
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	- against -	:	
	:	ZAKLUKIEWICZ, PUZO & MORRISSEY	
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	Defendant.	:	Islip Terrace, New York 11752
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-15; Replying Affidavits and supporting papers 16-17; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by the then 51 year old plaintiff on June 29, 2004 at approximately 5:30 p.m. when her vehicle was involved in a collision with defendant’s vehicle on Neighborhood Road at its intersection with West Drive in Brookhaven, New York. By her complaint, plaintiff seeks to recover damages for serious injuries, as defined in Insurance Law § 5102 (d), that she allegedly sustained as a result of this accident as well as economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a). By her bill of particulars, plaintiff alleges that she sustained the following serious injuries, cervical spine sprain; disc bulge at C5-6; lumbar spine sprain; facet arthropathy at L4-5; thoracic spine sprain; mangioma [sic] at T4 vertebrae; right wrist sprain; right carpal tunnel syndrome; left carpal tunnel syndrome; left ulnar¹ neuropathy;

¹Ulnar is defined as relating to the ulna, the medial and larger of the two bones of the forearm (Stedman’s Medical Dictionary 1905 [27th ed 2000]).

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adjustment disorder with depressed mood; chest contusion; left pectoral sprain; and aggravation and/or exacerbation of psoriasis. In addition, plaintiff alleges that following the accident she was treated and released from the emergency room of Brookhaven Memorial Hospital and that she was confined to bed and home from the date of the accident to July 6, 2004 and that she remains partially disabled to date.

Defendant now moves for summary judgment in her favor on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). In support of her motion, defendant submits plaintiff’s bill of particulars; the summons and complaint; her verified answer; the affirmed report dated December 19, 2006 of defendant’s examining orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on an examination of plaintiff on December 11, 2006; and plaintiff’s deposition transcript.

Insurance Law § 5102 (d) defines “serious injury” 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 constitute 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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendant failed to meet her prima facie burden of showing that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle

accident inasmuch as defendant's examining orthopedic surgeon found limitations when he examined plaintiff despite his ultimate conclusion that plaintiff did not sustain a "serious injury" (see, *Bentivegna v Stein*, 42 AD3d 555, ___ NYS2d ___, 2007 WL 2192075, 2007 NY Slip Op 06266 [NYAD 2 Dept Jul 31, 2007]; *Wade v Allied Bldg. Products Corp.*, 41 AD3d 466, 837 NYS2d 302 [2d Dept 2007]; *Tchjevskaja v Chase*, 15 AD3d 389, 790 NYS2d 175 [2d Dept 2005]). In his affirmed report, defendant's examining orthopedic surgeon indicated that when he examined plaintiff two and a half years after the subject accident and while measuring plaintiff's active ranges of motion by goniometer/tape measure he found, among other things, that plaintiff's cervical spine lateral flexion was 25/30 as compared to the Average Range of Joint Motion (ARJM) of 43; her elbow flexion was 130/130 as compared to an ARJM of 146; and plaintiff's ulnar deviation was 20/20 as compared to an ARJM of 33. Said results revealed that plaintiff's cervical spine lateral flexion was about 41 percent below the average, her elbow flexion was almost 11 percent below the average, and her ulnar deviation was approximately 39 percent below the average. Defendant's examining orthopedic surgeon concluded that while plaintiff presented "with extensive subjective complaints and restrictions" he found "no objective orthopedic evidence of any residual of injuries said to have occurred to her neck." He added that "[t]he mild restriction of motion noted" did "not appear consistent with the objective findings or the MRIs." While the defendant's examining orthopedic surgeon found no objective orthopedic evidence of any causally related residual injuries to the cervical, thoracic or lumbar spine, he specified certain degrees of limitation of range of motion in plaintiff's cervical spine such that defendant's proof failed to objectively establish that plaintiff suffered no limitation to the range of motion in her spine (see, *D'Angelo v Guerra*, 307 AD2d 306, 762 NYS2d 508 [2d Dept 2003]). After finding a negative Tinel sign over the ulnar groove and over the medial carpal tunnel, and that plaintiff could make a complete fist, and that abduction and adduction of the fingers was normal, defendant's examining orthopedic surgeon concluded that he found no evidence of carpal tunnel syndrome bilaterally and no evidence of a left ulnar nerve neuropathy. He opined that whatever soft tissue injuries plaintiff had sustained as a result of the subject accident appeared to have resolved.

At her deposition on October 5, 2006, plaintiff testified that at the time of the subject accident defendant's vehicle went by the stop sign without stopping and entered the intersection and that the front of her vehicle collided with the middle of the passenger side sliding door of defendant's van. In addition, plaintiff testified that following the accident she called 911 and waited on the grass; as a result of the impact she had bruises on her chest and on her left elbow; and plaintiff did not take the ambulance that came to the scene but instead her son-in-law took her to his home. Plaintiff also testified that the same day, at night, she went to the hospital emergency room because her neck and her lower back hurt her; plaintiff had x-rays taken and was given pain medication; then about one week later plaintiff sought medical attention at Main Street Medical with complaints involving her neck, mid back and left shoulder. According to plaintiff, she received treatment for her neck and lower back until October and her treatment consisted of heat and electric stimulation, then saw an orthopedist in November or December 2004, and did not receive treatment thereafter. Plaintiff stated that she had previously injured her lower back in a 2000 automobile accident and that she fractured her right wrist due to a fall in a parking lot in 2001. Plaintiff also stated that following the subject accident she was confined to bed and home for three days and that she was still continuing to take pain medication. As for her current physical complaints, plaintiff testified that she has constant daily pain in her neck; she has shoulder pain when lifting her left arm over her head; and numbness in the pinkies of both hands once a day. When asked what activities she could no longer perform, plaintiff listed playing with her son and bowling but could not think of any activities that she was limited in performing.

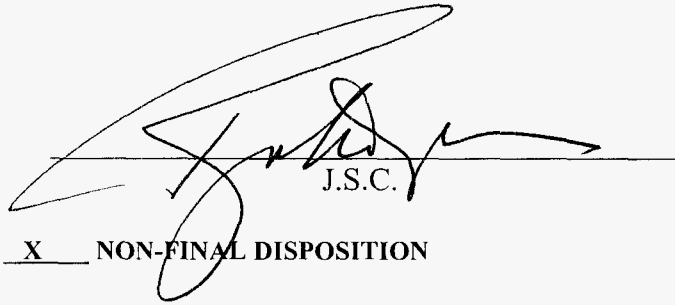
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Thus, defendant's proof failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her cervical spine and a permanent consequential limitation of use of her left arm as a result of the subject accident (*see, Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]; *see also, Bentivegna v Stein*, 42 AD3d 555, 2007 NY App Div LEXIS 8813, 2007 NY Slip Op 6266 [NY App Div 2d Dept 2007]).

Inasmuch as defendant has failed to establish her prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion is denied.

Dated: OCT 02 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION