Lora v Estate of Craft

2008 NY Slip Op 31119(U)

March 14, 2008

Supreme Court, New York County

Docket Number: 0117584/1999

Judge: Deborah A. Kaplan

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SCANNED ON 4/9/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Deborah Kaplan DEBORAH A. KAPLAN J.S.C. PART 22

Justice

Index Number : 117584/1999

LORA, HAYDEE

VS.

CRAFT, RAYMOND L.

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

FILED
APR 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... PAPERS NUMBERED

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions for summary judgment are granted in their entirety and the complaint is dismissed in accordance with the attached Opinion and Decision, and it is further,

ORDERED that the cross motion of plaintiff to extend the time to file a Note of Issue is denied as moot.

This constitutes the Decision and Order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3-14-08

Deborah Kaplan

DEBORAH A. KAPLAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

----------x

HAYDEE LORA,

Plaintiff, Index No.: 117584/99

- against -

ESTATE OF RAYMOND L. CRAFT, LUIS A. CHRISTOPHER, U SAVE AUTO RENTAL and SUNCO HOLDING CORP.,

Defendants.

----------x

DEBORAH KAPLAN, J:

This is a negligence action to recover for personal injuries sustained as a result of a three-car collision that occurred on January 25, 1997 (the Accident).

Defendant Raymond L. Craft moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint, dated August 20, 1999 (the Complaint) and all cross claims, on the ground that: (1) plaintiff failed to establish a prima facie case of negligence; and (2) plaintiff fails to meet the "serious injury" threshold pursuant to Section 5102 (d) of the New York Insurance Law. Defendant Luis A. Christopher joins in Craft's motion dismissing the Complaint on the grounds that plaintiff has not sustained a serious injury, and opposes the portion of Craft's motion with respect to the argument that Christopher was the cause of the collision with plaintiff's vehicle.

Defendant Sunco Holding Corp. d/b/a U Save Auto Rental of Binghamton s/h/a defendants U Save Auto Rental and Sunco Holding Corp. (Sunco), cross-moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the Complaint on the same grounds.

Plaintiff cross-moves for among other things, an extension of time in which to file the note of issue.

As discussed more fully below, defendants' motions for summary judgment are granted and plaintiff's cross motion for summary judgment is denied.

Background

Plaintiff rented a car from Sunco in order to drive from Binghamton to her residence. On the day in question, while driving along Route 17, plaintiff observed Craft outside his parked vehicle, on the shoulder of the highway, waiving his arms.[1] As plaintiff proceeded to slow down, she allegedly "lost control" of the car when she hit, what she believed to be, an ice patch and skidded to the left into a guard rail along the meridian of the highway. Once plaintiff regained control of the vehicle, she proceeded to drive the car across three lanes, in order to pull onto the shoulder, located on the right side of the road. Plaintiff parked the vehicle behind Craft's car. Plaintiff testified that as she was taking off her seat belt, she "felt pressure from behind the vehicle." She was knocked unconscious for a minute or two. Plaintiff was taken away by ambulance. Plaintiff claims that her vehicle was struck from behind by Christopher.

The Police Accident Report, written by Officer K. E. Buckley (the Report), states:

> "[Plaintiff] traveling eastbound on [R]t 17 was attempting to slow down in traffic due to an accident which had just occurred. [Plaintiff] then lost control of the vehicle due to black ice. [Plaintiff's vehicle] struck guide rail/meridian crossed eastbound lanes and struck a parked vehicle [owned by Craft]. [Christopher] was attempting to avoid [Plaintiff] and also lost control due to icy pavement and then struck [Plaintiff's] vehicle."

According to the report, plaintiff's vehicle was demolished, specifically with respect to the rear of the vehicle.

Plaintiff's Medical Treatment as a Result of the Accident

Plaintiff was taken by ambulance from the scene of the Accident to Community General Hospital of Sullivan Country, and was treated for a facial contusion, and a back and neck sprain. Three months after the accident, on April 8, 1997, plaintiff began physical therapy treatment at Lourdes Hospital in Binghamton, New York. Plaintiff attended eight physical therapy sessions

[1] Craft died on March 3, 2001 of Non-Hodgkins lymphoma and his estate has taken over as a party to this action. Craft was not produced for a deposition and never gave a sworn statement with respect to the Accident.

over the course of three months (see Patient's Progress Record). According to the Patient's Progress Record, plaintiff's last physical therapy session was on July 8, 1997.

According to plaintiff, she ceased medical treatment because she did not receive insurance.

Plaintiff's Alleged Injuries Attributed to the Accident

According to the Bill of Particulars, dated December 1, 1999, plaintiff suffered the following injuries as a result of the Accident:

- Neck and back spasm (lumbar sacral spine injuries)
- Neck and back pain

Plaintiff claims that, as a result of the Accident, she has sustained a permanent loss of the use of her back and neck. She claims that, due to back pain, she was restricted from delivering her two children naturally. In addition, plaintiff avers that the pain and limitations inhibit her from participating in daily activities, such as caring for her children, in that she cannot diaper, lift or pick up after them, and she cannot go grocery shopping. Plaintiff testified that, as a result of the accident, she was required to wear a neck brace for approximately one month. Plaintiff returned to school three weeks after the Accident and returned to her part-time employment three to four weeks after the Accident.

Plaintiff's Expert Witness

Dr. Chester L. Bogdan, a New York licensed chiropractor, examined plaintiff on July 20, 1997 and conducted a series of tests and measurements. He avers that he reviewed plaintiff's medical records dating back to the Accident (Affidavit of Dr. Chester L. Bogdan and report dated July 20, 2007 [Bogdan Aff.]). According to Dr. Bogdan's report (attached to the Bogdan Aff.), plaintiff "underwent physical therapy for two to three months" and saw "several doctors from 1999 to 2001, whose names [plaintiff] did not recall." Thereafter, in 2005, plaintiff "came under the care of Dr. Geraldini, a chiropractor" and in "2006, she saw Dr. Medici, an orthopedist and underwent physical therapy." With the exception of the uncertified copies of Lourdes

Hospital and 1997 physical therapy records, the court has not been provided with any other medical documentation referred to in Dr. Bogdan's report.

Based on his report, Dr. Bogdan conducted range of motion testing of the cervical and lumbar spine with the use of a goniometer. Based on this test method, Dr. Bogdan's examination found a 13 to 25 percent loss of motion in the cervical spine and a 17 to 25 percent loss of motion in the lumbar spine. Dr. Bogdan further found:

> "Pain was elicited in all ranges of motion in the cervical spine and lumbosacral spine. Cervical foraminal compression test was positive bilaterally. Soto-Hall test and Linder's test were positive in the cervical and lumbosacral spine respectively. Cervical distraction test was negative. Straight leg raise test was positive at 70 degrees on the right and 75 degrees on the left. Kempt's test, Milgram's test, and Bechterew's test were positive. Yeoman's test and Ely's test were negative. [Plaintiff] was able to heal and toe walk without difficulty. Palpation revealed spasm of the cervical, upper thoracic, and lumbosacral paraspinal muscles and trapezius muscles bilaterally. All reflexes tested in the upper and lower extremities were intact, graded 2+ bilaterally."

Dr. Bogdan concluded:

> "It is my opinion with a reasonable degree of certainty as a Doctor of Chiropractic that as a result of the accident, [Plaintiff] suffered trauma to her cervical, upper thoracic and lumbosacral spine causing the disruption of ligamentous and muscular tissue in these areas and irritation of the spinal nerves of the cervical, upper thoracic, and lumbosacral spine which are consistent with the history, review of records, and my examination findings. ... She has sustained a permanent partial disability of her cervical, upper thoracic and lumboscral spine. This has resulted in restricted motion and therefore limitation of use of these areas, interfering with her social and daily activities."

Defendants' Expert Witness

On September 26, 2001, Dr. Edward T. Habermann, Professor of Orthopedic Surgery, Albert Einstein College of Medicine, conducted an orthopedic examination on plaintiff. According to his evaluation and report, Dr. Habermann, reviewed the following records: Bill of Particulars dated January 25, 1997; health insurance claim form dated July 24, 1997, physical therapy records from Lourdes Hospital, and an Intake form from Community General Hospital of Sullivan Country, dated January 25, 1997. Based on his examination, Dr. Habermann opined

that, there were appropriate ranges of motion in all planes and all reflex testing was normal. He concluded that plaintiff had no present disability, but rather that she had a sprain of the cervical and lumbosacral spine which was resolved.

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact'" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (Pinto v Pinto, 308 AD2d 571 [2d Dept 2003], citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Pursuant to New York State Insurance Law § 5101 et seq., a party seeking damages for pain and suffering as a result of a motor vehicle accident, must establish that he or she has suffered a serious injury as defined under Insurance Law § 5101 (d). Serious injury is a threshold issue and is therefore a necessary element of plaintiff's prima face case (Licari v Elliott, 57 NY2d 230 [1982]; Pampafikos v Wander, 4 AD3d 152 [1st Dept 2004]; Reid v Brown, 308 AD2d 331, 332 [1st Dept 2003] [serious injury "is a threshold matter separate from the issue of fault").

On a motion for summary judgment in a personal injury action involving an automobile accident, a defendant bears the initial burden of showing that the plaintiff did not sustain a causally related serious injury (Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 352 [2002]). If defendants meet this threshold, the burden then shifts to plaintiff to present objective proof of a serious injury sufficient to raise a triable issue (Toure, 98 NY2d at 352). Section 5102 (d) of the Insurance Law defines a 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 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."

"Although the existence of a serious injury is often a jury question, 'the issue is one for the court, in the first instance where it is properly raised, to determine whether the plaintiff has established a prima face case of sustaining serious injury'" (Parreno v Jumbo Trucking, Inc., 40 AD3d 520, 523 [1st Dept 2007], quoting Licari, 57 NY2d at 237).

Defendants have successfully met the initial burden of establishing that plaintiff did not sustain a "serious injury" as defined by any of the three categories provided under Insurance Law § 5102(d) by providing Dr. Habermann's report, who found, based on an examination of plaintiff, as well as her medical records, that plaintiff had appropriate ranges of motion. Dr. Habermann further concluded that plaintiff suffered a sprain of the cerebral and lubrosacral spine which resolved.

Therefore, the court turns to whether plaintiff has raised a triable issue of fact under any of the three categories of the statutory definition of "serious injury".

Under the "90/180" category, plaintiff must: (1) demonstrate that her usual daily activities were restricted during 90 of the 180 days following the accident; and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities (see Toure, 98 NY2d at 347).

Here, plaintiff fails to substantiate any restrictions under the 90/180 category. Rather, plaintiff testified that she was able to return to school and to her part-time position three to four weeks after the Accident. This is insufficient (see Lloyd v Green, 45 AD3d 373 [1st Dept 2007]

[holding the plaintiff was able to perform usual and customary daily activities when the plaintiff admitted return to classes shortly after the alleged accident]; Candia v Omonia Cab Corp., 6 AD3d 641, 642 [2d Dept 2004] [the plaintiff's evidence was "insufficient with respect to the so-called "90/180 day" category, as he testified he returned to work albeit for partial shifts as a cab driver within two months of the accident and his only resulting limitation was his inability to drive his cab for a full shift"]; Medina-Santiago v Nojovits, 5 AD3d 253 [1st Dept 2004] [the plaintiff's "deposition testimony that he was unable to returning to work for four weeks and was confined to his home for two months falls short of establishing the statutory threshold"], citing Sherlock v Smith, 273 AD2d 95 [1st Dept 2000]).

Likewise, plaintiff fails to meet the permanent loss of a use of a body organ, member, function or system category. Specifically, plaintiff's expert admitted that plaintiff has not suffered any permanent, total loss of use of any nature (Hock v Aviles, 21 AD3d 786, 788 [1st Dept 2005]).

With respect to whether plaintiff has sustained a permanent consequential or significant limitation as a result of the Accident, plaintiff does not raise a triable issue. In order to establish a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, plaintiff must show more than a "minor, mild or slight limitation of use" (Grossman v Wright, 268 AD2d 79, 83-84 [2d Dept 2000] [citation omitted]). Here, plaintiff's alleged inability to perform daily tasks including grocery shopping, changing diapers and picking up after her children, does not rise to the level of a serious injury within the meaning of the statute (see Oberly v Bangs Ambulance, Inc., 96 NY2d 295, 297 [2001]; Gjelaj v Ludde, 281 AD2d 211, 212 [1st Dept 2001] ["plaintiff's affidavit and deposition testimony . . . that plaintiff has been unable to perform household chores since the accident, must be viewed as insufficient to establish a serious injury within the meaning of the statute"]).

Moreover, although plaintiff submits Dr. Bogman's report indicating range of motion restrictions with respect to her cervical and lumbar spine, plaintiff's proof is deficient because

she submits no objective medical proof that is contemporaneous with the accident showing any initial range of motion restrictions (see Lloyd v Green, 45 AD3d at 373 ["plaintiffs' submissions . . . lacked objective findings of restriction contemporaneous with the accident"] [citation omitted]; Vargas v Ahmed, 41 AD3d 328 [1st Dept 2007]; Lopez v Simpson, 39 AD3d 420, 421 [1st Dept 2007] [holding "the objectively tested range-of motion limitations submitted by [the] plaintiff were not assessed until two years after the accident, too remote to raise an issue of fact as to whether the limitations were caused by the accident"] [citations omitted]; see also Ifrach v Neiman, 306 AD2d 380, 380-381 [2d Dept 2003] [affirming dismissal of complaint where "plaintiff failed to submit any medical proof that was contemporaneous with the accident showing any initial range of motion restrictions in his spine"]).

Furthermore, although the tests conducted by Dr. Bogman were performed with a goniometer to measure the range of motion of plaintiff's cervical and lumbar spine, such measurements appear to have been mainly based upon plaintiff's subjective complaints of pain (see Parreno, 40 AD3d at 523-524; Nelson v Amicizia, 21 AD3d 1015, 1016 [2d Dept 2005] [citations omitted].

Accordingly, the motion for summary judgment dismissing the complaint is granted (Pampafikos, 4 AD3d at 153). In light of the court's decision, it need not address the remaining arguments raised in the motion.

Based on the foregoing, plaintiff's cross motion is denied as moot.

Conclusion

Accordingly, it is,

ORDERED that the motion and cross-motions for summary judgment on the issue of "serious injury" are granted and the Complaint, as well as any cross claims, are dismissed in their entirety with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion by plaintiff Haydee Lora is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 14, 2008

ENTER:

Deborah Kaplan

Deborah Kaplan J.S.C.

DEBORAH A. KAPLAN
J.S.C.

FILED
APR 09 2008
COUNTY CLERK'S OFFICE
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