

Soler v C.E. Escobar-Mejia

2010 NY Slip Op 33780(U)

August 23, 2010

Supreme Court, Suffolk County

Docket Number: 07-33698

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 6-15-10
ADJ. DATE 8-3-10
Mot. Seq. # 001 - MD

-----X	:	
LILLY SOLER,	:	SIBEN & SIBEN, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
	:	ROBERT P. TUSA, ESQ.
C.E. ESCOBAR-MEJIA and MARIA MADRIO,	:	Attorney for Defendants
	:	898 Veterans Memorial Highway, Suite 320
Defendants.	:	Hauppauge, New York 11788
-----X	:	

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-20; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, C.E. Escobar-Mejia and Marta Madrid s/h/a Maria Madrio, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that the injuries claimed by the plaintiff, Lilly Soler, do not meet the serious injury threshold, is denied.

This is an action for damages for personal injuries sustained by the plaintiff, Lilly Soler, arising out of a motor vehicle accident which occurred on June 1, 2007, on Wyandanch Avenue, 300 feet east of Mount Avenue, Town of Babylon, County of Suffolk, State of New York, while she was operating her vehicle when it came into contact with the vehicle operated by Maria Madrio and owned by C.E. Escobar-Mejia.

As a result of this automotive collision, Lilly Soler claims that she sustained a herniated disc at L4-5 which abuts the ventral thecal sac; lumbar myofascitis; lumbar spine sprain; thoraco-lumbar region dysfunction; herniated disc at C5-6 which effaces the ventral subarachnoid space; cervico-thoracic region dysfunction; cervical myofascitis; cervical radiculopathy; cervical spine sprain; thoracic myofascitis; internal derangement left shoulder; bilateral shoulder sprain; and chest wall contusions.

The defendants claim entitlement to an order granting summary judgment dismissing the complaint, asserting the plaintiff, Lilly Soler, did not sustain serious injuries sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

The 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 from the case.

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, supra. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact,” CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989] and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]. Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

Pursuant to Insurance Law §5102(d), “ ‘[s]erious injury’ means 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.”

The term “significant” as it appears in the statute has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment, Licari v Elliot, 57 NY2d 230 [1982].

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 [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 a specific percentage of the loss of range of motion must be ascribed 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, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]. A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute, Licari v Elliott (supra).

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 [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 [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 [1992].

In support of this motion the defendants have submitted, inter alia, an attorney’s affirmation; a copy of the summons and complaint; defendant’s verified answer; a copy of the verified bill of particulars; a partial copy of a transcript of an examination before trial of Lilly Soler dated June 15, 2009; an uncertified copy of the

plaintiff's Good Samaritan Hospital record; various uncertified treatment statements; copies of the sworn reports of Robert Isreal, M.D., orthopedist, dated November July 15, 2009; Allen Rothpearl, M.D., radiologist, dated April 14, 2008, and radiology reports dated November 26, 2008 for the cervical and lumbar spines by Sheldon Feit, M.D., radiologist.

The plaintiff opposes this motion by submitting, inter alia, an attorney's affirmation; a complete copy of the transcript of the examination before trial of Lilly Soler; medical records of Bernard Sengstack, DC, PC ; copy of the initial comprehensive physiatric consultation of Eleman Physician, P.C., Professional Healthcare records; MRI reports of the cervical spine dated July 9, 2007 and lumbar spine dated July 9, 2007. It is noted that none of the reports and records are not certified or in admissible form.

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), see, Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyster, 79 NY2d 955 [1992]. Here, defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d), see, Agathe v Tun Chen Wang, 33 AD3d 737 [2nd Dept 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2nd Dept 2006].

Robert Israel, M.D. conducted an independent orthopedic examination of the plaintiff on July 15, 2009 and set forth his range of motion findings upon examination of the plaintiff's cervical and lumbar spine, bilateral shoulders, right hand and left leg and compared those findings to the normal ranges of motion. However, he fails to set forth the method employed to obtain such measurements, such as the goniometer, inclinometer or arthroidal protractor, see, Vomero et al v Gronrous, 19 Misc3d 1109A [Supreme Court of New York, Nassau County 2008]; Martin et al v Pietrzak, 273 AD2d 361 [2nd Dept 2000], leaving it to this Court to speculate how the measurements were determined. He reviewed the MRI of the lumbosacral spine of July 8, 2007 and the cervical spine of July 6, 2007, but does not opine as to the findings. He does, however, find a cause and effect relationship between the accident and his diagnoses of resolved sprains of the cervical spine, lumbar spine, bilateral shoulder, right hand and left leg.

The radiology reports by Dr. Allen Rothpearl make findings of cervical disc bulges at C5-6, and lumbar disc bulge at L4-5 as well as degenerative disc changes at C2-3, C3-4, C5-6 and C6-7 and L4-5. Such reports are at variance to the MRI reports by Dr. Sheldon Feit submitted by the defendants, which reports reveal ventral epidural defects/disc bulges at the C5-6 and C6-7 levels and lumbar disc bulge at L4-5 compressing on the thecal sac and slightly impinging on the traversing L4 nerve roots bilaterally, again leaving it to this court to speculate as to the findings.

The moving defendants have not submitted a report from a neurologist concerning the plaintiff's complaints of tingling in her legs, leaving this court to speculate as to the results of any independent neurology examination and the significance of the L4-5 bulging disc compressing on the thecal sac and slightly impinging on the traversing L4 nerve roots bilaterally, see, Browdame v Candura et al, 25 AD3d 747 [2nd Dept 2006].

Defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident, Blanchard v Wilcox, 283 AD2d 821 [3rd Dept 2001]). Lilly Soler testified that she is a medical assistant at the Martin Luther King Clinic in Wyandanch and was involved in a two-vehicle accident on June 1, 2007. She sought medical care at Good Samaritan Hospital emergency room

for pain in her neck, left shoulder, lower back, and legs and her entire body was shaking. She felt tingling in her legs. She received follow-up care and physical therapy. MRI's were taken of her neck, left shoulder and back. She was out of work for one month following the accident and returned to lighter duties handling less patients than she did prior to the accident. This factual issue concerning the plaintiff's claimed limitations during the 180 days following the accident also precludes summary judgment. Therefore, the burden has not shifted to the plaintiff to raise a triable issue of fact to preclude summary judgment (CPLR 3212[b]; Zuckerman v City of New York, supra).

Accordingly, motion (001) for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is denied.

Dated: Aug 23, 2010

Ralph J. Colitti
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION