Agudio v Cooley

2011 NY Slip Op 32101(U)

July 7, 2011

Supreme Court, Suffolk County

Docket Number: 9546/2007

Judge: Paul J. Baisley

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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MARYANN AGUDIO, MELVIN AGUDIO and JANIECE ROBINSON, an infant by her mother and natural guardian, DENISE ROBINSON,

Plaintiffs,

-against-

MARCIA COOLEY and WARNER COOLEY,

Defendants.

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INDEX NO.: 9546/2007
CALENDAR NO.: 200902696MV
MOTION DATE: 7/29/2010
MOTION NO.: 001 MD; 002 MD

COPY

PLAINTIFFS' ATTORNEYS:
GRUNDFAST & GRUNDFAST
207 Hallock Road, Suite 207
Stony Brook, New York 11790

SCALZI & NOFI, PLLC
150 Broad Hollow Road, Suite 320
Melville, New York, 11747

DEFENDANTS' ATTORNEY:
ROBERT P. TUSA, ESQ.
898 Veterans Memorial Highway
Suite 320
Hauppauge, New York 11788

Upon the following papers numbered 1 to 38 read on this motion and cross-motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-17 : Notice of Cross Motion and supporting papers 18-27 : Answering Affidavits and supporting papers 28-30; 31-32; 33-34 : Replying Affidavits and supporting papers 35-36; 37-38 : ~~Other~~ ___ : (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff on the counterclaim, Maryann Agudio, pursuant to CPLR 3212 and New York Insurance Law § 5102 for summary judgment on the issue of liability and on basis that the infant plaintiff failed to sustain a serious injury as defined by Insurance Law §5102(d), is denied; and it is further

ORDERED that this motion (002) by the defendants, Marcia Cooley and Warner Cooley, pursuant to CPLR 3212 and New York Insurance Law §§ 5102 and 5104 for summary judgment dismissing the complaint asserted by Maryann Agudio, Melvin Agudio and Janiece Robinson, an infant by her mother and natural guardian Denise Robinson on the basis that the plaintiffs have failed to sustain a serious injury as defined by Insurance Law §5102(d), is denied.

This is an action to recover damages personally for injuries allegedly sustained by the plaintiffs, Maryann Agudio and Janiece Robinson, an infant by her mother and natural guardian Denise Robinson, on April 4, 2004 arising out of an automobile accident which is alleged to have occurred on Carleton Avenue at or near the intersection with Union Boulevard, County of Suffolk, State of New York. The infant plaintiff, then eight years old, was a passenger in the vehicle operated by Maryann Agudio, when the Agudio vehicle and the vehicle owned by Marcia Cooley and operated by Warner Cooley allegedly came into contact. A derivative claim is asserted on behalf of Melvin Agudio.

An answer was served by the defendants Marcia Cooley and Warner Cooley with a counterclaim asserted against Maryann Agudio wherein they seek judgment over against her based upon her culpable conduct in the occurrence of the accident. A reply was served in response thereto.

In motion (001), the plaintiff on the counterclaim, Maryann Agudio, seeks summary judgment dismissing the complaint of the defendants on their counterclaim premised upon her liability and further seeks summary judgment on the basis that the infant plaintiff has not sustained a serious injury within the meaning of Insurance Law section 5102. In support of this motion, Agudio has submitted, inter alia, an attorney's affirmation; a copy of the pleadings, answer, counterclaim and reply and the plaintiffs' verified bill of particulars; copies of the transcripts of the examinations before trial of Maryann Agudio, Janiece Robinson, Denise Robinson, and Warner Cooley dated August 17, 2009; and a copy of the reports for the independent orthopedic examination performed on Janiece Robinson by Robert Israel M.D. dated September 25, 2009.

The infant plaintiff opposes the motion of the plaintiff Maryann Agudio on the counterclaim with an attorney's affirmation.

In motion (002) the defendants seek dismissal of the complaint on the basis that the plaintiffs' injuries do not meet the threshold requirement imposed by Insurance Law section 5102 and supports the motion with an attorney's affirmation; a copy of the pleadings, answer, and counterclaim and the plaintiffs' verified bill of particulars; an uncertified copy of the Southside Hospital emergency department record for Janiece Robinson; copies of the transcripts of the examinations before trial of Maryann Agudio, Janiece Robinson, and Denise Robinson dated August 17, 2009; a copy of the report of Robert Isreal dated September 25, 2009 for the independent orthopedic examination of Janiece Robinson; an uncertified copy of the Southside Hospital emergency department record of Maryann Agudio; uncertified copy of a radiology report of the thoracic spine of Maryann Agudio; two uncertified pages from an unknown provider relative to Maryann Agudio; uncertified copy of one page of Platinum Health Physical Therapy record dated 4/14/04; one page uncertified copy of Qi-Health Accupuncture for Maryann Agudio; and a copy of the report of Robert Israel dated September 25, 2009 for the independent orthopedic examination of Maryann Agudio.

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, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 538 NYS2d 843 [1979]) 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, 435 NYS2d 340 [1981]). Summary judgment shall only be granted 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, 416 NYS2d 790 [1979]).

LIABILITY

Maryann Agudio testified at her examination before trial to the extent that she is the grandmother of Janiece Robinson and mother of Denise Robinson. She was involved in a motor vehicle accident on April 5, 2004 at about 2:30 or 3:00 in the afternoon. Janiece Robinson was a passenger in the vehicle as was her grandson, Michael Robinson, and both were seated in the rear passenger seat. She was operating her 1999 Escort on Carleton Avenue in a southbound direction on the one southbound travel lane. Visibility was good and traffic was light. She stopped her vehicle at a red traffic light at the intersection of Carleton Avenue with Union Boulevard. While her vehicle was stopped, she observed the defendant's stopped vehicle behind her. About five to ten seconds passed from when she observed the defendant's vehicle behind her until her vehicle was struck in the rear by the defendant's vehicle, causing her vehicle to jerk forward. The light did not change color and was still red when she claims her vehicle was struck. After the impact she turned onto Union Boulevard and pulled over, checking her grandchildren. She then went over to the defendant's vehicle and the male driver told her he was in a hurry because he was going to school to pick up his son.

Janiece Robinson testified at her examination before trial that she was born July 5, 1995 and was eight years old at the time of the accident on April 5, 2004. Her grandmother, Maryann Agudio was driving the car. She was seated in the left rear passenger seat and was sleeping when the accident occurred. Her one or two year old cousin Michael was also a passenger in the rear, seated in a car seat. She first became aware that they had an accident when the car got hit, causing her to move forward and to wake up.

Warner Cooley testified at his examination before trial that on April 5, 2004 at about 3:00 p.m. he was operating a Chrysler 300N, driving behind the plaintiff's vehicle on Carleton Avenue in a southbound direction. He testified that he did not remember seeing the plaintiff's car until he was at the intersection where the accident occurred. When he saw the plaintiff's vehicle, he did not remember if it was moving or stopped, but then stated he did observe that it was stopped for a red light at the intersection. He stopped immediately behind her car for a short time. When the traffic light turned green, the plaintiff let several cars proceed to make a left turn in front of her. She moved forward slightly and stopped and the traffic light turned red again. They remained stopped, then the light turned green again. The next thing he remembered was that she got out of her car. He then got out of his vehicle and asked her if she was ok. She suggested that they turn onto Union to get out of the road. He did not remember if she told him that he had contacted her vehicle, but asked her if she was ok because he thought that "something was strange." He then stated that there was no contact between their two vehicles. He then made the right turn onto Union and got out of his car again and asked her again if she was ok and she replied that she was. He did not see anyone else in her vehicle as he looked into the plaintiff's back window through the corner of the window from behind her car. They did not call the police and both left the scene together. He went to his daughter's school to pick her up. He did not notice any damage to the rear of the plaintiff's car or to the front of his car, however, after the accident he took his car to Allstate and was given an estimate for the cost of repairs to the front of his car. He did not consider his car damaged at any time prior to this incident but then testified that he believed Allstate gave him an estimate for repairs for damage which occurred prior to the incident.

Based upon the foregoing, it is determined that Maryann Agudio has not established *prima facie* entitlement to summary judgment dismissing the counterclaim as there are factual issues concerning whether or not an impact occurred. There are also credibility issues which require determination by the trier of fact (*see*, *Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]; *Lalla v Connolly*, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]).

Accordingly, that part of motion (001) which seeks summary judgment dismissing the counterclaim on the issue of liability is denied.

SERIOUS INJURY

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, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (*Rodriquez v Goldstein,* 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury,* 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova,* 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

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 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, 746 NYS2d 865 [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, 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]).

In motion (001), Maryann Agudio seeks dismissal of that part of the complaint on the basis that the infant plaintiff did not sustain a serious injury. It is determined that Ms. Agudio has not established prima facie entitlement to such a determination.

The defendants in motion (002) also seek dismissal of the complaint on the basis that Maryann Agudio and the infant plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102. It is determined that the defendants have not established prima facie entitlement to summary judgment on the basis that neither Agudio nor the infant plaintiff sustained a serious injury.

Both Agudio and the defendants have submitted the identical medical report of Robert Israel M.D. concerning his independent orthopedic examination of the infant plaintiff. The defendants have submitted a report of Robert Israel, M.D. concerning his independent examination of Maryann Agudio, in addition to other records which are not in admissible form to be considered on this motion.

Maryann Agudio claims in her bill of particulars that as a result of the within accident she sustained, inter alia, cervical radiculopathy; lumbosacral radiculopathy; myospasm of the cervical and lumbar paraspinals; thoracic sprain/strain; whiplash injury of the neck; lumbar spine sprain/strain; flexion/extension injury of the cervicothoracolumbar spine/internal cervcicothoracolumbar derangement; cervicolumbar intervertebral disc syndrome; thoracic myalgia; functional decline; upper/mid/lower back strain; tenderness of the spine at the C2-C6, T1-T12, L2-L5; tenderness left elbow; decreased range of motion in the neck, lumbar and thoracic spine and left elbow; pain in anterior chest wall, interscapular spine; trigger areas in shoulder blades and sacroiliac joints; wide based gait with slow cadence; headaches; and accupuncture

It is claimed that as a result of the accident, the infant plaintiff, Janiece Robinson, sustained, inter alia, cervical radiculopathy; lumbosacral radiculopathy; internal cervicothoracolumbar derangement; cervicolumbar intervertebral dis syndrome; myofascitis; post concussion lightheadedness; cervical spine strain/sprain; whiplash injury of the neck; cervicalgia; lumbar spine sprain/strain; low back strain; right sided muscle tenderness of the neck; decreased range of motion of the cervical spine; tenderness and pain in the neck, thoracic and lumbar spine, and right shoulder with decreased range of motion; trigger areas in the shoulder blades and sacroiliac joints; difficulty sleeping and ambulating due to pain; dizziness; headaches; and bilateral shoulder pain.

Maryann Agudio testified that later that night after the accident, she began to experience discomfort in her lower back and neck. She gave a history of prior back discomfort for which she was treated by a chiropractor prior to 1999 "for everything." She also had a prior back injury in

1999 when she was involved in an motor vehicle accident. In 2002, she was cleaning the bus she drove for Huntington Coach, and when she turned a certain way, she experienced discomfort in her back for which she filed a Workers' Compensation claim and received a $30,000 settlement for a partial disability due to her back injury. She worked for Huntington Coach for about one month after the injury. She also had a prior neck injury in 2002 but could not remember if it occurred at the same time she injured her back. In 2002, she began working for Walmart about twenty hours a week, just prior to her Workers' Compensation case settling, but never declared in her application to Walmart that she was partially disabled due to her back. Relative to the injuries claimed in the instant action, she went to Southside Hospital the evening of April 5, 2004, was x-rayed and discharged. About a week later, she began treating for about one month at the Brentwood Clinic, about two or three times a week until about May 4, 2004. She also began treating with Dr. Krumholz, by whom she previously was seen for chiropractic treatment, about three times a week for a couple of months. After the subject accident, she was not confined to bed or home and thought she might have missed a month from work at Walmart, but was cleared to return to work until about June 2004 when she moved to Huntington. She then began her employment as a part-time cashier at King Kullen in Huntington Station in about 2007 for about two and one half years. She did not indicate on her King Kullen application that she had any restrictions or limitations to any part of her body. She testified that there were no activities that she was engaged in before the date of this accident that she did not fully resume ninety days later.

Janiece Robinson testified to the effect that after the accident that she began to feel pain in her lower back and went to the hospital where she was examined and discharged. Thereafter, she went for physical therapy for her back and was treated with "hot and cold" and adjustments. She never had pain to her back prior to the accident. She was a fourth grade student at the time of the accident, and due to the pain in her back, she was not able to participate in gym for one month. There were no activities that she was able to do prior to the accident that she was unable to resume six months after the accident.

Denise Robinson testified that her daughter was also given TENS treatments by Dr. Krumholz to treat her back pain and the pain her daughter experienced in the back of her head. Dr. Krumholz treated her for one to two months following the accident, two to three times a week.

The report of Robert Israel M.D. concerning his independent orthopedic examination of the infant plaintiff on September 25, 2009, sets forth that he ascertained the range of motion of the infant plaintiff's cervical and lumbar spine and both shoulders, and compared his findings to the normal ranges of motion, as well as performing additional testing, and has determined the findings to be normal.

The report of Robert Israel M.D. concerning his independent orthopedic examination of the Maryann Agudio on September 25, 2009, sets forth that he ascertained the range of motion of the plaintiff's lumbar spine, and compared his findings to the normal ranges of motion, as well as performing additional testing, and has determined the findings to be normal.

However, Dr. Israel has not set forth in either of his reports the objective method employed to obtain such measurements, such as the goniometer, inclinometer or arthroidal protractor, (see, *Vomero et al v Gronrous*, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court of

New York, Nassau County 2008]; *Martin et al v Pietrzak*, 273 AD2d 361, 709 NYS2d 591 [2nd Dept 2000], leaving it to this court to speculate as to how he determined such ranges of motions when examining either the infant plaintiff or Maryann Agudio.

Dr. Isreal did not conduct examination of Agudio's cervical spine, thoracic spine, left elbow or scapulars although these injuries were set forth in the bill of particulars.

Additionally, although both the infant plaintiff and Maryann Agudio have claimed cervical and lumbar radiculopathy as injuries, no reports have been submitted by any of the moving parties from a neurologist to rule out such radicular injury to either plaintiff, (see, *Browdame v Candura et al*, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006].

Defendants' examining physician did not examine the infant plaintiff or Agudio 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 either 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, 725 NYS2d 433 [3rd Dept 2001]).

Here, the moving parties have failed to meet the *prima facie* burden of showing that the plaintiff and infant plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, *McFadden v Barry*, 63 AD3d 1120, 883 NYS2d 83 [2nd Dept 2009]; *Kelly v County of Suffolk*, 62 AD3d 837, 878 NYS2d 636 [2nd Dept 2009]); and do not exclude the possibility that either the plaintiff or the infant plaintiff suffered a serious injury in the accident (*see*, *Peschanker v Loporto*, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). To prevail on the motion for summary judgment dismissing the complaint, the defendants were 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 Renta A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]. Here, the defendants failed to satisfy that burden of establishing, prima facie, that plaintiffs did not sustain "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, *Agathe v Tun Chen Wang*, 33 AD3d 737, 822 NYS2d 766 [2nd Dept 2006]; *see also*, *Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Inasmuch as the moving parties have failed to establish their *prima facie* entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); *Krayn v Torella*, 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motions (001) and (002) for summary judgment on the basis the plaintiffs did not sustain a serious injury are denied.

Dated: July 7, 2011

PAUL J. BAISLEY, JR.

J.S.C.