

**Laborde v Valentin**

2012 NY Slip Op 30093(U)

January 11, 2012

Supreme Court, Queens County

Docket Number: 14459/210

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

CAROLYN LABORDE,	Index No.: 14459/210
Plaintiff,	Motion Date: 12/08/2010
- against -	Motion No.: 16
JOSE VALENTIN,	Motion Seq.: 2
Defendant.	

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendant, JOSE VALENTIN, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of CAROLYN LABORDE on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10
Reply Affirmation.....	11 - 12

This is a personal injury action in which Plaintiff, Carolyn Laborde, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on December 6, 2009, on the westbound span of the Brooklyn Bridge between Brooklyn and Manhattan, New York, New York.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Russell J. McBrearty, Esq; a copy of the pleadings;

plaintiff's verified bill of particulars; the affirmed medical reports of orthopedist Dr. Edward Crane; the examination before trial of plaintiff Carolyn LaBorde taken on February 24, 2011; the affirmed radiology reports of Dr. Douglas Noble; the emergency room records from Brooklyn Hospital Center from 12/6/09; unaffirmed MRI reports from Dr. Shapiro; an operative report from Dr. Freeman regarding left knee arthroscopy on 4/9/10 for torn left knee meniscus; and unaffirmed medical records regarding the plaintiff's prior accident of June 21, 2008 in which she claimed labral tear of the left shoulder as well as herniated disc at L5-S1, C6-7 and bulging discs at C2-3 and C7-T1.

In her verified bill of particulars, plaintiff, age 51, states that as a result of the accident she sustained, inter alia, a tear of the posterior horn of the medial meniscus of the left knee necessitating arthroscopic surgery; herniated disc at L4-5 with impingement; herniated disc at L5-S1; herniated disc at C3-4, C4-5 and C6-7 with impingement. In her second supplemental bill of particulars the plaintiff states that the injuries to her cervical and lumbar spine are a reactivation, exacerbation and/or aggravation of a prior condition. Plaintiff states that as a result of the accident she was confined to bed and home for a period of 18 weeks and intermittently and partially to date.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 her examination before trial taken on February 24, 2011, plaintiff testified that she was involved in a prior accident on June 21, 2008 in which the vehicle she was operating was struck in the rear while she was stopped at a traffic signal. In the prior accident she sustained injuries to her left shoulder, neck and back. She received physical therapy for six months after that accident and underwent arthroscopic surgery in October 2008 for a labral tear she sustained in her left shoulder in the prior accident. Plaintiff testified that after the accident in December 2009 she felt pain to her left knee, left elbow, left shoulder and her neck. She left the scene in an ambulance which

transported her to the emergency room at Brooklyn Hospital where she was treated and released the same day. Plaintiff stated that a week or two later she sought treatment at New York Rehab where she was initially examined by Dr. Levy and referred for MRIs. She received treatments 4 or 5 times per week. She was also referred to Dr. Lattuga in March 2010 for pain relief. Dr. Lattuga gave the plaintiff epidural injections in her neck and back. She was also referred to Dr. Braunstein for headaches and had an MRI of the head. That MRI was reportedly normal. She also saw Dr. Freeman who performed arthroscopic surgery on the plaintiff's left knee in early 2010. She stated she still has physical therapy once a week at NY Rehab. She stated that as a result of the 2008 accident and the instant accident she can no longer walk, drive, clean or cook.

Defendant also submits the affirmed medical report of Dr. Edward S. Crane, an orthopedic surgeon, retained by the defendant. Dr. Crane examined Ms. Laborde on May 2, 2011 and reviewed her medical treatment records from the instant accident as well as records from the prior accident of 2008. Plaintiff presented with pain to her knees, left shoulder, neck and lower back she told Dr. Crane she reinjured her left shoulder, neck and lower back. Dr. Crane performed range of motion testing and provided the plaintiff's degree of rotation of her cervical spine, left shoulder, lumbar spine and left knee. He provided a separate chart which gives values for normal range of motion. He stated, in conclusion, that he "found no objective evidence of any orthopedic residuals from the alleged accident of 12/6/09 except possibly the arthroscopic portal scars at her left knee. She had an excellent result following that left knee surgery, and no further treatment is indicated. There is no objective evidence that the accident of 12/6/09 caused any fundamental change in her pre-accident condition in regard to her neck, left shoulder or lower back. As a result of the incident of 12/6/09, she does not require any further treatment and her prognosis is excellent."

Defendant also submits the affirmed radiological reports of August 31, 2011 and September 1, 2011 of Dr. Noble who states that he reviewed plaintiff's MRI studies from 2001, 2008 and 2009 and reported that although the plaintiff showed evidence of herniated discs in the cervical, lumbar and thoracic spines there were no changes referable to the 2009 accident in the cervical spine, lumbar spine, thoracic spine, left shoulder, left knee and right knee.

Defendant's counsel contends that the medical report of Drs. Noble and Crane are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential

limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney, Irving Mandell, Esq., submits his own affirmation as well as the affirmation of Dr. Freeman an orthopedic surgeon who operated on the plaintiff to repair a torn meniscus of the left knee on April 9, 2010. Dr. Freeman states that the condition he treated was causally related to the accident of 12/6/09 and not from preexisting or degenerative causes. Plaintiff also submits an affirmation from Dr. Givoanni Angelino who treated the plaintiff with epidural steroid injections in the lumbar and cervical spines. In addition the plaintiff submits an affirmation from Dr. Lauren Stimler-Levy.

Dr. Stimler-Levy states that she first examined the plaintiff on December 14, 2009, with respect to her accident of December 6, 2009. At that time she found significant limitations of range of motion of the plaintiff's left knee, left shoulder, right shoulder, cervical spine, and lumbar spine which were quantified and compared to normal. Dr Stimler-Levy continued treatments of the plaintiff and most recently examined the plaintiff on September 26, 2011. On that date the plaintiff still exhibited significant range of motion limitations of the left knee, cervical spine and lumbar spine. Dr. Stimler-Levy concludes that the accident of December 6, 2009 aggravated, reactivated and exacerbated the herniated disc condition of the cervical and lumbar spine causing a significant limitation of motion. In addition, she concludes that the plaintiff's limitations of range of motion of the left knee were causally related to the accident of December 6, 2009. In addition Dr. Stimler-Levy states that the plaintiff sustained permanent partially disabling injuries to her left knee, neck and lower back which were causally related to the accident in question.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not

serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

The plaintiff's bill of particulars clearly sets forth that the plaintiff was totally disabled, and confined to her home for 18 weeks following the accident. Dr. Crane defendant's examining physician, mentioned in his report that he reviewed the bill of particulars, however, he did not relate his findings to the 90/180 category of serious injury for the period of time immediately following the subject accident. Thus, the defendant's motion papers failed to adequately address the plaintiff's claim, which was set forth in the bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (see Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Udochi v H & S Car Rental Inc., 76 AD3d 1011 [2d Dept. 2010]; Strilcic v Paroly, 75 AD3d 542 [2d Dept. 2010]; Bright v Moussa, 72 AD3d 859 [2d Dept. 2010]; Encarnacion v Smith, 70 AD3d 628 [2d Dept. 2010]; Negassi v Royle, 65 AD3d 1311 [2d Dept. 2009]; Alvarez v Dematas, 65 AD3d 598 [2d Dept. 209]; Smith v Quicci, 62 AD3d 858 [2d Dept. 2009]). Therefore, the defendant failed to 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.

In any event, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Dr. Shapiro and Dr. Stimler-Levy attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]). Dr Stimler-Levy also opined that the plaintiff was totally disabled from her usual activities for a period of 16 weeks. Thus, plaintiff has presented competent medical evidence sufficient to create issues of fact as to whether she has suffered a "serious injury" under the " 90/180" category set forth in Insurance Law § 5102(d).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion of the defendants for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 11, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**