

Carola v Rodriguez

2012 NY Slip Op 30523(U)

February 14, 2012

Sup Ct, Nassau County

Docket Number: 004284/10

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

**Present:
HON. F. DANA WINSLOW,**

**Justice
TRIAL/IAS, PART 3
NASSAU COUNTY**

SUZAN CAROLA,

Plaintiff,

MOTION DATE: 12/14/11

-against-

**MOTION SEQ. NO.: 003
INDEX NO.: 004284/10**

**RAFAEL RODRIGUEZ and TERRANCE P.
O'NEILL,**

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Plaintiff, age 40, alleges that on May 29, 2008 at approximately 4:40 p.m., she was the owner and operator of a motor vehicle which came into contact with a vehicle owned and operated by defendant RAFAEL RODRIGUEZ ("RODRIGUEZ"). The accident occurred on Route 24 (Hempstead Turnpike) at or near its intersection with Merritts Road, Farmingdale (the "May 2008 Accident"). Plaintiff's action against defendant TERRANCE P. O'NEILL ("O'NEILL") arose out of a separate motor vehicle accident which occurred on October 29, 2008. Plaintiff has settled her claims against O'NEILL only. RODRIGUEZ now moves for an order dismissing plaintiff's complaint pursuant to CPLR §3212 on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d). The motion is determined as follows.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of his motion for summary judgment, RODRIGUEZ submits (1) an affirmed report of examination, dated February 17, 2011, of orthopedist Vartkes Khachadurian, MD of Franklin Orthopaedic Group, covering an examination of that date; and (2) the deposition of plaintiff conducted on November 2, 2010.

Dr. Khachadurian reported that physical examination of plaintiff's cervical and lumbar spines revealed normal range of motion results, comparing the results to norms. Dr. Khachadurian's other reported findings, which specified the orthopedic tests performed, also revealed normal findings. Dr. Khachadurian diagnosed (1) "cervical sprain superimposed on reported degenerative disc disease with no clinical evidence of neuromotor deficits, no clinical evidence of herniated discs, radiculitis, or radiculopathy. Resolved."; and (2) "lumbar sprain with no clinical evidence of herniated discs, radiculitis, or radiculopathy. Resolved."

Plaintiff testified at her deposition that after the May 2008 Accident, she did not take any time off from her job as a teacher but was limited in some of her work duties, such as lifting or moving heavy things, and she could not resume her usual activities of yoga, running, jogging or hiking. Plaintiff testified that she sustained injuries to her neck and back, among other areas, in a subsequent motor vehicle accident on October 29, 2008, and a prior motor vehicle accident in 1990, which resulted in a two week hospitalization. Plaintiff also stated that she sustained back injuries in an accident in 2005 caused by "general work stuff". Plaintiff testified that she did not sustain any injuries as a result of a motor vehicle accident on September 3, 2009, but that a school altercation on March 10, 2006, caused injuries to an elbow and shoulder. She treated with chiropractors as a result of the May 2008 Accident and her accidents in October 2008, 2005 and 1990, and with an orthopedist after her accidents in 1990 and May 2008. The Court notes that in contradiction to plaintiff's deposition testimony, plaintiff's treating orthopedist, Thomas J. Dowling, MD states in his affirmation that plaintiff may have aggravated her neck injuries in the September 2009 accident. Plaintiff testified that she is still treating with chiropractors named Lockie and Mowachek.

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The Court finds that the report of RODRIGUEZ's examining physician is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, to satisfy the Court that an "objective basis" exists for his opinion. Accordingly, the Court finds that RODRIGUEZ has made a *prima facie* showing, that plaintiff SUZAN CAROLA did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyster**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) certified records from New Island Hospital covering an emergency room visit on the day of the May 2008 Accident; (2) an affidavit of chiropractor Russell M. Lamboy, D.C., sworn to on November 14, 2011, annexing and incorporating a copy of his treatment records; (3) an affirmation of orthopedist Robert J. Lippe, MD, dated November 14, 2011, annexing and incorporating a copy of his treatment records; (4) an affirmation of radiologist George Cavaliere, MD, affirming an MRI of plaintiff's cervical spine conducted on July 1, 2008; (5) an affirmation of osteopath Arjang Abbasi, DO, dated November 30, 2008, annexing and incorporating a copy of his treatment records; (6) an affirmation of orthopedist Thomas J. Dowling, MD, dated November 14, 2006, annexing and incorporating a copy of his treatment records; (7) an affidavit of chiropractor Richard E. Seibert, DC, sworn to on November 14, 2011; and (8) an affidavit of plaintiff, sworn to on November 15, 2011.

The Court finds that the totality of the medical evidence is sufficient, although just barely, to raise an issue of fact as to whether plaintiff suffered a serious injury, under the permanent consequential or significant limitation categories of **Insurance Law §5102(d)** as a result of the May 2008 Accident. See **Perl v. Meher**, 18 NY3d 208; **Kim v. Emkay Inc. Trust**, 2012 WL 234094; **Franco v. Supreme Poultry, Inc.**, 2012 WL 234110; **Wright v. Simpson**, 90 AD3d 1035. The Court finds, however, that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented her from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

The MRI of plaintiff's cervical spine reveals a disc herniation at C5-6, and disc bulging at multiple levels. The Court notes that the reports of Drs. Lippe and Dowling raise an issue of fact as to whether plaintiff suffered from significant reduced ranges of motion of her cervical and lumbar spines. Drs. Lippe and Dowling also provide explanations for the gap in treatment and for the effect, if any, of plaintiff's prior and subsequent accidents on the injuries she allegedly sustained as a result of the May 2008

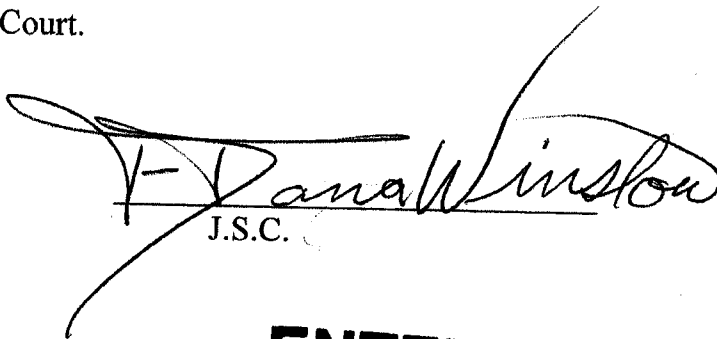
[* 4]
Accident. Although RODRIGUEZ argues, in view of plaintiff's other accidents and findings of degeneration, that plaintiff's injuries were not caused by the May 2008 Accident, the Court finds that plaintiff's submissions are sufficient to raise an issue of fact as to causation. See **Howell v. Skody**, 2012 WL 234102; **Muniz v. Singh**, 90 AD3d 1004. The Court makes this finding notwithstanding the fact that much of the evidence submitted by plaintiff is without probative value.

On the basis of the foregoing, it is

ORDERED, that the motion by defendant RAFAEL RODRIGUEZ for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff SUZAN CAROLA on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

This constitutes the Order of the Court.

Dated: Feb 14, 2012


J.S.C.

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