Russo v McCollin

2012 NY Slip Op 30606(U)

February 29, 2012

Supreme Court, Suffolk County

Docket Number: 09-38726

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 09-38726
CAL. No. 11-01453MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 10-20-11
ADJ. DATE 1-17-12
Mot. Seq. # 001 - MD

CHRISTA RUSSO,

Plaintiff,

- against -

ANTON MCCOLLIN and GEORGIANA PHILLIPS,

Defendants.

MATTHEW A. GLASSMAN, ESQ.
Attorney for Plaintiff
1227 Main Street, 3rd Floor
Port Jefferson, New York 11777

CHEVEN, KEELY & HATZIS, ESQS.
Attorney for Defendants McCollin and Phillips
40 Wall Street, 12th Floor
New York, New York 10005

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Anton McCollin and Georgiana Phillips, pursuant to CPLR §3212 for summary judgment dismissing the complaint because the plaintiff Christa Russo has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff seeks damages for personal injuries sustained in a motor vehicle accident on March 19, 2008, on Marcus Boulevard near its intersection with Grand Boulevard in Babylon, New York, when her vehicle was allegedly struck in the rear by the vehicle operated by the defendant Anton McCollin and owned by the defendant Georgiana Phillips.

The defendants seek dismissal of the complaint because the plaintiff did not sustain a serious injury as defined by Insurance Law § 5012 (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, 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 produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her 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]).

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 medical 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 state 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 the plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the 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 [1st Dept 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 [2d Dept 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 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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*).

In support of motion (001), the defendants have submitted, *inter alia*, an attorney's affirmation; a copy of the summons and complaint, answer, and plaintiff's verified bill of particulars; and the sworn reports of Marie Audrie DeJesus, M.D. (hereinafter DeJesus), dated April 5, 2011, concerning her independent neurology/psychiatry examination of the plaintiff, Joseph Margulies, M.D.(hereinafter Marguiles), dated April 5, 2011, concerning his independent orthopedic examination of the plaintiff, and Audrey Eisenstadt, M.D. (hereinafter Eisenstadt), dated April 21, 2011, concerning her independent radiological review of the plaintiff's cervical MRI, dated June 20, 2008.

In her bill of particulars, the plaintiff alleges that as a result of this accident, she sustained straightening of the cervical lordosis; disc bulges at C3-4 through C6-7 with cord compression; posterior disc herniation at C5-6 extending into the cord; cervical radiculitis; myofascial pain syndrome; right shoulder sprain; limited range of motion of the cervical, thoracic and lumbar regions; subluxations in the cervical and lumbar regions; restricted range of motion of the right arm; moderate to marked muscle spasms of the paravertebral muscles from C2 through C7 on the right; mild weakness of the right deltoid, biceps, triceps, and hand grasps; and constant neck stiffness/pain radiating into the right shoulder blade and arm.

In this case, the defendants have not established prima facie entitlement to summary judgment dismissing the complaint because the plaintiff did not sustain a serious injury. The moving papers raise triable issues of fact which preclude summary judgment.

The defendants have failed to support their motion with copies of the medical records and initial test results for the MRI studies of the plaintiff's cervical spine, dated June 29, 2008, the EMG report, dated June 27, 2008, echodiagnostic testing, dated June 18, 2008, the x-ray report of the cervical spine, dated March 24, 2008, the independent chiropractic report, dated July 17, 2008, concerning an examination of the plaintiff, and the various medical records and reports reviewed by the defendants' examining and opining physicians. An expert cannot base an opinion on facts he/she did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see,* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Supreme Court, Tompkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988];

O'Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). Thus, defendant's application is insufficient on its face.

In his report of his neurological examination of the plaintiff, Margulies stated that he obtained range of motion measurements of the plaintiff cervical and lumbar spine and shoulders, using visual observation rather than range of motion measurements obtained with the use of a goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]). The Court cannot speculate as to how Margulies determined such ranges of motions when examining the plaintiff ***(Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). DeJesus did not obtain any range of motion measurements in examining the plaintiff. She has not commented upon, or ruled out, the plaintiff's claim of cervical radiculopathy, and those findings relative to the electrodiagnostic testing, including the EMG of June 27, 2008, which she reviewed.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). In her report, Eisenstadt stated that there was a broad-based disc herniation at C5-6, disc bulging at the C3-4 intervertebral disc level, osteophyte formation at C5-6, and intervertebral disc desiccation throughout the cervical spine. While Eisendstadt stated that this desiccation was greater than six months in development, she has not stated the basis for this conclusion. She further stated that degenerative disc disease was a common etiology for disc herniations, but she has not set forth that there is no causal relationship between the accident and the disc bulge or herniation. While the plaintiff has claimed disc bulges at C3-4 through C6-7 with cord compression, Eisenstadt has not offered an opinion as to whether there is cord compression or disc bulges at those additional cervical levels, thus raising further factual issues.

The defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the 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 [3d Dept 2001]; ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). The experts offer no opinion with regard to this category of serious injury (*see,* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Based upon the foregoing, the defendants have failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102(d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the defendants have failed to establish 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 are sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint because the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: FEB 29 2012

J.S.C.
HON. PETER FOX COHALAN

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION