

Cestaro v Wilson

2012 NY Slip Op 31560(U)

June 12, 2012

Supreme Court, Queens County

Docket Number: 20125/2010

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

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ANGELA CESTARO, Index No.: 20125/2010
Plaintiff, Motion Date: 05/17/2012
- against - Motion No.:9
MICHAEL P. WILSON and LYNN E. WILSON, Motion Seq.: 3
Defendants.

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The following papers numbered 1 to 13 were read on this motion by defendants, MICHAEL P. WILSON and LYNN E. WILSON, for an order pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10
Reply Affirmation.....	11 - 13

This is a personal injury action in which the plaintiff, ANGELA CESTARO, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on May 21, 2010, on the eastbound lanes of Northern Boulevard near its intersection with Zion Street, Queens County, New York.

At the time of the accident, plaintiff was traveling on Northern Boulevard, with the right of way, when her vehicle collided with the vehicle being operated by defendant, Lynn E. Wilson, who was attempting to make a left turn and crossed immediately in front of the plaintiff's vehicle.

The plaintiff commenced an action against the defendants by filing a summons and verified complaint on July 20, 2010. Issue was joined by service of defendants' verified answer on or about September 9, 2010. The plaintiff filed a note of issue on December 9, 2011.

In support of the motion, the defendant submits an affidavit from counsel, Andrea E. Ferrucci, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of Ms. Cestaro's examination before trial; and the affirmed medical reports of Dr. Daniel J. Feuer, a board certified neurologist and Dr. Edward A. Toriello, a board certified orthopedic surgeon.

In her verified bill of particulars, the plaintiff states that as a result of the accident she sustained, inter alia, disc herniations at L2-3, L3-4, L4-5, C2-3, C3-4, C4-5 and C5-6 as well as TMJ dysfunction.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law §5102(d) in that she sustained permanent loss of use of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; 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.

Ms. Cestaro, age 67, who works as a waitress, was examined by Dr. Daniel J. Feuer, a board certified neurologist retained by the defendant. In his examination of November 29, 2011, Dr. Feuer performed quantified and comparative range of motion tests. At the time of the examination, plaintiff presented with complaints of lower back pain and clicking sounds in her shoulders. Upon examination, Dr. Feuer found no significant limitations of range of motion of the cervical spine and lumbar spine. He concluded that "based upon a reasonable degree of clinical certainty, I believe the claimant Ms. Angela Cestaro does not demonstrate any objective neurological disability or neurological permanency which is causally related to the accident of May 21, 2010. She is neurologically stable to engage in full active employment as a waitress as well as the full activities of daily living without restriction."

Dr. Toriello, a board certified orthopedic surgeon, examined the plaintiff on November 14, 2011. At the time of the examination plaintiff complained of low back pain and clicking in her right shoulder when lifting her arm. She told Dr. Toriello that she lost one week from work due the injuries she sustained in the accident. Dr. Toriello performed objective quantified and comparative range of motion tests of the plaintiff's cervical spine, right shoulder, left shoulder, right elbow, left elbow, right wrist and hand, left wrist and hand, and lumbosacral spine and found no limitations of range of motion in any area other than a 13% limitation with respect to bilateral rotation of the cervical spine. He states that there were no objective findings that support the subjective decreased range of motion in the neck and there is no clinical significance to that finding. Dr. Toriello concludes that, "the claimant reveals evidence of resolved cervical hyperextension injury, resolved right hand contusion, resolved right shoulder strain and resolved low back strain. He states that plaintiff reveals no evidence of disability from any orthopedic injury sustained in the accident.

In her examination before trial, taken on September 27, 2011, plaintiff testified that as a result of the collision, the airbag in her vehicle deployed, causing a bruise and burn to the plaintiff's hand. She also felt pain to her back and right shoulder. Plaintiff stated that she was transported from the scene in an ambulance and taken to the emergency room at North Shore Hospital in Manhasset where she was discharged the same day. Two weeks later she began treating with her chiropractor, Dr. DeCarolis and continued with him for four months. He recommended that plaintiff have an MRI of her back. The plaintiff stated that she was also treated by Dr. Liquori a neurologist. She saw him 4 or 5 times for tingling in her legs and hand. She also received treatments for four - five months from Dr. Akpinar, a dentist, for pain management and jaw problems. Dr. Akpinar told plaintiff that she was suffering from TMJ. Plaintiff testified that she was injured in a prior accident in 1997 in which she injured her neck and left leg. She testified that after the accident she returned to her job after 4 days. Plaintiff stated that she still experiences pain in her lower back, right shoulder and her jaw.

Defendant's counsel contends that the plaintiff's deposition testimony as well as the affirmed medical reports of Drs. Feuer and Toriello are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that she has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system.

Counsel also contends that there is no proof in the record that the plaintiff has sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

In opposition, plaintiff's counsel, Angela A. Capri, Esq., submits her own affirmation as well as the affidavit of plaintiff Angela Cestaro, dated March 13, 2012, and the affidavits of chiropractor, Dr. Patrick DeCarolus, neurologist, Dr. James Liguori, dentist, Dr. Bill Akpinar, and radiologists Dr. John Himelfarb, and Dr. Robert Diamond. The Court notes that the report of Dr. DeCarolus, although titled "affidavit," is not affirmed and therefore does not constitute competent evidence sufficient to oppose the defendants' motion (see CPLR 2106; Pierson v Edwards, 77 AD3d 642 [2d Dept. 2010]; DiLernia v Khan, 62 AD3d 644 [2d Dept. 2009]; McMullin v Walker, 68 AD3d 943 [2d Dept. 2009]; Perdomo v Scott, 50 AD3d 1115 [2d Dept. 2008]).

Dr. Bill B. Akpinar, a licensed dentist, states that he examined the plaintiff on July 20, 2010, after which he concluded that the plaintiff sustained TMJ disorder causally related to the accident of May 21, 2010. He stated that plaintiff had significant loss of function related to chewing and opening of the mouth. After re-examining plaintiff on March 31, 2012, he concluded that the jaw injuries were permanent in nature. He concluded that plaintiff sustained significant impairment and loss of function in the tempoeomandibular joints.

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 (see 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]).

Where defendant's 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]).

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition, and defendants' reply thereto, this court finds that the admissible evidence submitted by the defendants fails to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. In her bill of particulars, the plaintiff set forth the allegation that in addition to suffering herniated discs in her cervical and lumbar spines, she also sustained post-traumatic TMJ dysfunction. She testified at her deposition that she had been treated by dentist, Dr. Akpinar, for four months for pain arising out of her TMJ dysfunction. However, neither Dr. Toriello nor Dr. Feuer examined the plaintiff's jaw nor did the defendants submit an affirmation from a dentist with regard to the plaintiff's alleged TMJ. Thus, as the defendants failed to address the alleged permanent injury to the plaintiff's jaw, the evidence submitted is insufficient to demonstrate that there are no triable issues of fact with respect to the alleged permanent and significant injury to the jaw (see Galindo v Kohli, 2012 NY Slip Op 30991U [2d Dept. 2012]; Pleasant v M & Lenny Taxi Corp., 94 AD3d 1072 [2d Dept. 2012]; Safer v Silbersweig, 70 AD3d 921 [2d Dept. 2010]; Menezes v Khan, 67 AD3d 654 [2nd Dept. 2009]; McFadden v Barry, 63 AD3d 1120 [2d Dept. 2009]; Staubitz v. Yaser, 41 AD3d 698 [2d Dept. 2007]; Hughes v. Cai, 31 AD3d 385 [2d Dept. 2006]).

Inasmuch as the defendants did not meet their prima facie burden, it is unnecessary to consider the sufficiency of the plaintiff's papers in opposition (see Delayhaye v Caledonia Limo & Car Serv., Inc., 61 AD3d 814 [2d Dept. 2009]; Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept. 2008]; Ali v Rivera, 52 AD3d 445 [2d Dept. 2008]).

Accordingly, based on the foregoing, it is hereby

ORDERED that the motion by the defendants for summary judgment dismissing the plaintiff's complaint is denied.

Dated: Long Island City, N.Y.
June 12, 2012

ROBERT J. MCDONALD, J.S.C.