

**Ortiz v Clarke**

2012 NY Slip Op 32233(U)

August 22, 2012

Supreme Court, Queens County

Docket Number: 16718/2010

Judge: Robert J. McDonald

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

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

ANTOINETTE ORTIZ, Index No.: 16718/2010  
Plaintiff, Motion Date: 06/21/12  
- against - Motion No.: 26  
Motion Seq.: 1

JOHN CLARKE and ANNABELLE CLARKE,  
Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by defendants, JOHN CLARKE and ANNABELLE CLARKE, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the plaintiff's complaint 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 - 7  
Affirmation in Opposition-Affidavits-Exhibits.....8 - 13  
Reply Affirmation.....14 - 16

This is a personal injury action in which plaintiff, Antoinette Ortiz, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on December 3, 2009 on Central Avenue near the intersection with Nameoke Street, Queens County, New York.

The plaintiff alleges that she was injured when her vehicle was struck by the vehicle owned by defendant John Clarke and operated by defendant Annabelle Clarke as the defendants' vehicle was pulling out of a parking space.

The plaintiff commenced this action by filing a summons and complaint on June 30, 2010. Issue was joined by service of defendants' verified answer dated September 9, 2010. Defendants now move 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, Tracy Morgan, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of orthopedic surgeon, Dr. Salvatore Corso; and a copy of the transcript of the examination before trial of Plaintiff Antoinette Ortiz.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, central disc herniation at L4/L5 with impingement and exacerbation of prior lumbar bulges at L3/L4 and L4/L5. Plaintiff testified at her examination that she was not confined to bed and did not miss any days from work as a result of the accident.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she 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.

Dr. Salvatore Corso, an orthopedist retained by the defendants, examined Ms. Ortiz, age 48, on January 5, 2012. The plaintiff told Dr. Corso that as a result of the accident she injured her neck, left shoulder and lower back. She also told him that she injured her back and neck in a prior motor vehicle accident in 2007. On the date of the examination, the plaintiff complained of pain in the neck and lower back. Dr. Corso performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, left shoulder and thoracolumbar spine. Dr. Corso concludes that the plaintiff was status post exacerbation of prior neck and back injuries and status post left shoulder sprain, resolved. He states that based upon his objective physical examination there is no evidence of an orthopedic

disability.

In her examination before trial, taken on September 12, 2011, plaintiff testified that she is employed as a salesperson at The Cheese Store in Cedarhurst. She receives health insurance benefits through HIP. As a result of the accident which took place on December 3, 2009, she was not confined to her home or her bed and she did not miss any time from her job. She testified that on the day of the accident she was on her way home from work and was proceeding on Cental Avenue. As she approached the intersection with Nameoke Street she observed that the traffic signal at the intersection was green. As her vehicle was moving towards the intersection it was struck on the passenger side door by the vehicle driven by defendant Annabelle Clarke as the defendants' vehicle pulled out of the parking lane. Her left shoulder struck the interior of the car but she did not feel any pain to any part of her body while at the scene of the accident. After calling the police and making report the plaintiff left the scene in her own vehicle and drove to her home. She went to work the following day. She stated that she sought medical treatment with Dr. Sohal at Parkway Medical for back and neck pain after work the day after the accident. She had previously treated with Dr. Sohal for injuries she sustained in a prior accident. She testified that since the time of the accident she has been treated once a month by Dr. Sohal. She also was treated with injections for pain to her lower back. She stated that she was also treated by Dr. Babu Moses for pain management three times a week for six months and stopped sometime at the end of 2010. She stated that she stopped going on her own accord because she did not want to go anymore. Plaintiff also testified that she was involved in a motor vehicle accident on January 11, 2007 in which she injured her back and neck. She was also treated by Dr. Sohal and Dr. Moses for injuries she sustained in the prior accident.

Defendant's counsel contends that the medical report of Dr. Corso as well as the plaintiff's deposition testimony 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 Harold Solomon, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated March 29, 2010, and the affirmed medical report of Dr. Ajendra Sohal and the affirmed medical reports of radiologists Dr. Alan S. Lubitz and Dr. Robert D. Solomon.

In her affidavit the plaintiff states that she first sought treatment with Dr. Sohal one day after the accident due to pain in her neck, back and left shoulder. He prescribed physical therapy which she received at Mind and Body Power. She continues to see Dr. Sohal and last saw him on February 23, 2012. She states that she had a prior accident in January 2007 in which she sustained injuries to her back and neck. She stated that she received trigger point injections from Dr. Sohal for injuries sustained in the prior accident and made a full recovery within a year. She states that as of the time of the present accident she had fully recovered from the prior accident and was not under medical care. She states that she has not had a day without pain in her lower back since the instant accident and the pain interferes with all of her daily activities to some extent.

Dr. Sohal, a specialist in the field of physical medicine and rehabilitation submits an affirmed medical report in which he states that plaintiff first came under care for the accident of December 3, 3009 on December 9, 2009. He states that she had a previous motor vehicle accident on January 11, 2007 from which she had recovered completely. At the initial examination he found that the plaintiff demonstrated limited range of motion in her cervical spine, right shoulder and lumbosacral spine. He treated the plaintiff for pain including injections of lidocaine approximately once a month through February 12, 2012. At the time of his most recent examination on February 23, 2012, Dr Sohal found significant limitations of range of motion of the plaintiff's lumbar spine. He states that in his opinion the plaintiff suffers from a partial disability in her low back and left shoulder that impairs her ability to perform her activities of daily living.

The affirmed medical report of radiologist Dr Alan Lubitz who states that the plaintiff has a disc herniation at L4-L5.

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]).

Here, the proof submitted by the defendant, including the affirmed medical report of Dr. Corso and the plaintiff's examination before trial in which she stated that she returned to work the day following the accident, were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Sohal 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 resulted from trauma causally related to the accident (see Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; 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 of her lumbosacral spine 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]).

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

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

Dated: August 22, 2012  
Long Island City, N.Y.

---

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