

Furman v Lattka

2013 NY Slip Op 30482(U)

February 14, 2013

Supreme Court, Suffolk County

Docket Number: 26488/2008

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Deborah Furman,

Plaintiff,

-against-

Bryan Lattka, Michael Furman and John Furman,

Defendants.

Index No.: 26488/2008Motion Sequence No.: 006; MDMotion Date: 9/24/10Submitted: 12/13/10Motion Sequence No.: 007; XMDMotion Date: 9/24/10Submitted: 12/13/10

Clerk of the Court
Attorney for Plaintiff:

Krentsel & Guzman, LLP

17 Battery Place, #064

New York, NY 10004

Attorney for Defendant Bryan Lattka:

David J. Sobel, P.C.

811 West Jericho Tpke., Suite 105W

Smithtown, NY 11787

Attorney for DefendantsMichael Furman and John Furman:

Andrea G. Sawyers, Esq.

3 Huntington Quad., Suite 102S

Melville, NY 11747

Upon the following papers numbered 1 to 14 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 4; Notice of Cross Motion and supporting papers, 5 - 7; Answering Affidavits and supporting papers, 8 - 10; Replying Affidavits and supporting papers, 11 - 12, 13 - 14.

Furman v. Lattka and Furman

Index No.: 26488/2008

Page 2

In this negligence action, plaintiff alleges that she sustained personal injuries in a motor vehicle accident on October 31, 2007 at or near the intersection of Center Lane and Cliff Lane in Levittown, New York. Plaintiff alleges that the vehicle owned by defendant John Furman and operated by Michael H. Furman (“the Furman defendants”), in which she was traveling as a front seat passenger, was struck by a vehicle owned and operated by defendant Bryan Lattka.

In the bill of particulars, plaintiff alleges that she sustained the following injuries: post concussion syndrome; headaches; ligament, cartilage and tendon tears to the left knee; torn medial and lateral meniscus of the left knee requiring arthroscopy and surgical repair on June 28, 2008; loss of cervical lordosis; cervical strain; cervical radiculopathy; thoracic strain; disc bulges at L2 through S1; lumbar radiculopathy; bilateral shoulder pain; impingement syndrome of right shoulder; and anxiety. Plaintiff alleges that the above stated injuries are permanent. Plaintiff further alleges that she sustained a 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 medically determined injury or impairment of a non-permanent nature which prevents 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.

The Furman defendants now move for summary judgment dismissing the complaint. Defendant Lattka cross-moves for summary judgment.

Under Insurance Law § 5102(d), “serious 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 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.”

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 (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

A defendant can establish that the 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 (see, Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]). Once defendant has met the burden, the burden shifts to the plaintiff to demonstrate with competent proof that he sustained a serious

Furman v. Lattka and Furman

Index No.: 26488/2008

Page 3

injury within the meaning of the No-Fault Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Staff v. Yshua, 59 AD3d 614 [2nd Dept., 2009]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]).

In support of the motion, the Furman defendants submit, *inter alia*, the pleadings, the bill of particulars, plaintiff's deposition testimony and the affirmed reports of Robert L. Michaels, M.D., and Steven L. Mendelsohn, M.D. In support of their cross motion, defendant Lattka adopts and incorporates by reference the facts, legal arguments, exhibits and procedural history set forth by the Furman defendants. Initially, the Court rejects the portions of these experts' reports which rely upon unsubmitted medical records (see, Merisca v. Alford, 243 AD2d 613 [2nd Dept., 1997]). However, to the extent these doctors have relied on their own personal examinations of plaintiff and not on the unsubmitted reports, their opinions were considered.

Plaintiff testified that she underwent low back surgery in June, 2006. In addition, plaintiff testified that she had undergone cervical spine surgery ten days prior to the motor vehicle accident. Approximately one week after the accident, she presented to her neurosurgeon, complaining of neck pain, bilateral shoulder pain and left knee pain. The neurosurgeon referred plaintiff to physical therapy. Plaintiff returned to work one week after the accident at light duty. She was unable to perform all of her work activities as a recreational activities leader in a nursing home. She stated that she had no prior injuries to the left shoulder or the left knee. She was referred to an orthopedic surgeon initially for treatment of her pain to the left shoulder. She presented to another orthopedic surgeon in 2008 for treatment of her left knee. She underwent arthroscopic surgery of the left knee in July, 2008 and subsequently received physical therapy for approximately three months. At the present time, she cannot jog or exercise at the gym as she did prior to the accident.

Dr. Michaels affirms that he performed an orthopedic independent medical examination on February 16, 2010. He noted limitations in left knee flexion, cervical spine rotation, thoracolumbar spine flexion and rotation as compared to normal ranges of motion. He performed objective tests which were negative. He found no objective evidence of orthopedic disability or permanence as related to the accident of October 31, 2007. He diagnosed plaintiff as having sustained status post lumbar surgery, pre-existing; status post cervical surgery, pre-existing; status post left knee arthroscopy, the causal relationship of which could not be substantiated, and a normal left shoulder.

Dr. Mendelsohn affirms that he performed a radiologic review on June 29, 2010, of plaintiff's MRIs. The left knee MRI, performed on April 5, 2008, revealed mild age-related meniscal degeneration. There were no abnormalities causally related to trauma. The left shoulder MRI, performed on December 19, 2007, revealed mild supraspinatus tendinitis and mild acromioclavicular degenerative changes. The right shoulder x-ray, performed on December 14, 2007, revealed mild acromioclavicular degenerative changes. The lumbar spine MRI, performed on December 19, 2007, revealed small post annular tears at L2/3, and L3/4 and mild to moderate diffuse degenerative changes, the greatest extent at L4/5.

Furman v. Lattka and Furman

Index No.: 26488/2008

Page 4

Here, defendants failed to satisfy their *prima facie* burden by establishing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) as a result of the subject accident (see, Joissaint v. Starrett-1 Inc., 46 AD3d 622 [2nd Dept., 2007]). The examining orthopedist identified significant limitations in the ranges of motion of the plaintiff's cervical and thoracolumbar spines and left knee based upon his examination of the plaintiff, which took place almost four years after the subject accident (see, *id.*). Summary judgment is therefore inappropriate (see, Zamaniyan v. Vrabeck, 41 AD3d 472 [2nd Dept., 2007]; Bentivegna v. Stein, 42 AD3d 555 [2nd Dept., 2007]; Morales v. Theogene, 46 AD3d 775 [2nd Dept., 2007]). Since defendants failed to meet their initial burden of establishing a *prima facie* case that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) as a result of the subject accident, the sufficiency of plaintiff's opposition papers need not be considered (see, Paulino v. Dedios, 24 AD3d 741 [2nd Dept., 2005]; Birnbaum v. Constanza, 17 AD3d 304 [2nd Dept., 2005]).

Accordingly, it is

ORDERED that the motion (006) by defendants Michael H. Furman and John Furman for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion (007) by defendant Bryan Lattka for summary judgment dismissing the complaint is denied.

Dated: February 14, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION