

Trunzo v Yannotti

2013 NY Slip Op 32341(U)

September 23, 2013

Supreme Court, Queens County

Docket Number: 20657/2011

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

- - - - - x

JENNIFER TRUNZO,

Plaintiff,

- against -

MICHAEL A. YANNOTTI and DENISE
YANNOTTI,

Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendants, MICHAEL A. YANNOTTI and DENISE YANNOTTI, for an order pursuant to CPLR 3212 granting defendant 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.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 10
Reply Affirmation.....	11 - 12

This is a personal injury action in which plaintiff, JENNIFER TRUNZO, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on March 12, 2009, at approximately 6:45 a.m., at the intersection of West Park Avenue and Connecticut Avenue, Long Beach, Nassau County, New York.

Plaintiff claims that at the time of the accident, she was operating her vehicle in a westbound direction on Park Avenue when the defendant, Michael Yanotti, intending to make a left turn from Connecticut onto Park Avenue collided with plaintiff's vehicle in the middle of the intersection. Plaintiff states that as a result of the accident she sustained physical injuries to her neck and back.

The plaintiff commenced this action by filing a summons and complaint on September 2, 2011. Issue was joined by service of defendant's verified answer dated October 15, 2011. By decision and order dated April 4, 2013, this Court granted the motion by the plaintiff for partial summary judgment on the issue of liability. Defendant now moves 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 and 5104.

In support of the motion, defendant submits an affirmation from counsel, Andrea E. Ferrucci, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; and the affirmed medical reports of Dr. Marvin Winell, a board certified orthopedic surgeon, and Dr. Stephen Lastig, a board certified radiologist.

In her verified Bill of Particulars, plaintiff, Jennifer Trunzo, age 32, states that as a result of the accident she sustained, inter alia, narrowed disc spaces between C5-C6, lower thoracic syrinx at T10-T11, diminished disc height at T11-T12, and disc bulge at L4-L5.

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

On September 25, 2012, the plaintiff, was examined by Dr. Marvin Winell, a board certified orthopedic surgeon, retained by the defendants. In his affirmed report, Dr. Winell states that plaintiff reported that she injured her neck and lower back in the accident. She told Dr. Winell that she underwent physical therapy, pain management and chiropractic care following the accident. At the time of his examination the plaintiff presented with complaints of pain in her back. Plaintiff reported that she was employed as a psychologist at the time of the accident and missed a few weeks from work following the accident. Dr. Winell performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in

the cervical spine, thoracic spine or lumbar spine. After reviewing the plaintiff's medical records his diagnosis was resolved sprain/strain of the cervical spine, resolved sprain/strain of the thoracic spine, resolved sprain/strain of the lumbosacral spine all causally related to the subject accident. However, he states that there is no causally related orthopedic disability resulting from the accident of record. He states that the plaintiff may continue working and performing her usual activities of daily living without restriction or limitation.

Dr. Stephen Lastig, a radiologist, reviewed the MRI studies of the plaintiff's lumbar spine and found that there were no disc herniations or bulges. He states that in his opinion there were no findings on the study which were causally related to the subject accident.

In her examination before trial, taken on August 24, 2012, plaintiff testified that she works as a school psychologist at Brookville Center for Children Services. She stated that on March 12, 2009, her vehicle was struck by defendant's vehicle in the middle of the intersection at West Park Avenue and Connecticut Avenue Long Beach, New York. She testified that following the accident she was experiencing back pain and went to the emergency room at Long beach Medical Center where she was treated and released the same day. She next sought medical attention for back pain from Dr. Stanger one week following the accident. She underwent physical therapy and chiropractic treatment with Dr. Stanger for approximately a year and a half. After she moved she was treated for a year at another facility in Astoria with a neurologist, physical therapist and chiropractor. She is presently treating with chiropractor Dr. Schneider. She states that she missed four weeks from work as a result of the injuries sustained in the accident. She stated that she still experience back pain on a daily basis.

Defendant's counsel contends that the medical report of Drs. Winell and Lastig, together with the plaintiff's deposition testimony in which she stated that she missed four weeks from work, 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, Christian R. Oliver, Esq., submits his own affirmation as well as an affirmation from Dr. Mihir Bhatt.

Dr. Bhatt states that he first examined the plaintiff on March 21, 2012. He states that upon information and belief Ms. Trunzo was initially treated at Long Beach Medical Center and followed up with extensive physiotherapy and chiropractic treatment. He states that when he first treated Ms. Trunzo in March 2012, her biggest complaint was lower back pain. After conducting range of motion testing he found that the plaintiff had significantly reduced range of motion of the cervical and lumbar spines. He then began a course of treatment with the plaintiff during which he provided treatment at least once a month through the present time. His review of the plaintiff's MRI taken on April 30, 2012 showed posterior disc bulges at L1-2 through L5-S1. He recently reexamined the plaintiff on July 31, 2013 at which time she still displayed limitations of range of motion of the cervical and lumbar spine. He states that in his opinion, the plaintiff's cervical and lumbar spine injuries are caused solely by the subject motor vehicle accident. He states that the plaintiff has sustained permanent partial loss of use of her cervical and lumbar spine and permanent significant limitations of use and a loss of function in her lumbar and cervical spine caused by the motor vehicle accident of March 12, 2009.

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 (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]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Drs. Winell and Lastig and the testimony of the plaintiff, in which she stated that she returned to work four weeks after the accident, were sufficient to meet for the defendant to meet its 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]).

In opposition, the plaintiff failed to raise a question of fact. Although Dr. Bhatt found that the plaintiff had limited range of motion of the cervical and lumbar spines in March 2012 and in his recent examination of July 2013, the plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury to her neck or back that was contemporaneous with the subject accident. Although a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident. As stated in Perl v Meher, 18 NY3d 208[2011], "a contemporaneous doctor's report is important to proof of causation." The absence of a contemporaneous medical report invites speculation as to causation (see Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]). As stated by the Appellate Division, First Judicial Department, "while the Court of Appeals in Perl rejected a rule that would make contemporaneous quantitative assessments a prerequisite to recovery...Perl did not abrogate the need for at least a qualitative assessment of injuries soon after the accident (see Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" [Rosa v Mejia, supra]).

Here, the accident occurred in March 2009. Plaintiff testified that she received treatment following the accident however, the plaintiff did not submit any competent medical evidence regarding the extent of her injuries for three years, from March 2009 through March 2012. Therefore, this

Court does not have before it evidence of contemporaneous treatment resulting from the plaintiff's accident. Dr. Bhatt's affirmation describing the plaintiff's medical condition in 2012 is insufficient to raise a triable issue of fact as to whether plaintiff's alleged injuries existed for a sufficient period of time to constitute a serious injury under the limitations of use categories of the Insurance Law. Thus, the plaintiff's opposition papers do not raise a triable issue of fact as to whether she sustained a serious injury under the permanent consequential limitation of use or the significant limitation of use category of Insurance Law § 5102 (d) (see Taylor v Flaherty, 65 AD3d 1328 [2d Dept. 2009]; Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept. 2008]).

With respect to the 90/180 category, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). In this regard, the plaintiff admitted at her deposition that he missed only four weeks from work as a result of the subject accident (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted and the complaint of plaintiff JENNIFER TRUNZO is dismissed.

Dated: September 23, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.