

Anderson v Jozefowski
2013 NY Slip Op 32869(U)
October 29, 2013
Sup Ct, Suffolk County
Docket Number: 10-35041
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 8-6-13
ADJ. DATE 10-15-13
Mot. Seq. # 001 - MD

-----X
SUSAN ANDERSON,

Plaintiff,

- against -

MARGARET JOZEFOWSKI and RICHARD
JOZEFOWSKI,

Defendants.
-----X

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-9; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 10-13; Replying Affidavits and supporting papers 14-15; Other __; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (001) by the defendants, Margaret Jozefowski and Richard Jozefowski, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

This action arises out of an automobile accident which occurred on October 25, 2009, on Montauk Highway at or near its intersection with Connetquot Avenue, in the Town of Islip, New York, when the vehicle operated by the defendant Margaret Jozefowski and owned by Richard Jozefowski, came into contact with the vehicle operated by plaintiff's husband, Joseph Razzano, in which the plaintiff, Susan Anderson, was a passenger. The plaintiff alleges that as a result of this accident she sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant

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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 offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

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 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 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 Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth 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 plaintiff has no cause of action” (*Rodriguez 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 this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, and plaintiff's verified and supplemental verified bills of particulars; a copy of the unsigned and certified transcript of the plaintiff's examination before trial dated March 20, 2012; and the signed report of Dr. Robert Israel dated May 29, 2012 concerning the independent orthopedic examination of the plaintiff.

By way of the plaintiff's verified bills of particular, the plaintiff alleges, inter alia, that as a result of this accident, the following injuries were sustained: posterior left paracentral and left foraminal disc herniation at L4-5 impinging the descending left L5 and exiting left L4 nerve roots associated with the thecal sac deformity; disc desiccation and bulging at L2-3 and L3-4; C3-4 posterior disc herniation abutting ventral cords; C4-5 posterior right sided disc bulge; C5-6 and C6-7 diminished disc space height and disc hydration loss present with anterior disc extension and anterior spurring at these levels, as well as posterior disc herniation and uncinata productive changes with ventral cord impression and central canal stenosis; 1 T1-2 posterior disc bulge; T2-43 right facet hypertrophic change narrowing the right foramen; numbness in legs and feet; loss of normal cervical lordosis, anterolisthesis of C6 on C7; flexion malposition of C2 on C3, C3 on C4, C4 on C5 with bilateral shoulder pain and tingling down the left arm; severe pain down the right leg with weakness and numbness over the outer thigh and outer calf with constant tingling in the toes; pain in the right hip; pain in the right elbow and right forearm; and abrasion to the right arm; damage to muscles, nerves, tendons, ligaments, bone and surrounding soft tissue, and inability to sleep.

Based upon a review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under both categories of injury.

The moving papers contain Dr. Israel's report of his independent orthopedic examination of the 58 year-old plaintiff who is vice president of human resources. Dr. Katz set forth in his report that he reviewed the plaintiff's Good Samaritan Hospital records, records of John Russo, D.C., and Robin Stein, D.C., and the MRI studies of plaintiff's cervical and lumbar spine, however, these reports and records have not been submitted with the moving papers, leaving this court to speculate as to the contents of those records and tests, raising factual issues which preclude summary judgment. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *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]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

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]). After examining the plaintiff's cervical and lumbar spine, it is noted that Dr. Israel has not provided range of motion findings for left and right lateral rotation, leaving this court to speculate as to those ranges of motion, raising factual issues which preclude summary judgment. Importantly, Dr. Israel does not rule out that plaintiff's claims of multiple herniated and bulging cervical, thoracic, and lumbar discs are causally related to the subject accident, precluding summary judgment, and he does not address these injuries pleaded in the bills of particulars. Dr. Israel does state, however, that if the history of the accident is correct, there was a cause and

effect relationship between the diagnoses which he made and the reported accident.

Although the plaintiff claims to have sustained posterior left paracentral and left foraminal disc herniation at L4-5 impinging the descending left L5 and exiting left L4 nerve roots associated with the thecal sac deformity as a result of this accident, no report from an examining neurologist has been submitted by the defendants to rule out that such impingement/neurological/radicular injuries are a result of this accident, precluding summary judgment (*see McFadden v Barry*, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Lawyer v Albany OK Cab Co.*, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; *Faber v Gaugler*, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

The defendants' expert has offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and did not examine the plaintiff during that statutory period (*see Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; *Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

The plaintiff testified that she is employed at Estee Lauder as vice president of human resources and change management, North America, global supply chain, which requires her to travel as needed to New Jersey, Pennsylvania, California, or Canada, between six and eight weeks each year. Although after the accident she missed two weeks from work, and returned to her usual job, she reduced her travel to every four to five months, and will not travel alone, or rent a car or drive a car when she travels out of state. She stated she is too fearful of either getting into an accident or being hurt as she is afraid of having sciatic pain again. After the accident, she could not travel for about six to eight months.

After the accident, the plaintiff experienced pain in her lower back, burning in her neck, tingling in her arms, and pain in her hip. She started chiropractic therapy two to four times a week, ongoing until just several months prior to her deposition. She was sent for MRIs. She saw an orthopedist, Dr. Root at Hospital for Special Surgery for the pain in her lower back and hip. He prescribed a muscle relaxer and pain medication, and she started physical therapy to her lower back. She started working out with a personal trainer. Prior to the accident, she had a gym membership at the YMCA and attended six or seven days a week. She also did kick boxing, which she can no longer do, and zumba classes at East Islip Fitness, which she continues to do. After the accident, she did not maintain her membership at the YMCA. She now does cardio at East Islip Fitness. Since the accident she cannot kick box, cook for long periods of time as she cannot stand, carry shopping bags, engage in sporting activities or strenuous exercises, walk for a period of time, or ride a bicycle. She cannot lift weights over ten pounds, do heavy lifting, gardening, or spring or winter cleaning. Due to pain in her lower body, she is no longer intimate with her husband.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of 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 moving party failed to establish prima facie entitlement to judgment as a matter of law in the first

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instance on the issue of “serious injury” within the meaning of Insurance Law § 5102 (d), the burden has not shifted to the plaintiff 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, the defendants’ motion (002), for summary judgment dismissing the complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: October 29, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION