

Dalce v Brugnone

2013 NY Slip Op 32909(U)

November 8, 2013

Supreme Court, Queens County

Docket Number: 14058/2011

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 DALCE, Index No.: 14058/2011
Plaintiff, Motion Date: 10/30/13
- against - Motion No.: 37
ANGELA BRUGNONE, Motion Seq.: 2

Defendant.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendant, ANGELA BRUGNONE, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff, JENNIFER DALCE, 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 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 11
Reply Affirmation.....12 - 14

This is a personal injury action in which plaintiff, JENNIFER DALCE, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on April 1, 2011, at the intersection of Hempstead Turnpike and Rintin Street, Nassau County, New York. Plaintiff claims that while she was lawfully proceeding on Hempstead Turnpike her vehicle was struck on the front passenger side by the defendant's vehicle as the defendant came out from a parking lane.

The plaintiff commenced this action by filing a summons and complaint on May 4, 2011. Issue was joined by service of the defendant's verified answer dated August 25, 2011. A note of

issue was filed by the plaintiff on March 27, 2013. The matter is presently on the calendar in the Trial Scheduling Part for April 10, 2014. 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.

In support of the motion, defendant submits an affirmation from counsel, Marcella Gerbasi Crewe, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars and supplemental bill of particulars; the uncertified hospital records for the plaintiff's emergency room admission at Franklin General Hospital; the affirmed medical report of orthopedist, Dr. Leon Sultan; the affirmed radiological reports of radiologist, Dr. Alan Greenfield, and a copy of the transcript of the plaintiff's examination before trial.

Plaintiff, age 22, contends that as a result of the accident she sustained, inter alia, herniated discs at C7-T1, L4-5 and L5-S1. Plaintiff asserts 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. Leon Sultan, an orthopedist retained by the defendant, examined the plaintiff on March 6, 2013. Plaintiff reported to him that she was a restrained driver in a vehicle that was involved in a motor vehicle accident two years earlier on April 1, 2011. She reported that she sustained injuries to her neck, mid and lower back. She told Dr. Sultan that she is a senior in college and is employed as a clerical worker. She told him that as a result of the accident she lost one day from work. She presented on the date of the examination with no complaints of pain. Dr. Sultan tested the plaintiff's range of motion using a goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine or thoracolumbar spine. He states that his examination revealed the plaintiff to be orthopedically stable and neurologically intact. He did not find any orthopedic or neurological impairment causally related to the accident of April 1, 2011. He stated that no residual permanency was noted and no further testing or treatment was indicated.

Dr. Alan Greenfield reviewed the MRI images taken in May 2011 of the plaintiff's lumbar spine and cervical spine. He states that in his review he observed no evidence of disc herniation, fracture or subluxation. He did observe disc bulging at L4-L5 and L5-S1 of minimal magnitude. He stated it was due to early disc degeneration or a slight delay in physiological maturation of the annulus fibrosus at both levels. However, he states that in either case it is unrelated to the trauma of an accident on April 1, 2011. He concluded that there were no findings which could be attributed to an accident occurring on April 1, 2011.

In her examination before trial taken on August 22, 2012, the plaintiff, Ms. Dalce, a nursing student at Adelphi University testified that on April 1, 2011, the date of the accident, she was operating a Honda Odyssey van owned by her father. She was operating the van westbound on Hempstead Turnpike having left Adelphi and was heading to her home in Queens County. She was proceeding near the intersection of Rintin Street when the front of her vehicle was heavily impacted by the front of the defendant's vehicle causing her airbag to deploy. When the emergency medical personnel came to the scene she told them that she had pain in her neck, both shoulders, and lower back. She left the scene in an ambulance and was transported to the emergency room at Franklin Hospital where she was treated and released the same day. She subsequently commenced a course of physical rehabilitation with Dr. Reddy at Total Rehab where she was treated for neck, shoulder, and back pain. She continued rehabilitation for three months and stated that she stopped because it was becoming too time consuming. She stated that she has not had any further treatment for accident related injuries since July 2011. In addition to attending school she also works at an insurance agency. She stated she missed a week or two weeks from work due to the accident but she did not miss any class time. She states that she still has back pain on a weekly basis.

Defendant's counsel contends that the medical report of Drs. Sultan and Greenfield together with the plaintiff's testimony at her examination before trial that she only missed two weeks of work and missed no days from school following the accident is sufficient to demonstrate 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 Angela A. Capri, Esq., submits her own affirmation as well as the affidavit of plaintiff Jennifer Dalce, the affirmed medical report of Dr Surendranath K. Reddy; the affirmed medical report of Dr. Farshad David Hannanian; and the affirmed medical report of Dr. William A. Weiner.

In her affidavit, dated October 7, 2013, plaintiff states that after the impact with defendant's vehicle she hit her head and back on the interior of the vehicle. When she arrived by ambulance at Franklin General Hospital emergency room she complained of pain to her neck, back and both shoulders. One week after the accident she began to treat with Dr. Reddy at Total Rehab. He recommended a course of physical therapy which she underwent from April 13, 2011 through June 27, 2011. She states that she discontinued physical therapy because she was unable to continue and because her no-fault benefits had stopped. She states that Dr. Reddy informed her that she had reached maximum medical improvement and that her condition was chronic. She states that she also treated with neurologist Dr. Hannanian from May 23, 2011 through June 27, 2011. She states that she was out of work due to her injuries from April 1, 2011 through May 18, 2011. She also states that at the present time she still experiences constant and daily neck and back pain.

Dr. William Weiner, a radiologist reviewed the plaintiff's MRI studies taken on May 15, 2011 of her cervical and lumbar spines. He states in an affirmed report dated October 7, 2013, that the plaintiff sustained a C7-T1 disc herniation as well as disc herniations at L4-L5 and L5-S1.

In his affirmation, Dr. Reddy states that he first examined Ms. Dalce on April 13, 2011 with respect to her accident of April 1, 2011. At the initial visit Ms. Dalce had complaints of severe pain lower back, neck and right shoulder Dr. Reddy tested her range of motion and found significant limitations of range of motion of the cervical spine. He instructed her to remain out of work for 6 -7 weeks. He referred the plaintiff for MRIs and advised her to begin a course of physical therapy. He also referred her for a neurological consult with Dr. Hannanian. He states that the plaintiff treated at his office until June 27, 2011 when the no fault carrier terminated payments and she could not pay out of pocket. Moreover, he states that she had reached maximum medical improvement at that time as her condition was chronic. Dr. Reddy states that he re-examined the plaintiff on August 7, 2013. His cervical and lumbar range of motion

testing showed that the plaintiff still exhibited significant limitations of range of motion of the cervical and lumbar spines. He states that in his opinion the injuries sustained by the plaintiff including the disc pathologies diagnosed by the MRI are significant and permanent in nature and causally related to the accident of April 1, 2011. He states that the herniated discs sustained by the plaintiff do not lend themselves to relief absent surgical intervention.

Dr. Hannanian, a neurologist, submits an affirmed report dated October 7, 2013, in which he states that he first examined the plaintiff on May 23, 2011, seven weeks after the accident. At that time she had complaints of neck pain radiating to the right shoulder and arm, low back pain and pain and restricted movement of the thoracic spine area. Upon his examination he found that the plaintiff had significant limitations of range of motion of the cervical and lumbar spines. The plaintiff treated with his office until June 27, 2011 when her no fault benefits were terminated. He re-examined the plaintiff on August 12, 2013, at which time she still had limitations of range of motion which Dr. Hannanian determined were causally related to the motor vehicle accident and which are permanent and significant in nature. In his opinion, the plaintiff is permanently partially disabled with a 15- 20% restriction of range of motion of the cervical and lumbar spines.

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 report of Drs. Sultan and Greenfield and the plaintiff's testimony at her examination before trial stating that she only missed two weeks from work immediately following the accident are sufficient to meet defendant's 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 reports of Drs. Reddy, Weiner, and Hannanian attesting to the fact that the plaintiff sustained herniated discs in the lumbar and cervical spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her cervical and lumbar spines both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; 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 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 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Drs. Reddy and Hannanian and the plaintiff adequately explained the gap in plaintiff's treatment stating that no-fault had stopped the plaintiff's benefits and the plaintiff had limited ability to pay for treatment. In addition both of the plaintiff's treating physicians stated that she had reached a point of maximum medical improvement as her injuries are chronic (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc.,

56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

ORDERED, that the motion by defendant, ANGELA BRUGNONE for an order granting summary judgment dismissing the complaint of plaintiff, JENNIFER DALCE, is denied.

Dated: November 8, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.