Chandonnet v Smith
2013 NY Slip Op 33152(U)
November 26, 2013
Sup Ct, Suffolk County
Docket Number: 11-33374
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 11-33374
CAL. No. 13-01047MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 7-10-13 (#003)
MOTION DATE 9-11-13 (#004)
ADJ. DATE 10-30-13
Mot. Seq. # 003 - MD
004 - XMG

---X

ALISON MARIE CHANDONNET,

Plaintiff,

- against -

MARY C. SMITH, as Executor of the Estate of DARRYL ST. GEORGE a/k/a DARRYL R. ST. GEORGE, deceased,

Defendant.

---X

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 9 untabbed ; Notice of Cross Motion and supporting papers 22-30; Answering Affidavits and supporting papers 10-20 ; Replying Affidavits and supporting papers 21-22; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motions (003) and (004) are consolidated for purposes of this determination; and it is further

ORDERED that this motion (003) by the defendant, Mary C. Smith as Executor of the Estate of Darryl St. George a/k/a Darryl R. St. George, deceased, for summary judgment dismissing the complaint on the basis that plaintiff's injuries do not meet the serious injury threshold as defined by Insurance Law §5102 (d), is denied; and it is further

ORDERED that this cross motion (004) by the plaintiff, Alison Marie Chandonnet, for summary judgment in her favor on the issue of liability is granted, and the plaintiff is directed to serve and file a copy of this order with notice of entry upon the defendant and the Clerk of the Calendar Department, Supreme Court, Riverhead within sixty days of the entry of this order, and the Clerk is directed to schedule this matter for a trial on damages forthwith.

This action has been brought to recover damages for personal injuries allegedly sustained by the plaintiff, Alison Marie Chandonnet, on December 18, 2009, on Pulaski Road at or near its intersection with Greenlawn Road, in the Town of Huntington, New York, when the vehicle operated by the plaintiff and owned by Jean Paul Chandonnet, was struck by the vehicle operated by defendant Darryl St. George. Defendant's vehicle had a snow plow attached to it and allegedly side-swiped and dragged the plaintiff's vehicle.

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 (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [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 [2nd Dept 1981]).

In support of motion (003), the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars and supplemental/ amended verified bill of particulars; a copy of the transcript of plaintiff's examination before trial dated October 11, 2012; the sworn reports of Noah S. Finkel, M.D. dated February 28, 2013 concerning his independent orthopedic examination of the plaintiff on that date, and A. Robert Tantleff, M.D. concerning his independent radiology review of the plaintiff's cervical MRI of April 16, 2010.

In opposition to motion (003), the plaintiff has submitted, inter alia, an attorney's affirmation; affirmations of Andrew Patane, M.D., Hargovind DeWal, M.D., Seema V. Nambiar, M.D., Barbara A. Allis, M.D., Donna L. Kissinger, M.D., and Michael Shapiro, M.D.; affidavits of Michael Rosati, P.T., D.P.T., John A. Tonna, D.C., and Alison Marie Chandonnet.

In support of motion (004), the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; copies of the transcripts of plaintiff's examination before trial dated October 11, 2012 and of defendant dated October 11, 2012 by Mary C. Smith as executrix of decedent's estate; and an uncertified copy of the MV 104 Police Accident report. Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see, Lacagnino v Gonzalez, 306 AD2d 250 [2d Dept 2003]; Hegy v Coller, 262 AD2d 606 [2nd Dept 1999]).

The plaintiff testified to the extent that on December 18, 2009, at approximately 11:30 a.m., she was involved in an automobile accident at the intersection of Pulaski Road and Greenlawn Road/Cuba Hill Road, Huntington, New York. Her four year old daughter and three month old son were passengers in the vehicle. She was operating a 2004 Nissan in an eastbound direction on Pulaski Road. It was her intention

to make a left turn onto Greenlawn Road, however, there was a red traffic light at the intersection, so she brought her vehicle to a stop for about one minute in the left turn lane while she was waiting for the light to change to green. Prior to the accident, she did not see the defendant's pick up truck with the plow on front approaching, but she felt an impact to the right rear bumper, quarter panel, and right rear tire of her car. After the first impact to her car, the pick up truck went into reverse causing a second impact to her car, and continued to back up, pulling her car backwards about one car length before both vehicles came to a rest.

Mary C. Smith testified that her deceased husband was involved in the motor vehicle accident of December 18, 2009, at which time he owned a truck, a Chevy Silverado, and a snow plow. She did not know if the snow plow was on the truck at the time of the accident. She did not know if there was any damage to his vehicle as a result of the accident.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (Chepel v Meyers, 306 AD2d 235 [2003]; Power v Hupart, 260 AD2d 458 [1999]). Vehicle & Traffic Law § 1129 (a) provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. The defendant was under a duty to maintain a safe distance between his truck, which was traveling in an east bound direction on Pulaski Road, and the rear of the plaintiff's car. The failure to do so, in the absence of a nonnegligent explanation, constitutes negligence as a matter of law (Mendiolaza v Novinski, 268 AD2d 452 [2nd Dept 2000]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that the defendant rebut the inference of negligence by providing a nonnegligent explanation for the collision (Grimm v Bailey, 105 AD3d 703 [2nd Dept]). Under the circumstances of this case, the unrebutted testimony by the plaintiff establishes that the plaintiff's vehicle was struck from the rear by the plow on the defendant's vehicle and sideswiped while it was stopped in the left turn lane of Pulaski Road.

Here, the plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that her vehicle was impacted twice and then dragged by the defendant's truck, that the plaintiff's vehicle was stopped at the time of the impact, and that the defendant failed to maintain control of his vehicle, and failed to use reasonable care to avoid colliding with the plaintiff's vehicle. A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (People of the State of New York v Anderson, 7 Misc3d 1022A [City Court, Ithaca 2005]).

In opposition, the defendant has not proffered an explanation to rebut the inference of negligence caused by the rear-end collision (see, Byrne v Smith, 96 AD3d 704 [2nd Dept 2012]; Franco v Bauguste, 70 AD3d 767[2nd Dept 2010]) through admissible evidentiary proof. Rather, the defendant does not oppose plaintiff's motion on the issue of liability conceding that the plaintiff's vehicle was stopped when it was hit by the plow blade of the defendant's vehicle.

Accordingly, this cross motion (004) by the plaintiff, Alison Marie Chandonnet, for summary judgment in her favor on the issue of liability is granted.

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 Elliot, 57 NY2d 230).

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" (Rodriquez v Goldstein, 182 AD2d 396 [1st Dept 1992]). Once 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 [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 [2nd 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 [3rd Dept 1990]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance Inc., 96 NY2d 295 [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 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, supra).

By way of her bill of particulars, the plaintiff alleges that as a result of the subject accident she sustained injuries consisting of cervical disc displacement without myelopathy; herniated nucleus pulposus/herniated disc at C5-6 with impingement of the thecal sac; cervical disc syndrome; scoliosis; cervical spondylosis; cervical disc disease; cervical radiculopathy; straightening of the cervical lordosis; cervical sprain/strain; myofascial pain and dysfunction syndrome and muscle spasm, neck, and upper back; paraspinal muscle spasm; significant trapezial muscle spasm; elevator ani spasm; occipital spasm; post-traumatic headache syndrome; migraine headache syndrome; tension headache syndrome; cervicalgia; cervical myalgia, myoscitis, and shoulder/upper extremity pain syndrome-with x-rays of the cervical spine showing straightening of the cervical lordosis-with Magnetic Resonance Imaging of the cervical spine

showing straightening of the cervical lordosis, central disc herniation at C5-6 which is causing mild impingement on the thecal sac/small central to right sided herniated nucleus pulposus, C5-6, with impingement, all with severe pain and suffering in the neck, upper back, head, shoulders, and upper extremities; headaches restriction and limitation of motion of the neck, upper back, head, shoulders and upper extremities; muscle spasms; weakness, left upper extremity; multiple positive testing; difficulty with sitting, lying down, driving, reaching, holding, carrying, pushing, pulling, lifting, sleeping, working and with activities of daily living; soreness, tenderness, stiffness, swelling and involvement of the surrounding nerves, muscles, ligaments, tendons, blood vessels and other soft tissues of the neck, upper back, head, shoulders and upper extremities; all of which required invasive trigger point injections; left shoulder trauma and spasms; and aggravation and/or activation/or precipitation and/or acceleration of a pre-existing migraine headache condition which prior to the accident had been non-disabling and symptom free, but which condition acted up and became painful and disabling as a result of the accident; traumatic arthritis and other pathology of the injured joints.

Upon a careful review of the evidentiary submissions, it is determined that the defendant has not established prima facie entitlement to summary judgment, and the reports of the expert physicians submitted in support of this motion do not exclude the possibility that the plaintiff suffered serious injury within the meaning of Insurance Law §5102, and do not establish that the plaintiffs' injuries were not causally related to this accident; therefore, the moving parties are not entitled to summary judgment (see, Peschanker v Loporto, 252 AD2d 485 [2nd Dept 1998]).

Dr. Finkel set forth the many medical records and diagnostic test reports which he reviewed, including MRI's of the plaintiff's cervical spine, and x-rays, and upon which he based his impressions. However, the defendant failed to support this motion with copies of those medical records, including six months of physical therapy records, spine consultation records and reports, and the reports for the x-ray and MRI studies. Although Dr. Finkel reviewed Dr. Stauber's IME (independent medical examination) dated August 13, 2011, and commented upon it, a copy of that report has not been provided. Dr. Tantleff has not submitted a copy of the MRI report for the MRI films which he reviewed. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that the expert testimony is limited to facts in evidence (see, Allen v Uh, 82 AD3d 1025 [2nd Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2nd Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2nd Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2nd Dept 1984]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]). These records and reports are not in evidence, leaving this court to speculate as to the contents contained therein, precluding summary judgment.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (Jankowsky v Smith, 294 AD2d 540 [2nd Dept 2002]). A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (Hussein, et al. v Harry Littman, et al., 287 AD2d 543 [2nd Dept 2001]). While the plaintiff alleged that she suffered a herniated disc and herniated nucleus pulposus at C5-6, Dr. Finkel has not commented on the herniated discs and has not ruled out that plaintiff sustained such injuries or state that they are not causally related to the subject accident. He did note, however, that he observed some local muscle tightness upon examination of her cervical spine. Upon examination of plaintiff's cervical spine, Dr. Finkel failed to provide the range of motion findings with

respect to lateral bending or flexion of plaintiff's neck. Additionally, he set forth that he obtained his range of motion measurements by visual identification, however, he failed to set forth an objective method employed to obtain such range of motion measurements of the plaintiffs' cervical spine and shoulders, such as the goniometer, inclinometer or arthroidal protractor (see, Martin v Pietrzak, 273 AD2d 361 [2nd Dept 2000]; Vomero v Gronrous, 19 Misc3d 1109A [Sup Ct, Nassau County 2008]), leaving it to the court to speculate as to how he determined such ranges of motions when examining the plaintiff.

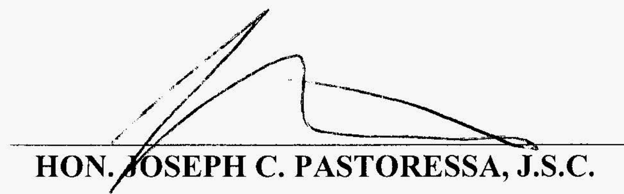
Although the plaintiff claims to have cervical radiculopathy, no report from an independent examining neurologist has been submitted by defendant to rule out such injury, and Dr. Finkel made a conclusory statement that no radicular component was identified, raising a further factual issue as to whether or not radiculopathy is present, precluding summary judgment (see, Browdame v Candura, 25 AD3d 747 [2nd Dept 2006]).

Dr. Tantleff set forth in his report that upon review of the plaintiff's cervical MRI of April 16, 2010, he observed degeneration and desiccation of the visualized intervertebral discs variably throughout the upper thoracic and cervical region, most pronounced at C5-6, which he stated is of no significance. He continued that there is chronic degenerative discogenic changes, however, he does not indicate the duration or causation of such condition, and does not correlate his interpretations with the plaintiff's clinical presentation and history, leaving this court to speculate as to the basis for his opinions (Dufel v Green, 84 NY2d 795; Carmona v Youssef, 27 Misc3d 1238 [Sup Ct, Queens County 2010]). Although the plaintiff testified that she had a subsequent cervical MRI performed in July 2012, Dr. Tantleff had not commented on this study, leaving this court to speculate as to an opinion or findings, had he reviewed the additional MRI study.

Additionally, the defendant's physicians' affidavit is insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (Blanchard v Wilcox, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]; see, Uddin v Cooper, 32 AD3d 270, [1st Dept 2006]; Toussaint v Claudio, 23 AD3d 268 [1st Dept 2005]), as the examining physician does not opine on this category of serious injury, thus, raising further factual issues. The plaintiff testified at her examination before trial that she had a "whopper headache," as well as neck and shoulder pain. Prior to this accident, she rarely suffered from migraine headaches. She can no longer sleep on her stomach or on her right side. She has difficulty sleeping at night. She can no longer easily lift her son. She can not carry heavy items, such as groceries. She has to use a neck pillow for driving or sitting in the car, and she cannot take long trips. Although epidural injections to her neck were recommended by Dr. DeWal, she refused them because her father had epidural injections which caused a staph infection which almost caused him to die; he is now paralyzed as a result. She was concerned about suffering these ailments herself if she had the epidurals. She had physical therapy for six months following the accident, which did not help. She saw Dr. Nambiar and was prescribed a topical muscle relaxer cream, and given trigger point injections into her neck and shoulder areas, but the injections did not help. Based upon the foregoing, there are factual issues which preclude summary judgment with regard to this category of injury as well.

The foregoing factual issues raised in defendant's moving papers preclude summary judgment. Thus, the defendant 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 [2006]); see also, Walters v Papanastassiou, 31 AD3d 439 [2nd Dept 2006]). Inasmuch as the moving party has failed to establish entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see, Yong Deok Lee v Singh, 56 AD3d 662 [2nd Dept 2008]); Krayn v Torella, 40 AD3d 588 [2nd Dept 2007]; Walker v Village of Ossining, 18 AD3d 867 [2nd Dept 2005]). However, however it is noted that the plaintiff's opposing evidentiary submissions raise factual issues which preclude summary judgment from being granted to the defendant. The plaintiff, through the affirmations and affidavits, has demonstrated deficits in cervical range of motion in flexion, extension, and rotation; and migraine headaches; and treatment by a neurologist.

Accordingly, motion (003) by the defendant for dismissal of the complaint on the basis that the plaintiff has failed to meet the serious injury threshold as defined by Insurance Law § 5102 (d) is denied.



Dated: November 26, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION