

Shorter v Calderon

2014 NY Slip Op 30065(U)

January 10, 2014

Supreme Court, Queens County

Docket Number: 9133/2012

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

KAREN L. SHORTER, Index No.: 9133/2012
Plaintiff, Motion Date: 12/13/13
- against - Motion No.: 90
EDGAR O. CALDERON and CAROLINE Motion Seq.: 1
CALDERON,

Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by defendants EDGAR O. CALDERON and CAROLINE CALDERON, for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff KAREN L. SHORTER on the ground that said plaintiff has not sustained 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.....8 - 13
Reply Affirmation.....14 - 16

This is a personal injury action in which plaintiff, Karen L. Shorter seeks to recover damages for injuries She allegedly sustained on January 12, 2012 at approximately 7:15 a.m. when her vehicle was involved in a collision with the vehicle owned by Caroline Calderon and operated by defendant Edgar O. Calderon. The accident took place at or near the intersection of Brookville Boulevard and North Conduit Avenue, Queens County, New York. Plaintiff commenced the instant action by filing a summons and complaint on May 1, 2012. Issue was joined by service of defendants' verified answer dated June 11, 2012. Plaintiff filed a note of issue on July 12, 2013. The matter is presently on the calendar of the Trial Scheduling Part on February 13, 2014.

Defendants Edgar O. Calderon and Caroline Calderon now move for an order pursuant to CPLR 3212 dismissing the complaint of plaintiff Karen L. Shorter on the ground that the injuries claimed by said plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendants submit an affirmation from counsel, Stuart Kurland, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; a copy of the affirmed medical report of orthopedic surgeon, Dr. Joseph Y. Margulies and the affirmed radiological report of Dr. Sheldon Feit.

In her verified bill of particulars, the plaintiff, age 55, states that as a result of the accident she sustained inter alia, a herniated disc at C5-C6, a partial tear of the supraspinatus muscle of the right shoulder and a partial tear of the supraspinatus muscle of the left shoulder and brain cerebellum dysfunction. The plaintiff contends that she sustained a serious injury as defined in Insurance Law §5102(d) in that as a result of the accident she has a significant limitation of use of and/or consequential loss of use of the cervical and lumbar spines and both the right and left shoulders as well as brain cerebellum dysfunction.

Plaintiff, Karen L. Shorter, a case manager for mentally ill adults and a case worker for drug abuse patients was deposed on July 1, 2013. She testified that as a result of the accident she missed one week from work from the Episcopal Community Service due to the pain she was having in her neck and shoulders. On the date of the accident she was operating a 1999 Nissan Altima proceeding westbound on Sunrise Highway in Valley Stream when she stopped her vehicle at a red traffic signal at the intersection with Brookville Road. She was stopped for between 30 and 60 seconds when her car was struck in the rear by the vehicle operated by defendant Edgar O. Calderon. She stated that after she exited her vehicle the defendant approached her to see if she was okay and to apologize for hitting her vehicle. When the police officers arrived at the scene, she told them that she was stopped at the red light when her vehicle was rear-ended. She told the officers that she did not require immediate medical assistance. However, after she arrived home she sought medical treatment at Brookville Pavilion where she began a course of physical therapy and chiropractic treatment for pain to her shoulders and neck. She treated there for four or five months until no fault terminated payments for the treatment. Part of her treatment included lidocaine injections for pain in her

shoulders. She states that she still experiences shoulder pain on a daily basis. She testified that she injured her back in a prior accident in June 2005.

The plaintiff was seen for an independent orthopedic evaluation on August 2, 2013 by orthopedist, Dr. Joseph Y. Margulies, a physician retained by the defendant. At that time the plaintiff reported to Dr. Margulies that she suffers from pain in her neck, back and shoulders. Dr. Margulies tested the plaintiff's range of motion using a goniometer and found that the plaintiff had no loss of range of motion of the cervical spine, bilateral shoulders, and lumbosacral spine. He stated that there were no objective findings on examination of the head and neck. His diagnosis was cervical sprain, resolved; contusion of both shoulders, resolved; and lumbar sprain, resolved. He states that, "based on orthopaedic clinical evaluation, the claimant revealed no functional disability at the present time. The claimant may continue with activities of daily living as well as the present employment."

Radiologist, Dr. Sheldon Feit, reviewed the MRI studies of the plaintiff's cervical spine, right shoulder and left shoulder. As to the cervical spine he found disc bulges at C3-4 and C5-6 which resulted from pre-existing degenerative changes. He states that disc bulges are not traumatic in origin and are degenerative secondary to annular degeneration. He states that no post-traumatic changes are noted and there are no findings which are causally related to the accident of January 12, 2012. With respect to the MRIs of the right and left shoulders, Dr. Feit stated that there was no MRI evidence of rotator cuff tearing and no evidence of any impingement on the supraspinatus muscle. He stated that the MRI of the right and left shoulders demonstrated no discernible abnormalities and therefore no abnormalities causally related to the subject accident.

Defendants' counsel contends that the affirmed medical reports of Drs. Margulies and Feit are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who returned to work one week after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

In opposition, plaintiff's attorney, Andrew Hirschhorn, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated November 10, 2013, and the affirmed medical report of board certified internist, Dr. Marc Rybstein, plaintiff's treating physician and the surgical evaluation and postoperative report of Dr. Fritz Gondre.

Dr. Gondre examined the plaintiff on September 9, 2012, eight months after the accident. He states that upon orthopedic range of motion testing he found that the plaintiff exhibited diminished range of motion of the cervical spine, lumbar spine, left shoulder and right shoulder. He administered trigger point injections in the shoulder and cervical spine.

Dr. Rybstein states in his affirmation that he examined the plaintiff on November 10, 2013. At that time he reviewed the plaintiff's MRI studies which showed a partial tear of the supraspinatus muscle of the left shoulder, a central herniation of the cervical spine at C5-C6, and a partial tear of the supraspinatus muscle of the right shoulder. He performed objective range of motion testing and found that the plaintiff had significant restriction of range of motion of the cervical spine, lumbar spine, left shoulder and right shoulder. He states that the plaintiff exhibited limitations of range of motion and positive orthopedic findings more than a year after the event and after an intensive course of physical therapy. He states that the restrictions are permanent in nature.

In her affidavit, Ms. Shorter states that following the accident she sought treatment at the Brookville Medical Pavilion where she underwent physical therapy, chiropractic care and acupuncture for four months. She states that she stopped treatment when her no-fault benefits were terminated and she could not afford to pay out-of-pocket for continued treatments. She states that she still has neck pain, lower back pain, bilateral shoulder pain and concussive syndrome.

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 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 defendants' 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]).

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition, and defendants' reply thereto, this court finds that the admissible evidence submitted by the defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

In her bill of particulars, the plaintiff set forth the allegation that in addition to suffering herniated discs in her cervical spine, and torn rotator cuff injuries in both shoulders she also sustained brain cerebellum dysfunction. However, the defendant failed to submit a report from a neurologist and neither Dr. Margulies nor Dr. Feit specifically ruled out a brain injury. Thus, as the defendants failed to address the alleged permanent injury to the plaintiff's brain, the evidence submitted is insufficient to demonstrate that there are no triable issues of fact with respect to the plaintiff's alleged permanent and significant injuries (see Foster v Franco, 110 AD3d 678 [2d Dept. 2013][summary judgment denied where the defendants' motion papers failed to adequately address the plaintiff's claim, clearly set forth in the bill of particulars, that he sustained serious injuries to his head and brain as a result of the accident]; Pleasant v M & Lenny Taxi Corp., 94 AD3d 1072 [2d Dept. 2012][the defendants failed to address, much less satisfy, their burden with respect to the plaintiff's allegation that her brain sustained certain injuries as a result of the subject accident]; Safer v Silbersweig, 70 AD3d 921 [2d Dept. 2010]; Menezes v Khan, 67 AD3d 654 [2nd Dept. 2009]; McFadden v Barry, 63 AD3d 1120 [2d Dept. 2009]; Staubitz v Yaser, 41 AD3d 698 [2d Dept. 2007]; Hughes v Cai, 31 AD3d 385 [2d Dept. 2006]).

Inasmuch as the defendants did not meet their prima facie burden, it is unnecessary to consider the sufficiency of the plaintiff's papers in opposition (see Delayhaye v Caledonia Limo & Car Serv., Inc., 61 AD3d 814 [2d Dept. 2009]; Yong Deok Lee v

Singh, 56 AD3d 662 [2d Dept. 2008]; Ali v Rivera, 52 AD3d 445, [2d Dept. 2008]).

Accordingly, based on the foregoing, it is hereby,

ORDERED, that the motion by the defendants for summary judgment dismissing the plaintiff's complaint of plaintiff Karen L. Shorter is denied.

Dated: January 10, 2014
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.