McCarthy v Lauzadis
2014 NY Slip Op 30173(U)
January 7, 2014
Supreme Court, Suffolk County
Docket Number: 12-3027
Judge: Jerry Garguilo
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[* 1]

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SHORT FORM ORDER

INDEX No. 12-3027
CAL No. 13-00668MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-29-13
ADJ. DATE 12-11-13
Mot. Seq. # 001 - MD
002 - MD

BRYAN C. MCCARTHY and JULIE MCCARTHY,

Plaintiffs,

- against -

JUSTAS LAUZADIS and ARUNAS LAUZADIS,

Defendants.

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-11; (002) 12-25; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 26-33; Replying Affidavits and supporting papers 34-35; 36-37; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the plaintiff on the counterclaim, Bryan McCarthy, pursuant to CPLR 3212 for summary judgment dismissing that part of the complaint asserted by Julie McCarthy on the basis that she did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (002) by the defendants, Justas Lauzadis and Arunas Lauzadis, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Julie McCarthy, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

JH

In this negligence action, the plaintiffs, Bryan C. McCarthy and Julie McCarthy, seek damages for personal injuries alleged to have been sustained on February 5, 2011, on Wading River Road at or near its intersection with Beech Street, in the town of Brookhaven, New York, when the vehicle operated by Bryan McCarthy, in which Julie McCarthy was a passenger, and the vehicle operated by Justas Lauzadis and owned by Arunas Lauzadis, came into contact. The Lauzadis defendants have asserted a counterclaim against Bryan McCarthy for indemnification/contributions in whole or in part based upon his alleged negligence for any injuries claimed by Julie McCarthy.

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 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]).

In support of motion (001), the plaintiff on the counterclaim has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer with counterclaim and demands, and plaintiff's verified bill of particulars; the transcript of the Julie McCarthy's examination before trial dated December 27, 2012; the expert witness disclosure and report of Edward M. Weiland, M.D. dated January 24, 2013 concerning his independent neurology examination of the plaintiff.

In support of motion (002), the defendants have submitted[1], inter alia, an attorney's affirmation; copies of the summons and complaint, answer with counterclaim and demands, and plaintiff's verified bill of particulars; the transcript of Julie McCarthy's examination before trial dated December 27, 2012; the expert witness disclosure and report of Edward M. Weiland, M.D. dated January 24, 2013 concerning his independent neurology examination of the plaintiff.

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[1]The defendants have submitted untabbed exhibits which fail to comport with the rules of the court. In the future, counsel is directed to properly tab exhibits as it renders it difficult for this court to match arguments to documents and to sort through the multitude of pages (*see* ***DelVecchio v Sciacca***, 2012 NY Slip Op 33088U [Sup Ct, Suffolk County]; ***Ro v Noah ModaMaya Sa De Cv, Inc.***, 2009 NY Slip Op 32598 U [Sup Ct, New York County]; ***Youngewirth v Town of Ramapo Town Board***, 29 Misc3d 1221A, 918 NYS2d 401 [Sup Ct, Rockland County 2010]).

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, 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" (***Rodriquez 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*).

By way of the verified bill of particulars, Julie McCarthy alleges to have sustained the following injuries in the subject accident: exacerbation of cervical radiculopathy; cerebral concussion; post concussion syndrome; micro hemorrhages in the right putamen and left superior front gyrus of the brain as evidenced by MRI; loss of consciousness; headaches; dizziness; traumatic vestibulopathy and vestibulo-ocular dysfunction; loss of memory and forgetfulness; decreased short term memory; acute exotropia; diplopia; ametropia; bilateral convergence insufficiency exophoria; facial laceration; facial scarring; soft tissue injury to the face; laceration to the left frontal region of the forehead requiring repair

and resulting in scarring; bilateral knee contusions; neck pain/stiffness which radiates to the right shoulder blade and arm associated with occasional numbness; cervical pain syndrome.

Upon careful review and consideration of the moving parties' evidentiary submissions, it is determined that they have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Julie McCarthy did not sustain a serious injury in either category as defined by Insurance Law § 5102 (d).

Although Dr. Weiland set forth the materials, medical records, and reports which he reviewed, and upon which he bases his opinions in part, copies of the records, ultrasounds, x-rays, CT, EEG, and MRI reports, and the narrative reports of Dr. Mebrahtu, Dr. Firoutzale, Dr. Rosen, Dr. Meltzer, and Dr. Protosow, inter alia, have not been provided. 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 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]). Here, the aforementioned records and reports are not in evidence, leaving this court speculate as to the contents of those reports.

Dr. Weiland set forth that the EEG study by Dr. Firoutzale was noted to be abnormal due to intermittent mild slowing in the left temporal area. He noted that there was a borderline normal study addressed by Dr. Rosen concerning the infrared video nystagmogram examination of the plaintiff, however, he does not comment upon these findings. Dr. Weiland stated that the Julie McCarthy underwent a cervical spine fusion procedure on March 1, 2010. Upon examination of her lumbar spine, Dr. Weiland failed to report left and right lateral lumbar rotation, leaving this court to speculate as to the findings. It is further noted that Dr. Weiland reported that if the history obtained from the claimant is correct, then there is a causal relationship with regards to the claimants subjective complaints and the injuries reportedly occurring on February 5, 2011, however, he does not set forth the subjective complaints to which he refers.

While Dr. Weiland set forth that he could find no evidence of any lateralizing neurological deficits, he did not address the neurological findings set forth in the reports he reviewed, and deferred any specific neurocognitive difficulty to the appropriate health care specialists, specifically a neurobehavorial or neurocognitive specialist. In that no reports of any examinations by a neurobehavorial or neurocognitive specialist on behalf of the moving parties have been submitted, this court is left to speculate as to the professional opinions of such examiners in those specialties to whom Dr. Weiland defers. Additionally, Dr. Weiland did not rule out that Julie McCarthy sustained exacerbation of the cervical radiculopathy alleged to have been caused by the subject accident, and he did not comment upon the plaintiff's continuing headaches and double vision, raising further factual issues which preclude summary judgment.

It is further observed that although Julie McCarthy has alleged knee injuries, and a facial laceration and scarring, no examination by an orthopedist or plastic surgeon has been submitted, raising

further factual issues 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 movants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether Julie McCarthy 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 [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]), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, summary judgment is precluded to the moving parties with regard to this category of injury as well.

The plaintiff testified that she was seven weeks pregnant at the time of the accident, but does not allege that any injury was caused to the child whom she carried to full term. Because she lost consciousness at the time of the accident, her last memory prior to the accident was being at home. She thereafter learned that she had been hospitalized for a week. She was upset because she had a CT scan of her brain while she was unconscious and learned that she shouldn't have a CT scan while pregnant. She sustained a laceration to her forehead which she stated left scarring in the nature of an indent. The scar bothers her because she "is a female." She has had memory problems since the accident and had to undergo balance therapy. She could not drive following the accident, and upon returning to work, her husband drove her the first couple of weeks. She was experiencing double vision and had to undergo vision therapy with Dr. Meltzer for one year. She now works with a computer disc twice a week to address the double vision problem. McCarthy testified that she had a cervical fusion due to an herniated disc prior to the accident. After the accident, she had to attend physical therapy twice a week due to the pain in her neck. Due to the injury to her knee, she had no feeling in the area of her knee cap for one year. Her current complaints are those of headaches, anxiety getting into a car, and double vision which she experiences every day. Following the accident, she was out of work for three weeks. She teaches autistic children and also provided tutoring and ABA (applied behavioral analysis) therapy ten hours a week, which she had to stop until May following the accident. Following the accident, she had to hire a cleaning woman. Since the accident, she experiences difficulty processing things and has difficulty multi-tasking. She missed three weeks from work, so when she had the baby, she had less maternity leave as she used that time following the accident.

Based upon the foregoing, plaintiff on the counterclaim and the defendants have not demonstrated prima facie entitlement to summary judgment. The factual issues raised in the moving papers preclude summary judgment and the moving parties have failed to satisfy the burden of establishing, prima facie, that plaintiff Julie McCarthy 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 parties have failed to establish prima facie entitlement to judgment as a matter of law in

the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), 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, 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, motions (001) and (002) are denied.

Dated: Jan. 7, 2014

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**