

Dirks v Savage

2014 NY Slip Op 30689(U)

March 18, 2014

Supreme Court, Wayne County

Docket Number: 73604/2011

Judge: John B. Nesbitt

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

HUGUETTE DIRKS

Plaintiff,

-vs-

Index No. 73604

MARCIA SAVAGE and JAMES ANDRE,
a/k/a JAMES SAVAGE, a/k/a JAMES
ANDRE SAVAGE

2011

Defendants.

APPEARANCES: CHAMBERLAIN D'AMANDA
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Attorneys for the Plaintiff

COSTELLO, COONEY & FEARON, PLLC
(Shannon R. Becker, Esq., of counsel)
Attorneys for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. Introduction and Issue Presented.

Defendants move for summary judgment dismissing plaintiff's complaint upon the ground that she fails to present a triable issue of fact whether she sustained a serious injury as defined in N.Y. Insurance Law §5102. The complaint pleads a common law negligence action against defendants based upon defendant James Andre's operation of a motor vehicle that collided with a motor vehicle operated by the plaintiff. Plaintiff claims that this collision, allegedly caused by defendant Andre's negligence, directly caused personal injuries to plaintiff, for which she seeks monetary damages.

Assuming for purposes of this motion that the collision was caused by defendant Andre's negligent motor vehicle operation, defendants argue that the alleged injuries claimed by plaintiff are not "serious" as statutorily defined and not related to the collision. Regarding the latter, defendants claim, as a matter of law, based upon the record, that plaintiff's alleged injuries are, in fact, conditions that pre-existed the collision or are the consequent manifestations of those conditions unaffected by the accident.

The issue presented is whether plaintiff's action may proceed to trial because there is a genuine issue of fact whether plaintiff sustained a serious injury as a result of the accident.

II. Summary Judgment and the Serious Injury Threshold.

To recover for non-economic loss under N.Y. Insurance Law §5102(d), as sought by the plaintiff, she must plead and prove a "serious injury" falling within one or more of the statutorily defined categories. She claims her injuries fall into four of those categories:

- (1) "a fracture" allegedly being a broken tooth.
- (2) "permanent consequential limitation of use of a body organ and member" allegedly being permanent limitation of use of her left and right shoulders and right leg.
- (3) "significant limitation of use of a body function or system" allegedly being significantly limited use of both shoulders, right leg, neck, back, jaw and teeth.
- (4) "a medically determined injury or impairment of a non-permanent nature" that prevented plaintiff "from performing substantially all of the material acts" constituting her "usual and customary daily activities for not less than ninety days during the 180 days immediately following the occurrence of the injury or impairment." The medically determined injury or impairment in this case are the alleged injuries described above, which allegedly caused an inability to eat and chew properly, and a painful and/or functional inability to perform activities requiring shoulder, back, and right leg movement. These conditions allegedly disabled plaintiff from substantially performing her usual and customary daily activities for at least ninety of the 180 days following the accident.

At the outset, it is helpful to outline the principles governing summary judgment in general and how they relate to the serious injury threshold in particular. Summary judgment is governed by section 3212 of the Civil Practice Law and Rules ("CPLR"). Summary judgment motions require a court to determine whether the cause of action, counterclaim, or defense requires a trial before it can be sustained or dismissed (CPLR 3212(b)). A trial is required where there are disputed issues of fact to be resolved before a cause of action, counterclaim, or defense can be determined meritorious or not (Siegel, New York Practice §278 at 476 [5th ed. 2011]). Such a motion must be supported by proper evidentiary proof that, if uncontroverted, entitles the moving party to judgment as a matter of law (CPLR §3212(b)). Said otherwise, the moving party must make a prima facie showing that it is entitled to judgment as a matter of law, and provide sufficient evidence to show

the absence of any material issue of fact that would require a trial for resolution (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 [2003]). Once such a showing is made by the movant, the opposing party must respond with proper proof challenging one or more of the factual claims upon which summary judgment depends (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]).

In deciding these issues, judges are reminded that summary judgment is “a drastic remedy and should not be granted where there is any doubt as to the existence of triable issues” (*Dal Construction Corp. v. City of New York*, 108 A.D.2d 892, 894 [2nd Dep’t 1985]). Only where “no reasonable view of the evidence” supports a claim or defense should a court rule upon its merits as a matter of law (*Eddy v. Syracuse University*, 78 A.D.2d 989 [4th Dep’t 1980]). “Where varying inferences are possible, however, the issue is one for the jury” (*id.*). Accordingly, evidence adduced upon a motion for summary judgment must be viewed in the light most favorable to the party opposing the motion (*Rizk v. Cohen*, 73 N.Y.2d 98, 103 [1989]).

In the context of “serious injury” claims, a certain type of proof is required. As stated by the Court of Appeals:

“This Court has long recognized that the ‘legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries.’ As such, we have required objective proof of a plaintiff’s injury in order to satisfy the statutory serious injury threshold; subjective complaints alone are not sufficient” (*Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 351 [2002])(citations omitted).

Based upon the plaintiff’s documented medical history and the results of an independent medical examination by defendants’ own medical expert, defendants claim that there is no objective evidence of any injury to the plaintiff caused by the accident that would fall into any of the statutory “serious injury” categories. Plaintiff counters that there is such objective evidence, which she claims is set out in the affidavits of two medical professionals submitted in opposition to defendants’ motion.

III. Defendants’ Argument and Proof in Support of Summary Judgment Motion.

Defendants have submitted a thorough and well supported argument both on the facts and the law in support of their argument that plaintiff did not sustain a serious injury as a result of the motor vehicle accident occurring on December 12, 2008. They emphasize the substantial medical history of plaintiff predating the accident that involves the same sort of conditions diagnosed and treated previous to the accident as those following. The post-accident conditions are “simply a matter

of more of the same” (Defendant’s Memorandum of Law at p. 6). To some extent this appears true, although, as plaintiff counters, exacerbation of existing conditions is nevertheless actionable under the “eggshell plaintiff” doctrine (Plaintiff’s Memorandum of Law at 16).

Defendants argue, based upon plaintiff’s own medical records and the report of their expert, that plaintiff’s present medical condition stems from her degenerative osteoarthritis, which is chronic and progressive, complicated by fibromyalgia, as well as a cognitive dysfunction that impacts her ability to deal with these conditions. With these conditions, “senescent changes [will] tend to progress with time” (Defendant’s Memorandum of Law at 4.) Thus, regarding the permanent consequential limitation of use and significant limitation of use categories of serious injury, defendants argue, based upon their expert’s opinion:

“[T]he Plaintiff has not had any injury that can be objectively defined related to the motor vehicle accident of December 12, 2008; that the only objective medical findings with respect to any alleged injury relate to a pre-existing degenerative condition, osteoarthritis and longstanding pain resulting from fibromyalgia of her cervical and lumbar spines, right and left shoulders, knees, hands and feet; that the symptoms Plaintiff has before and after December 12, 2008 are essentially one and the same and there were no new abnormalities or problems attributable to the December 12, 2008 accident; and that there is no evidence of a traumatic injury to the Plaintiff’s cervical spine, lumbar spine, right shoulder, left shoulder, knees, hands or feet attributable to the 2008 accident. As such, Plaintiff has failed to meet the definition of a serious injury under the permanent consequential limitation of use and significant limitation of use categories” (Defendants’ Memorandum of Law at p. 8-9).

Defendants deny as well plaintiff’s claim that her injuries satisfy the 90/180 standard - a “medically determined” non-permanent injury or impairment that prevented plaintiff from performing substantially all of the material acts constituting her usual and customary activities for not less than 90 days during the 180 days following the occurrence of the injury. Defendants argue that there is no objective medical proof upon which to base a medical determination that the December 12, 2008, accident inflicted any injury or aggravated plaintiff’s already existing physical impairments. Moreover, defendants emphasize that any differentiation between plaintiff’s pre- and post- accident physical condition is based upon plaintiff’s subjective complaints. Plaintiff’s reliance upon the opinion of Dr. Todd Stein, her pre- and post-accident treating physician, fails in the defendants’ view, because his post-accident assessment of plaintiff with limited range of motion is

unquantified in terms of present degree of limitation, devoid of a quantified comparison of pre- and post-accident limitations, and wholly derived from symptoms subjectively experienced and reported by the plaintiff.

Defendants also dispute plaintiff's claim that she meets the "fracture" category of the serious injury threshold because of a tooth allegedly damaged during the accident. Plaintiff's own medical records, argue defendants, show that what was supposedly damaged as a result of the accident was not a tooth, but a bridge which is "hardware" and "not a bone or part of her body that broke" (Defendants' Reply Attorney Affidavit ¶3). Defendants contend as well that any causal relationship between the accident and difficulties with her #10 tooth, culminating in a root canal procedure in 2009, is speculative and, in any event, does not constitute a serious injury under the "permanent" category. So too, the fact that plaintiff's expert opines that the #10 tooth "is more susceptible to future infections in the event that a crack develops or in the event that the material used to fill the root canal breaks down" is speculation on possible future dental issues and not indicative of a present or even probable future permanent condition (Id. at ¶8).

Lastly, defendants dispute that an alleged injury to the temporomandibular joint rises to the level of serious injury. Plaintiff's expert opines that "TMJ condition is chronic and permanent" (Pignato Aff. ¶18). Defendants cite *Evans v Fuller*, 136 A.D.2d 856 (3rd Dep't 1988) for the proposition that a TMJ injury diagnosis does not, standing alone, constitute a serious injury. In that case, the court found the medical report of an oral surgeon insufficient to establish serious injury, because "nowhere in that report is there a diagnosis of any serious injury or a statement that the temporomandibular conditions observed ... are permanent or significant in any respect, or were caused by the motor vehicle accident," and that the doctor's opinion that the TMJ injury caused "some functional limitations", failed to define the degree of that limitation and opine that it was permanent, let alone significant" (Id. at 856-857).

III. Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

Plaintiff submits in opposition to the present motion the affidavits of Todd M. Stein, M.D., and Michael Pignato, D.D.S., which, she argues, raise issues of fact whether she sustained a serious injury as a result of the motor vehicle accident occurring on December 12, 2008. Dr. Stein began treating plaintiff in July 2006. Dr. Stein's involvement with plaintiff from 2006 up to the date of the accident primarily concerned a right rotator cuff tear, which was treated surgically. She treated with

Dr. Stein after the accident, but apparently did not present any new complaints to Dr. Stein or mention the 2008 car accident until October, 6, 2009 (Becker Aff p. 19, Ex H p. 165-166). On December 21, 2009, Dr. Stein treated plaintiff for bilateral shoulder pain and ordered “a bilateral rotator cuff MRI to rule out additional rotator cuff tears.” In January, 2010 Dr. Stein determined from the MRI that there was a re-tear of her right shoulder rotator cuff and a small to medium left shoulder rotator cuff tear. During subsequent office visits, Dr. Stein determined that plaintiff was experiencing moderate range of motion limitations in both shoulders and recommended continuation of aqua therapy and chiropractic care as surgery was not an appropriate course of treatment given her “reasonable function and age.” Dr. Stein concluded his report as follows:

17. I understand from Ms. Dirks that she was struck from behind and in turn her vehicle struck the vehicle ahead of her, and she was propelled first backward then forward, which did tear her left rotator cuff and re-tear her right rotator cuff.

18. In my opinion within a reasonable range of medical certainty, the motor vehicle accident of December 12, 2008 was the competent producing agent of Ms. Dirks’ serious personal injuries including her left rotator cuff tear and right rotator cuff re-tear and related symptoms including pain, discomfort, and limited range of motion as well.

19. Ms. Dirks has sustained a functional disability, limitation of range of motion, and will continuously have pain in her bilateral shoulders as a result of the rotator cuff tear and re-tear sustained in this motor vehicle accident.

20. I have recommended injection treatments for Ms. Dirks and still do not recommend surgery based upon her age. As Ms. Dirks is not a candidate for surgery, she will continue to suffer from permanent pain and as a result, a permanent consequential limitation of use and movement of her shoulders and arms, and significant limitation of use and movement of her shoulders and arms.

The second expert plaintiff presents in this motion is Michael Pignato, D.D.S., who began treating plaintiff in 2005. Prior to the December 12, 2008, accident, Dr. Pignato performed various dental procedures for plaintiff, including fillings and root canal. On January 12, 2009, one month after the accident, plaintiff consulted with Dr. Pignato about soreness in her right jaw and her involvement in a motor vehicle accident. She was referred to a specialist in temporomandibular joint pain and disorders (TMJ). About a week later, she consulted again with Dr. Pignato who found a broken bridge as well as an abscess at the root of her #10 tooth. Dr. Pignato performed a root canal procedure upon her #10 tooth.

Based upon the fact that plaintiff voiced no complaints prior to the December 12, 2008, accident about the #10 tooth or any TMJ problems, Dr. Pignato opines that trauma associated with the accident caused these conditions. He points out that it is “commonplace for trauma to the mouth and jaw, either direct or indirect, to result in damage to a vital, healthy tooth,” and based upon this fact as well as plaintiff’s fractured bridge, he can conclude “within a reasonable degree of medical and dental certainty,” the accident “was the competent producing cause of her symptoms, including pain, discomfort, in her #10 tooth and her jaw, as well as the fractured bridge” (Pignato Aff¶13-15).

Regarding the TMJ condition, Dr. Pignato relies primarily upon the self-reporting of the plaintiff and the findings of Dr. Caplash, and opines that “the TMJ problem is chronic and permanent.”


IV. Conclusion.

Based upon the papers submitted, the Court finds that plaintiff has made out a prima facie case so to defeat defendant’s motion for summary judgment regarding the permanent consequential and significant limitation and medically determined non-permanent categories of serious injuries regarding the shoulder and related injuries. There is objective evidence of the rotator cuff tears and certainly a question of fact whether the accident caused these conditions.

The Courts grants defendants’ motion regarding the #10 tooth and TMJ complaints. Assuming causation, the Court finds that a tooth injury requiring a root canal does not arise to a serious injury under any of the statutory categories of serious injuries. Regarding the TMJ problems, there is no objective evidence that has been presented that substantiates its diagnosis or its significance.

Defendants’ counsel shall submit an order consistent with this decision upon notice to, or approved as to form, by plaintiff’s counsel.

Dated: March 18, 2014
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

THE
WAYNE COUNTY COURT
SUPREME AND DISTRICT COURT
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