

Fellicciardi v Lankap Cab Corp.

2014 NY Slip Op 30807(U)

March 13, 2014

Sup Ct, Suffolk County

Docket Number: 46064/10

Judge: Paul J. Baisley

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

Cur

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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MAUREEN FELICCIARDI and THOMAS
FELICCIARDI,

Plaintiffs,

-against-

LANKAP CAB CORP., GALIB ISLAN SARKAR,
MD. and JOEL SPANIER,

Defendants.

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INDEX NO.: 46064/10
CALENDAR NO.: 201300218MV
MOTION DATE: 9/25/13
MOTION NO.: 004 MD

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 15-19; Replying Affidavits and supporting papers 20-21; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion) it is,~~

ORDERED that the motion (motion sequence no. 001) of defendants Lankap Cab Corp. and Galib Islam Sarkar, Md. for an order pursuant to CPLR R. 3212, granting summary judgment dismissing the complaint on the basis that plaintiff Maureen Felicciardi did not sustain a serious injury as defined by Insurance Law §5102(d), is denied.

In this action plaintiffs seek damages, personally and derivatively, for serious personal injuries allegedly sustained by Maureen Felicciardi on February 3, 2010, when the vehicle in which she was a passenger, and which was operated by defendant Galib Islam Sarkar Md. and owned by defendant Lankap Cab Corp., came into contact with a vehicle operated by defendant Joel Spanier. Galib Islam Sarkar Md. and Lankap Cab Corp. have asserted a cross claim against Joel Spanier seeking judgment over for indemnification or contribution relative to any recovery by the plaintiffs for injuries and damages they claim to have sustained in the accident.

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]). 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

(M&L)

party must assemble, lay bare and reveal its proof in order to establish that the matters set forth in its 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 their application, the moving defendants have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, the answer with cross claim served by them, and the plaintiff's verified bill of particulars and supplemental verified bill of particulars; an order with notice of entry dated December 9, 2010 changing the venue of this action to Suffolk County; copies of the transcripts of the depositions of Maureen Fellicciardi dated August 17, 2011, with proof of service, and of Thomas Fellicciardi dated May 24, 2012, with proof of service; an uncertified Southside Hospital record dated May 20, 2001 relating to prior medical care; a complaint dated June 11, 1997 for an action which contains no index number; and the reports of Lee M. Kupersmith, M.D. dated September 20, 2011 concerning his independent orthopedic examination of the plaintiff, with an addendum; and of Sheldon Feit, M.D. dated September 10, 2012 concerning his independent radiology review of the films for an examination of right shoulder dated April 5, 2010, of an MR arthrogram of right shoulder dated April 5, 2010, of an abdominal ultrasound dated June 9, 2010, of an MRI of lumbosacral spine dated June 17, 2010, and of an MRI of cervical spine dated June 21, 2010. The moving defendants have failed to provide a copy of the answer served by co-defendant Joel Spanier as required pursuant to CPLR R. 3212(b).

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 on the issue of serious injury as defined by Insurance Law §5102(d), the initial burden is on the moving party to present evidence in competent form showing that the plaintiff did not sustain a serious injury as a result of the accident (*see Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see 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 (*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 the plaintiff’s limitations, with an objective basis, correlating the 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*).

In her verified bill of particulars, Maureen Felicciardi alleges that as a result of this accident she sustained injuries consisting of a tear of the articular sides of the supraspinatus and infraspinatus tendons; a tear of the superior labrum; a right shoulder partial rotator cuff tear; a labral tear with fragments and loose bodies; right shoulder impingement; a bulging disc at C4-5 and C5-6; straightening with some reversal of the normal cervical lordotic curve; lumbosacral radiculitis; and a large partially detached osteochondral fragment from the humeral head with contrast undermining the fragment.

Both of defendants’ expert physicians have set forth the materials and records they reviewed; however, copies of those records and reports rendered by the plaintiff’s examining physicians have not been provided to this Court. These include films for an examination of right shoulder dated April 5, 2010, an MR arthrogram of right shoulder dated April 5, 2010, an abdominal ultrasound dated June 9, 2010, an MRI of lumbosacral spine dated June 17, 2010, an MRI of cervical spine dated June 21, 2010, a DEXA scan of lumbar spine dated September 9, 2009, a DEXA scan of left wrist, and medical records of Maureen Felicciardi’s treating physicians, *inter alia*, all as required pursuant to *Friends of Animals v Associated Fur Mfrs.* (*supra*). Expert testimony is limited to facts in evidence (*see also 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]). Since those records and reports are not in evidence, summary judgment is precluded.

While the injured plaintiff has pleaded that she sustained lumbar radiculopathy, no report from a neurologist who performed an independent neurological examination has been provided to rule out that such neurological/radicular injury is not a result of this accident, likewise 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 32623[U], 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

Upon examination of the plaintiff, Dr. Kupersmith obtained various range of motion values and compared his findings to the reported normal range of motion values. It is noted that Dr. Kupersmith reports deficits of 10 degrees in cervical flexion, right shoulder forward flexion, internal rotation and external rotation, and 20 degrees in right shoulder abduction. However, he fails to comment upon the cause or duration of those deficits and does not rule out that they are causally related to the subject accident (*Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995];

Carmona v Youssef, 27 Misc 3d 1238[A], 910 NYS2d 761 [Sup Ct, Queens County 2010]). While Dr. Kupersmith reports that the injured plaintiff has a partial thickness rotator cuff tear as per the MRI report, he again does not rule out that this injury is not causally related to the accident. He instead merely states that the “slight restriction in range of motion of her right shoulder” is due to the fact that she had an old proximal humerus fracture as shown on the MRI; his opinion, however, is conclusory and unsupported, and lacks any comparison with range of motion findings of the injured plaintiff’s right shoulder prior to the subject accident. Thus, this Court is left to speculate as to the basis for his opinion.

Dr. Kupersmith does not comment upon the claim of injury with regard to bulging discs at C4-5 and C5-6, and does not rule out that they are causally related to the subject accident. While he submits an addendum dated December 15, 2012 to his initial report concerning his review of many additional medical records from the injured plaintiff’s health care providers, he states that his review of these records does not change his opinions with regard to his prior independent orthopedic examination. It is noted that none of these additional records has been provided to this Court, as required. It is additionally noted that Dr. Kupersmith makes reference to a cervical MRI of September 20, 2007 in which no bulging cervical discs are reported, yet in his review of a cervical MRI of June 21, 2010, he notes that there are bulging discs at C4-5 and C5-6 with straightening and some reversal of the normal cervical lordotic curvature, likely related to muscular spasm. Dr. Kupersmith does not reconcile the report of the bulging cervical discs in the cervical MRI following the accident with the cervical MRI pre-dating the subject accident. Such factual issues preclude summary judgment.

While Dr. Feit has reported that the MR arthrogram of right shoulder of May 5, 2010 demonstrates findings compatible with a full thickness tear of the mid to distal supraspinatus tendon with retraction and marked to moderate supraspinatus atrophy, he opines that the finding is most likely related to the associated old fracture and rotator cuff tear. However, his opinion is conclusory and no evidentiary proof of a prior tear and retraction has been submitted, raising factual issues which preclude summary judgment. Dr. Feit has set forth a conclusory and unsupported opinion concerning the findings of disc bulges at the L3-4, L4-5 and L5-S1 levels demonstrated in the lumbosacral MRI of June 17, 2010 and simply concludes the findings are not post-traumatic and not causally related to the subject accident. His conclusion with regard to the bulging cervical discs noted at C3-4, C4-5, and C5-6 is also conclusory and unsupported by any explanation. There are factual issues concerning his interpretation of the films wherein he reports that there is a bulging disc at C3-4 which was not reported by Dr. Kupersmith in his rendition of the MRI report of June 21, 2010, which was not provided to this Court. Such factual issues preclude summary judgment (*see Estella v Geico Insurance Company*, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; *Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]).

The defendants’ examining physicians offer no opinion as to whether the injured plaintiff was incapacitated from substantially performing her activities of daily living for a period of 90 days in the 180 days following the accident, and he did not examine her during that statutory period (*see Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). He 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]), raising factual issues concerning whether Maureen Fellicciardi sustained a serious injury

with regard to this second category of injury. Notably, she testified that at the time of this accident, she was wearing an external fixator as she had an interior fusion of the ankle and extension of the tibia and fibula, involving 13 metal bars through her foot and leg. As a result of this accident, she initially complained of pain in her right shoulder, back, and neck. She received cortisone injections in her right shoulder by her orthopedist subsequent to the accident. She also received epidural injections into her neck and lower back by Dr. Patcoff. She testified that both Dr. Marzac and Dr. Pearle at Hospital for Special Surgery have now recommended that she have surgery on her right shoulder. She has pain in her right shoulder and has difficulty moving it. She has pain in her neck and low back, with intense nausea and vomiting that accompanies the pain. The pain in her back prevents her from standing for periods of time.

These factual issues raised in the defendants' moving papers preclude summary judgment, as the defendants failed to satisfy the burden of establishing, *prima facie*, that Maureen Felicciardi did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) under either category (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 defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law, 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]) as the burden has not shifted to the plaintiffs.

Accordingly, defendants' motion for summary judgment is denied.

Dated: March 13, 2014

PAUL J. BAILEY, JR.

J.S.C.