Behrmann-Welch v Normoyle
2014 NY Slip Op 30903(U)
March 27, 2014
Supreme Court, Suffolk County
Docket Number: 09-37568
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 09-37568

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 9-13-12
ADJ. DATE 1-29-14
Mot. Seq. # 004 - MD

KRISTIN ANN BEHRMANN-WELCH,

Plaintiff,

- against -

GEORGE A. NORMOYLE, JR. and PATRICIAN SHAFFER,

Defendants

PAUL K. SIEPMANN, ESQ.
Attorney for Plaintiff
Danes Street, P.O. Box 672
Patchogue, New York 11772-0672

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Defendants
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 9; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 10-15; Replying Affidavits and supporting papers 16-17; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendants, George A. Normoyle, Jr. and Patricia Shaffer, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Kristin Ann Behrmann-Welch, did not sustain a serious injury as defined by Insurance Law 5102 (d), is denied.

This negligence action arises out of a motor vehicle accident wherein the plaintiff, Kristin Ann Behrmann-Welch, seeks damages for personal injuries allegedly sustained on September 18, 2006, when her vehicle, and the vehicle operated by defendant George A. Normoyle, Jr. and owned by Patricia Shaffer, came into contact on Boyle Road, in Suffolk County, New York.

The defendants, in this motion served prior to filing the note of issue and certificate of readiness, seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law 5102 (d).

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 [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 [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 [2d Dept 1981]).

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 [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 [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 [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 [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 [3d Dept 1990]).

In support of the instant application, the defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers, and plaintiff's incomplete verified bill of particulars; plaintiff's transcript of the examination before trial with proof of mailing; and the affirmed report of Jeffrey Guttman, M.D. dated January 3, 2012, concerning his independent orthopedic examination of the plaintiff with attendant curriculum vitae.

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 [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 the bill of particulars, the plaintiff alleges that she has a congenital bilateral below the knee amputation. She asserts she was rear-ended by defendant, resulting in injuries which prevented her from utilizing prosthetic devices and providing direct care and treatment to clients. She claims injuries including cervicalgia, cervical spine strain, lumbar strain, lumbago, neck pain, back pain, and hip pain.

It is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as to either category of injury defined in Insurance Law § 5102 (d).

Dr. Guttman submitted a copy of his curriculum vitae to qualify as an expert in this action. The defendant failed to support this motion with the previous EMG studies and thermal narratives and the report of Dr. Michael Maiorino dated December 4, 2007 which he reviewed. He does not indicate, however, what portion of the plaintiff's body was included in the electrodiagnostic studies, or the findings set forth in the report, leaving it to the court to speculate as to the contents of the same. While the plaintiff testified that she underwent cervical and lumbar MRIs, Dr. Guttman does not comment upon the findings or indicate that he reviewed the MRI reports or films, leaving this court to speculate as to the findings, precluding summary judgment. Additionally, the plaintiff had more MRIs following an accident in March 2007, however, Dr. Guttman has not reviewed those films and compared the findings on those films or reports, nor has he reviewed the additional MRI films or reports for studies obtained in July 2011. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence (see Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2d Dept 1984]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]).

Dr. Guttman set forth a conclusory and unsupported opinion that the amputee plaintiff does not have an orthopedic disability. He failed to address plaintiff's claims that her injuries prevented her from utilizing prosthetic devices, as set forth in her bill of particulars, raising factual issues which preclude summary judgment. It is additionally noted that although the plaintiff alleges she sustained an injury to her right hip, Dr. Guttman's report does not indicate that he examined her hip and he does not comment upon this injury.

Dr. Guttman stated that the 41 year old plaintiff presented walking with a limp due to the congenital loss of limbs. She reported injuries to her neck and back as a result of the accident, and has undergone physical therapy, chiropractic treatment, and massage therapy, and currently attends at the frequency of two visits per week. She is followed by Dr. Eric Pace, whose records Dr. Guttman does not indicate he reviewed, leaving this court to speculate as to whether his opinions would remain the same upon review of the plaintiff's treating physician's records. Dr. Guttman stated that the plaintiff continues to have neck and back pain and is employed as an occupational therapist on a part time basis. Dr. Guttman set forth his range of motion findings upon examination of plaintiff's cervical spine, noting no deficits. Upon examination of plaintiff's lumbar spine, he omitted range of motion values for right and left lateral rotations.

While Dr. Guttman stated the plaintiff was found to be neurologically intact, he failed to correlate his findings with the results of the electrodiagnostic studies, raising factual issues concerning his conclusory opinion. Although the plaintiff alleges she sustained cervicalgia, and lumbago, no report by an examining neurololgist has been submitted by the defendants (see McFadden v Barry, 63 AD3d 1120 [2d Dept 2009]; Browdame v Candura, 25 AD3d 747 [2d Dept 2006]; Lawyer v Albany OK Cab Co., 142 AD2d 871 [3d Dept 1988]; Faber v Gaugler, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]), precluding summary judgment.

The defendant's physician's affidavit was insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted the 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[3d Dept 2001]; Uddin v Cooper, 32 AD3d 270 [1st Dept 2006]; Toussaint v Claudio, 23 AD3d 268 [1st Dept 2005]), since it offered no opinion with regard to this category of serious injury (see Delayhaye v Caledonia Limo & Car Service, Inc., 61 AD3d 814 [2d Dept 2009]).

Ms. Behrmann-Welch, an occupational therapist, testified to the extent that at the time of the accident she was working at New York Therapy Placement Services full-time from 60 to 80 hours a week, including administrative work she did at home in the evenings. Following the accident, she could no longer treat patients or even lift her one-year old daughter, and was unable to return to work treating patients until 2009. She missed one week of work following the accident then returned part-time. She was no longer able to earn extra money after work, in a self-employed capacity performing CPSE, school and early intervention evaluations. When she returned to work, she became strictly an administrator, and she was unable to do outside work as she could not lift or play or physically evaluate and treat children. It was not until after June 2008 that she was able to start treating children again. The plaintiff testified that in September 2010, she stopped working because of issues with her legs and depression. She developed an infection in her left knee.

The plaintiff testified that due to the accident, she suffered injuries to her neck, back and right hip. She started treatment with Dr. Janpool for chiropractic treatment and massage three times a week for several weeks, then twice a week until January 2007. She then saw the orthopedist, Dr. Eric Price, in February due to the pain, and underwent MRIs. The plaintiff testified that she was involved in another accident in March 2007 for which she resumed chiropractic care. Prior to the March 2007 accident, her prior injuries from the subject accident had only marginally improved. New MRIs were obtained following that accident, and again in July 2001. The plaintiff testified that after the 2006 accident, she could not pick up her daughter until she was about two years old, and that she was one year old at the time of the accident. Since the accident, she has had intermittent flare-ups of pain in her neck, back and right hip, and has daily pain in her back, neck and right hip.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendant failed to satisfy his 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 [2d Dept 2006]). Inasmuch as the moving party failed to establish prima facie 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

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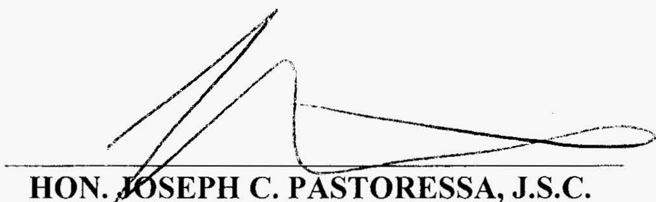
fact (see Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept 2008]); Krayn v Torella, 40 AD3d 588 [2d Dept 2007]; Walker v Village of Ossining, 18 AD3d 867 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (004) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.



Dated: March 27, 2014

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**