

Formica v Reifert

2014 NY Slip Op 32014(U)

July 24, 2014

Supreme Court, Suffolk County

Docket Number: 11-33213

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-13-14 (#002)
MOTION DATE 4-10-14 (#003)
ADJ. DATE 5-8-14
Mot. Seq. # 002 - MD
003 - MD

-----X
ANGELA FORMICA,

Plaintiff,

- against -

GARY W. REIFERT and DOROTHY M.
REIFERT,

Defendants.
-----X

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Upon the following papers numbered 1 to 26 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10; Notice of Cross Motion and supporting papers (002) 11-20; Answering Affidavits and supporting papers 21-22; Replying Affidavits and supporting papers 23-24; 25-26; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants, Gary W. Reifert and Dorothy M. Reifert, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Angela Formica, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that cross motion (003) by plaintiff, Angela Formica, pursuant CPLR 3212 for summary judgment in favor of plaintiff on the basis that she did sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

This negligence action arises out of a motor vehicle accident which occurred on March 10, 2011, on Stewart Avenue at its intersection with Cherry Avenue in the Village of Bethpage, New York when the vehicle operated by the plaintiff, Angela Formica, was struck by the defendants' vehicle. The plaintiff seeks damages for serious personal injuries which she alleges she sustained in this accident. The defendants seek summary dismissal of the complaint on the basis that the plaintiff did not sustain serious

injury as defined by Insurance Law § 5102 (d). Plaintiff cross moves for summary judgment on the basis that she sustained serious injury as defined by Insurance Law § 5102 (d).

It is noted that the note of issue was filed on November 6, 2013, and therefore, the motions for summary judgment should have been filed within 120 days, or by March 6, 2014, pursuant to CPLR 3212. Plaintiff did not serve her cross motion for summary judgment until April 4, 2014, well beyond the 120 days from the date of filing the note of issue. However, in that defendants timely served motion (002) seeks the same relief as the plaintiff seeks, namely whether the plaintiff sustained serious injury as defined by Insurance Law § 5102 (d), plaintiff's motion is considered (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *First Union Auto Finance, Inc.*, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005]; *Tucci v Colella*, 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]).

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]; *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 motion (002), the defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, plaintiff's verified bill of particulars; an uncertified copy of a Plainview Hospital record; transcript of the examination before trial of the plaintiff; and the sworn report of Lee Kupersmith, M.D. dated September 24, 2013 concerning his independent orthopedic examination of the plaintiff.

In support of motion (003), plaintiff submitted an attorney's affirmation; a verified bill of particulars; discovery response consisting of authorizations; sworn report of Ali E. Guy, M.D. dated March 11, 2014; certified copy of the Plainview Hospital record; uncertified consultation letter by Dr. Robert Lippe to Dr. Phyllis Hampton; and uncertified copies of the MRI reports of plaintiff's cervical and lumbar spine, and knees, which are not in admissible form.

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 90 days during the 180 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 Elliott*, 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 her verified bills of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of disc herniation at L5-S1 impressing upon and displacing the right S1 nerve root; bulging discs at T11-12, L1-2, L2-3, L3-4, L4-5, C2-3, C3-4, C4-5, C5-6, C6-7; pain and restriction of range of motion; right sided C5-6 cervical radiculopathy; and cervical trigger point injections May 31, 2011, June 7, 2011, and June 14, 2011

Based upon a review and careful consideration of the evidentiary submissions, 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 defined by Insurance Law §5102 (d) under both categories of injury.

The moving papers contain the report of Dr. Lee Kupersmith concerning his findings upon examination of plaintiff. He indicated the materials and medical records and reports he reviewed, including cervical and lumbar MRI reports, right knee MRI report, EMG/NCV studies, as well as

various other x-rays and injection reports of Dr. Guy, however, copies of those records and reports have not been provided with the moving papers. 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 the 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]). The right knee, cervical and lumbar MRI studies, and EMG/NCV study, and the records of plaintiff's treating medical doctors reviewed by defendants' experts are not in evidence.

It has not been established that the injuries alleged by the plaintiff are not causally related to the subject accident. Dr. Kupersmith commented in a conclusory and unsupported manner that the lumbosacral herniated nucleus pulposus, and cervical and lumbar radiculopathy are per report only, however, he does not opine that such injuries are causally unrelated to the subject accident.

The plaintiff was treated by neurologist Dr. Guy, for injuries sustained in this accident, including cervical radiculopathy, as alleged in the bill of particulars, however, no report from an examining neurologist has been submitted to rule out neurological injury relating to this accident, 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 defendants' expert offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of 90 days in the 180 days following the accident, and the plaintiff was not examined by the defendant's physicians during that statutory period (see *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]; *Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, movants have not established that the plaintiff did not suffer a serious injury for this category of injury as well.

Dr. Kupersmith stated that the plaintiff is a 21 year old female who sustained injuries with regard to her neck and lower back when her vehicle was hit on the front driver's side. She was taken to North Shore Hospital at Plainview, evaluated and discharged home. She came under the care of Dr. Guy and Dr. Lippe and also attended physical therapy three times a week for one year and had acupuncture concurrently. She was administered three cortisone injections to the neck and was also administered massage therapy. Dr. Kupersmith continued that the plaintiff was a college student at LIU Post at the time of the accident and worked as a server at Fridays. However, she missed six months from work due to the injuries. Dr. Kupersmith reported that she complains of pain in her neck and lower back with some pain radiating down her arms and legs, and is achy all the time.

The plaintiff testified that immediately following the accident, her knees hurt very badly and she could not walk. She could not move her right wrist. Her neck, shoulder, and back had significant pain.

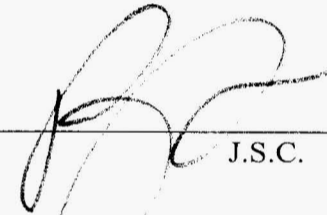
After being seen in the emergency room, she followed up with Dr. Lippe, who had been referred by the hospital, and who recommended physical therapy. She attended physical therapy at Dr. Guy's office, three times a week for about a year, had electric stimulation therapy, and massage for her neck and back, and also some treatment for her knee. She received injections on about five occasions for her neck. However, after time, she realized that the treatments were not helping her pain. The injuries have caused her to approach things in a slower way as she tires easily and cannot perform as she was able to. She is unable to exercise a lot and once a week does some sit ups, but it hurts to do so.

In reviewing plaintiff's evidentiary submissions, it is also determined that plaintiff has not demonstrated prima facie entitlement to summary judgment in motion (003) due to the inadmissible form of her supporting proof in the moving papers. While the MRI reports demonstrate the plaintiff's alleged cervical and lumbar bulging discs and knee injuries, said reports are not certified. No report from plaintiff's treating neurologist has been submitted, except for a letter to a Dr. Phyllis Hampton, which plaintiff cannot certify pursuant to CPLR 4518. She has not submitted a certified copy of Dr. Guy's office records.

Inasmuch as neither moving party has established 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*, 833 NYS2d 406, NY Slip Op 03885 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motions (002) and (003) for summary judgment on the issue of "serious injury" are denied.

Dated: 7/24/14



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION