Childress v Murphy
2014 NY Slip Op 32459(U)
September 14, 2014
Supreme Court, Suffolk County
Docket Number: 32769/2012
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Tracy Childress,

Plaintiff,

-against-

Lisa Murphy,

Defendant.

Motion Sequence No.: 001; MD
Motion Date: 6/18/14
Submitted: 8/13/14

Index No.: 32769/2012

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Clerk of the Court

Upon the following papers numbered 1 to 27 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 - 25; Replying Affidavits and supporting papers, 26 - 27; it is

ORDERED that motion by defendant, Lisa Murphy, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Tracy Childress, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This negligence action is premised upon an automobile accident wherein the plaintiff, Tracy Childress, seeks damages for serious personal injury she alleges she sustained on September 7, 2011, on William Floyd Parkway at or near its intersection with Beacon Street, in Shirley, Suffolk County, New York, when her vehicle and the vehicle operated by defendant Lisa Murphy were involved in a collision.

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" CPLR3212 [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]).

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 this 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* ***Rodriquez 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 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*).

In support of motion (001), defendant submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; transcript of the examination before trial of plaintiff with proof of service pursuant to CPLR 3212; records of Gus Katsigiorgis, D.O. with x-ray report of knee; unsigned MRI report of Mark Decker, M.D.; unauthenticated no-fault records; and the reports of Allen D. Greenfield, M.D. dated August 17, 2013, concerning his independent radiologic review of the plaintiff's lumbar spine and cervical spine MRIs dated August 17, 2013, and Isaac Cohen, M.D. dated January 23, 2014 concerning his independent orthopedic examination of the plaintiff.

By way of her verified bill of particulars, Tracy Childless alleges that as a result of this accident she sustained injuries consisting of: bulging disc at C3-4 with flattening of the thecal sac; bulging disc at C4-5; straightening of the normal cervical lordosis; cervical sprain/strain; cervical radiculopathy; lumbar sprain/strain; lumbar radiculopathy; bilateral knee contusions; and pain, stiffness and restriction of motion of the affected areas.

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]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Reports and medical records which have not been provided are not in evidence.

Dr. Greenfield provided reports concerning his review of plaintiff's lumbar and cervical spine MRI studies, but has not provided the cervical MRI report generated by plaintiff's examining radiologist as required pursuant to CPLR 3212 (*see* ***Friends of Animals v Associated Fur Mfrs.***, *supra*). Therefore, Dr. Greenfield has not ruled out that plaintiff's claims of cervical disc bulges at C3-4 and C4-5 are causally related to the subject accident. While Dr. Greenfield reported findings of degenerative disc disease and broad disc bulge at L5-S1, which he stated are clearly longstanding and have evolved over a period of years, Dr. Greenfield did not provide a basis for this opinion, and did not set forth what is meant by "degenerative disc bulging" or its duration of his findings (*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]). Dr. Greenfield does not mention the bulging discs at L4-5 and L3-4 reported by Dr. Decker, and he does not rule out that such bulges are causally related to the subject accident.

Dr. Cohen reported that the plaintiff is a 43 year old female who stated she sustained injury to her neck, back, and both knees when her vehicle was struck on the driver's side by defendant's

vehicle. He indicated that she underwent MRIs and electrical studies. She had prior injuries to her knees and back in a work related accident on July 7, 2008, however, Dr. Cohen did not indicate the type of injuries sustained and the location of the back injuries. The medical records of Dr. Silverman, MRI reports of 2008, report of the independent orthopedic examination by Dr. Habacker and addendum report, and many of the 85 records and reports reviewed by Dr. Cohen, including the EMG/NCV test reports, have not been provided with the moving papers and are not in evidence.

Upon examination of the plaintiff's knees, Dr. Cohen set forth his range of motion findings of 140 degrees for each knee, however, he compared his findings to a spectrum of ranges of motion from 130-150 degrees. When normal range of motion values are set forth in a range of values or a spectrum, it leaves it to this Court to speculate as to the actual normal ranges of motions without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]; ***Lee v M & M Auto Coach***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). Furthermore, although plaintiff claimed in the bill of particulars that she sustained cervical and lumbar radiculopathy as a result of this accident, defendants have not submitted a report from a neurologist who examined plaintiff, ruling out the claimed neurological injury (*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]). Such factual issues preclude summary judgment.

Based upon the foregoing, the defendant has not demonstrated entitlement to summary judgment dismissing the complaint as to the first category of injury defined in Insurance Law § 5102.

Defendant's examining and reviewing physicians offer 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 did not examine the plaintiff 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]). No opinion with regard to this category of serious injury has been provided (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

The plaintiff testified that she injured her knees, neck, and lower back in the subject accident. She sought medical care the day after the accident at Island Musculoskeletal, where she had physical therapy to her right knee following surgery in 2001. After this accident, she attended physical therapy twice a week for one or two months, then moved to Virginia, where she saw a doctor for her neck, back and knees, and who referred her to be evaluated by a neurologist. When she returned to New York, she resumed physical therapy, and was treated by Dr. Moreta, a neurologist. She also

underwent MRIs of her neck, back, and knees. At the time of the accident, she was employed 40 hours a week as a medical receptionist at Orthopedic Associates of Long Island. She is currently employed full time by AHRC, a facility for mentally challenged adults, and is a module instructor, providing hands-on skills for daily living. She had previously been involved in a car accident in about 2000 and "had something" with her neck and back, for which she was seen at Central Suffolk Hospital. She thought she received other care. In 2008, she had a workers' compensation claim due to an injury to her lower back when she was working as a court advocate for "A Brighter Tomorrow" and fell at the courthouse in Central Islip. She had treatment for about a month following that incident. Since this accident, she wears a back brace while working. She continues to experience pain in her neck, back, and knees, all day long and when she stands.

These factual issues raised in defendant's moving papers preclude summary judgment, as the defendant failed to satisfy the burden of establishing, *prima facie*, that the plaintiff 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 moving party has failed to establish *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 plaintiff.

Accordingly, motion by the defendant for summary judgment dismissing the complaint is denied.

Dated: September 14, 2014

HON. WILLIAM B. REBOLINI, J.S.C.

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