Abedin v Ivanov
2014 NY Slip Op 32739(U)
October 21, 2014
Sup Ct, Suffolk County
Docket Number: 12-33249
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 12-33249
CAL. No. 14-00567MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 5-28-14
ADJ. DATE 8-5-14
Mot. Seq. # 001 - MD

JULIANN ABEDIN,	:	CARL MALTESE, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	1050 West Jericho Turnpike
	:	Smithtown, New York 11787
- against -	:	
	:	ABAMONT & ASSOCIATES
GEORGII A. IVANOV AND GEORGIYEVNA GALINA,	:	Attorney for Defendants
	:	200 Garden City Plaza, Suite 400
	:	P.O. Box 9250
Defendants.	:	Garden City, New York 11530

Upon the following papers numbered 1 to 22read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-15; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 16-20; Replying Affidavits and supporting papers 21-22; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants Georgia A. Ivanov and Georgiyevna Galina pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff Juliann Abedin did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This action arises out of an automobile accident which occurred on December 1, 2011 on Oakwood Road and North Street in Huntington, New York. Juliann Abedin seeks damages for personal injuries alleged to have been sustained when her vehicle and the vehicle operated by defendant Georgiyevna Galina, and owned by defendant Georgia A. Ivanov, came into contact.

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, and 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 support of this application, the defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars; the unsigned but certified transcript of plaintiff's examination before trial which is considered (***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); a redacted, unauthenticated claims inquiry; the sworn report of Ira J. Chernoff, M.D. dated December 16, 2013 concerning his independent orthopedic examination of plaintiff; unsigned and uncertified record of Noah Finkel, M.D.; signed records of William Healy, M.D.; and the electronically signed MRI report of plaintiff's lumbar spine dated January 24, 2012 which is inadmissible (***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, 50 AD3d 778, 860 NYS2d 532 [2d Dept 2008] ; ***Rogy Med., P.C. v Mercury Cas. Co.***, 23 Misc3d 132 [A], 885 NYS2d 713, [U] [App Term, 2d Dept 2009]; ***Sweeney v Springs***, 2012 NY Slip Op 30415 [U] [Sup Ct, Nassau County 2012]).

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 defendant as the moving party to present evidence in competent form, showing that he sustained 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 burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does not 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*).

By way of the verified bill of particulars, the plaintiff alleges the following injuries were sustained in the subject accident: herniated disc at L4-5 effacing the thecal sac; severe pain, tenderness, weakness, stiffness, soreness, and discomfort; lumbar strain; permanent significant limitation of the back; pain radiating from the lumbar spine into the supraspinatus, posterior deltoids, trapezoids rhomboids, arms and hand.

Upon review of the evidentiary submissions, it is determined that the defendants failed to establish prima facie entitlement to summary judgment on the issue of whether the plaintiff sustained a serious injury as defined by Insurance Law §5102 (d) under both categories of injury.

Although a copy of a curriculum vitae has been submitted by defendants' counsel, it is noted that Dr. Ira Chernoff has not sworn to the truth of its contents. Dr. Chernoff performed an orthopedic examination on the plaintiff and indicated the multiple records which he reviewed as part of his evaluation of the plaintiff. However, MRI studies of plaintiff's left knee of January 14, 2012, lumbar spine of January 24, 2012, left shoulder of July 11, 2013, the disability note from Dr. Healy dated December 7, 2011, and the medical records of plaintiff's treating physicians and facilities, referenced by Dr. Chernoff, have not been provided with the moving papers, leaving this court to speculate at to the contents of those records and reports, raising factual issues which precludes summary judgment. 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]).

During his orthopedic evaluation of the plaintiff, Dr. Chernoff determined certain range of motion values of the plaintiff's lumbar spine and stated that these findings were obtained by use of a goniometer and/or bubble inclinometer and by visual evaluation. It is noted that while he reported range of motion values for lumbar flexion and extension, he failed to report right and left rotation and right and left lateral flexion of plaintiff's lumbar spine. While he reported cervical range of motion findings, he omitted cervical extension and lateral flexion. These omissions raise factual issues concerning whether or not these values were obtained, and whether or not deficits were noted. Upon examination of plaintiff's left shoulder, he noted positive impingement sign at 90 degrees, but stated that plaintiff did not believe she injured her left shoulder in the accident.

Dr. Chernoff noted that the left knee MRI revealed fluid in the joint space, fission in the cartilage involving the weight bearing aspect of the femoral condole of her knee, and patella femoral space narrowing, however, he does not opine whether these findings are causally related to the accident. With regard to plaintiff's allegation that she sustained a herniated disc at L4-5, Dr. Chernoff offers no opinion with regard to whether or not such herniation is causally related to the subject accident.

It is noted that Dr. Chernoff did not offer an opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see* ***Delayhaye v***

Caledonia Limo & Car Service, Inc., 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; ***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]).

The plaintiff testified to the extent that she was out of work for ninety-six consecutive days following the accident, commencing the day after the accident. She had attempted to work following the accident, but had too much pain in her lower back. She had pain and could not lift children, sit in low chairs, or clean up after the children at the Huntington YMCA where she worked. When she returned to work in March 2012, she still had difficulty lifting children, sitting in the low chairs, bending, and picking up after the children who were all two years of age.

The plaintiff stated she was taken by ambulance to the emergency room at Huntington Hospital where she was examined for pain in her lower back, and released with a prescription for muscle relaxants. She had follow up care with her doctor and was prescribed a back brace which she wore for two to three months, and still uses on a weekly basis. She treated for the pain in her left knee for about three visits with Dr. Healy, an orthopedist, who referred her to Dr. Sanelli, a spine specialist, for treatment concerning her back pain. She also went for physical therapy two to three times a week from December 2011 through March 2012. She had MRIs of her knee and back. The plaintiff testified that she had no prior back injuries or history of back pain. She followed up with Dr. Finkel for her back pain as it was not improving. The pain was mostly on the right side of her back. Dr. Finkel recommended physical therapy, but she advised him that it was not helping her back. She has difficulty lifting, bending, changing bed sheets, carrying laundry, and weeding or planting. Prior to the accident, she ran about forty-five minutes, two to three times a week, which she can no longer do due to the pain in her lower back.

Based upon the foregoing, the defendants have failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102 (d) (*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 failed to establish prima facie entitlement to judgment as a matter of law on the issue of "serious injury", 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]).

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: October 21, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**