

D'Angelo v Nykolyn

2014 NY Slip Op 32741(U)

October 17, 2014

Sup Ct, Suffolk County

Docket Number: 12-15711

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 12-15711
CAL No. 14-01087MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-13-14
ADJ. DATE 9-10-14
Mot. Seq. # 001 - MD

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FRANCINE D'ANGELO,

Plaintiff,

- against -

ANDREW P. NYKOLYN and JAYNE C.
NYKOLYN,

Defendants.

-----X

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-17-no affidavit of service; Replying Affidavits and supporting papers 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants, Andrew P. Nykolyn and Jayne C. Nykolyn, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Francine D'Angelo, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This negligence action is premised upon an automobile accident which occurred on December 1, 2011, on Northern State Parkway, near Wolf Hill Road, in the Town of Huntington, New York. The plaintiff, Francine D'Angelo, seeks damages for serious personal injury she alleges she sustained, when her vehicle was struck in the rear by the vehicle operated by defendant Jayne Nykolyn and owned by Andrew Nykolyn.

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]).

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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 support of this application, defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer, plaintiff's verified and amended verified bills of particulars; uncertified and unsigned medical record; sworn report of Nicholas C. Bavaro, D.C. dated July 18, 2012; transcript of plaintiff's examination before trial; the sworn report of Lee Kupersmith, M.D. dated November 5, 2013 concerning his independent orthopedic examination of the plaintiff; and the electronically signed radiology report by Cono W. Gallo, M.D., dated January 7, 2012, which is inadmissible.

CPLR 2106 governs the use of physician affirmations. While deemed admissible by the Appellate Division, First Department, electronic signatures are not recognized by the Second Department (*see Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 860 NYS2d 532 [2d Dept 2008]; *Eill v Morck*, 37 Mis3d 1211 (A), 961 NYS2d 357 [Sup Ct Kings County 2012]). In *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, *supra*, the Second Department held medical reports to be inadmissible where they contained computerized, affixed, or stamped facsimiles of a physician's signature. The court stated the records failed to comport with CPLR 2106 as the signatures were not subscribed or affirmed, and the reports merely contained facsimiles of the physician's signature without any indication as to who placed them on the reports, or as to whether they were properly authorized. Subsequent to *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, the Appellate Term, Second Department ruled inadmissible "affirmed" medical reports with stamped or electronic facsimile signatures where the record did not demonstrate that the signature was placed on the report by the doctor or at the doctor's direction (*see Rogy Med., P.C. v Mercury Cas. Co.*, 23 Misc3d 132 [A], 885 NYS2d 713, 2009 NY Slip Op 50732[U] [App Term, 2d Dept 2009]); *Sweeney v Springs*, 2012 NY Slip Op 30415 [U] [Sup Ct, Nassau County 2012], [affirmed medical report with stamped signature submitted on serious injury motion ruled inadmissible]).

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 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 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 bill of particulars, Francine D’Angelo alleges that as a result of this accident she sustained injuries consisting of: numbness of the right arm and wrist, pinky and ring finger; burning pain in the upper back, shoulder, and neck; constant headaches; cervical nerve root injury; cervical myofascitis and spasm; cervical radiculopathy; thoracic nerve root injury; thoracic myofascitis and spasm; cervical disc herniation at C6-7; and carpal tunnel syndrome.

The defendant’s orthopedic expert, Dr. Kupersmith, set forth the materials and records which he reviewed. It is noted, however, that the CT scan of the neck dated September 21, 2010, bone density exam, physical therapy records, independent acupuncture examination of Rocco Bonavista, independent orthopedic examination of Dr. Mills dated March 30, 2012, re-examination report from Dr. Bavaro dated May 23, 2012, independent acupuncture exam of Kevin Spears, independent orthopedic reexamination report of Dr. Mills, and the EMG/NCV studies of January 11, 2012, which the expert reviewed, have not been provided as required pursuant to *Friends of Animals v Associated Fur Mfrs., supra*, leaving this court to speculate as to the contents of same. 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]), and these records are not in evidence, precluding summary judgment.

Dr. Kupersmith set forth that the plaintiff is a fifty-two year old female who was the seat-belted driver when her vehicle was struck in the rear by the defendants’ vehicle. She complained of injury to her neck and back region on the right side and received treatment from her primary medical doctor, Dr. Muscara. She obtained physical therapy, acupuncture, and chiropractic treatments three times per week for eight months. She receives trigger point injection to her neck back, and shoulder regions. He stated that she now receives massage therapy a few times a week. Upon examination, Dr. Kupersmith noted that plaintiff had pain in her neck and upper back region, with numbness and tingling radiating down her right arm to the ring and small fingers, and to the outside of her arm. She gets occasional numbness and tingling down her legs.

Dr. Kupersmith obtained range of motion values for plaintiff's cervical and thoracic spine, and right and left wrists, and reported no deficits. Dr. Kupersmith set forth the following diagnoses: cervical sprain/strain; cervical herniated nucleus pulposus and radiculopathy as per report; thoracic sprain/strain, resolved, superimposed on a preexisting history of old compression deformity; and right and left carpal tunnel syndrome as per EMG/NCV report, but not evident clinically and unrelated to the accident. Dr. Kupersmith has not opined that any of the injuries he set forth involving the cervical spine and thoracic spine are not causally related. His opinion that the thoracic compression deformity and right and left carpal tunnel syndrome are pre-existing and unrelated to the accident is conclusory and unsupported with the basis for such opinions, although the conditions were all evidenced on the reports which he reviewed, leaving this court to speculate as to the same (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]).

Although the plaintiff has pleaded that she sustained injuries consisting of cervical radiculopathy, carpal tunnel syndrome, numbness of the right arm and wrist, pinky and ring finger, burning pain in the upper back, shoulder, and neck, constant headaches, cervical nerve root injury, and thoracic nerve root injury, no report from a neurologist who performed an independent neurological examination of the plaintiff has been provided (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]), leaving this court to speculate with regard to plaintiff's alleged neurological injuries, raising further factual issues.

Nicholas C. Bavaro, D.C. submitted his sworn report dated July 18, 2012 concerning his chiropractic re-evaluation of plaintiff on July 18, 2012. He had previously performed independent chiropractic examinations of the plaintiff on March 30, 2012, and May 23, 2012, but has not provided copies of those reports, leaving this court to speculate as to the findings set forth therein. Dr. Bavaro has not submitted a copy of his curriculum vitae or otherwise qualified to render expert chiropractic opinion in this matter. Dr. Bavaro does not indicate the basis for re-evaluating the plaintiff. While Dr. Bavaro indicated the plaintiff did not receive emergency medical care following the accident, it is noted that the plaintiff testified that she drove from the accident scene about a block, and obtained care and treatment from her physician, Dr. Muscara.

While Dr. Bavaro set forth that the plaintiff had MRIs of her neck and mid back, the reports of the same, which he reviewed, have not been provided to this court. It is noted that although Dr. Bavaro's impression was thoracic spine sprain/strain-resolved, inter alia, he did not indicate that he examined the plaintiff's thoracic spine, and he did not report any range of motion findings, thus raising factual issues concerning the basis for his opinion that the thoracic spine injury was resolved. Dr. Bavaro does opine, however, that based upon the history provided and findings upon examination, there is a probable causal relationship between the accident of record and the plaintiff's reported injuries.

Defendants' examining physicians offer no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the one hundred eighty days following the accident, and they 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]).

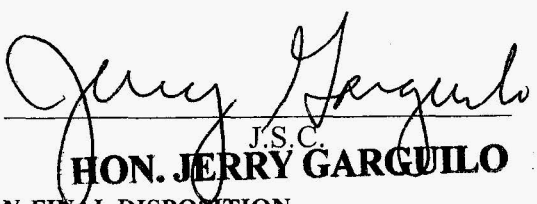
Defendants' experts offer no opinion with regard to this category of serious injury as well (*see Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), raising factual issues concerning whether the plaintiff sustained a serious injury with regard to this second category of injury.

Additionally, the plaintiff testified that at the time of impact to her vehicle, her right collarbone hit the steering wheel. Immediately following the accident, she felt dizzy, leaned outside of her car door, and felt like she was going to throw up. After the accident, she drove down the block to see Dr. Muscara, her family practice physician. Upon examination, he advised her she had whiplash, and referred her for x-rays. Thereafter, she stayed home from work for two to three days, then was out for about three weeks due to the pain. She then started treatment at Eastern Island Medical Care for numbness and pain in her right arm radiating down into her fingers, as well as for the pain in her mid back and neck. She received injections for pain management. She attended physical therapy three times a week for eight months. Currently, she receives massage therapy. Since the accident she has only been able to work as an electrologist three or four days a week, and less hours, instead of full time. Everything in her life has been affected by the injuries she sustained in the accident, including cleaning the house, cooking, and anything that takes time, as she has to do things slowly. She has had to hire someone to clean house for her. Initially, the person she hired was with her a full day for a week following the accident, then three days a week for three weeks, and now periodically to help with cleaning and cooking.

These factual issues raised in defendants' moving papers preclude summary judgment, as the defendants 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 (001) by the defendants for summary judgment dismissing the complaint is denied.

Dated: 10/17/14


J.S.C.
HON. JERRY GARGUILO

FINAL DISPOSITION NON-FINAL DISPOSITION