

Canelo v Bedoya

2015 NY Slip Op 30110(U)

January 22, 2015

Supreme Court, Queens County

Docket Number: 19768/2012

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JESSICA CANELO, Index No.: 19768/2012
Plaintiff, Motion Date: 12/01/14
- against - Motion Nos.: 27 and 28

Motion Seq.: 4 and 5

JONATHAN BEDOYA, MARINKO DJOKIC and
INGRID GUZMAN,

Defendants.

- - - - - x

The following papers numbered 1 to 21 were read on the respective
motions by defendants, Jonathan Bedoya and Marinko Djokic and
Ingrid Guzman, for an order pursuant to CPLR 3212 granting
summary judgment in favor of the defendants and dismissing the
plaintiff's complaint on the ground that the Plaintiff, Jessica
Canelo, did not sustain a serious injury within the meaning of
Insurance Law §§ 5102 and 5104:

Table with 2 columns: Document Name and Page Number. Includes entries for Bedoya's Notice of Motion-Affidavits-Exhibits (1-5), Djokic and Guzman's Notice of Motion-Affidavits (6-11), Plaintiff's Affirmation in Opposition-Affidavits-Exhibits (12-16), and Reply Affirmations (2) (17-21).

This is a personal injury action in which plaintiff, Jessica
Canelo, seeks to recover damages for injuries she sustained as a
result of a motor vehicle accident that occurred on August 19,
2011, on Astoria Boulevard at or near its intersection with 77th
Street, Queens County, New York. At the time of the accident,
defendant Djokic was operating his vehicle on Astoria Boulevard,
near its intersection with 77th Street in Queens County, New
York. Plaintiff is alleged to have been a passenger in the Djokic
vehicle. Djokic claims that his vehicle was completely stopped at

a red traffic signal when it was struck in the rear by the vehicle operated by defendant, Jonathan Bedoya. Plaintiff alleges that she sustained serious physical injuries as a result of the impact.

The plaintiff commenced this action by filing a summons and verified complaint on September 24, 2012. Issue was joined by service of defendant Djokic and Guzman's verified answer with cross-claims on January 7, 2013. Defendant Bedoya joined issue by serving a verified answer with cross-claims dated December 20, 2012. Plaintiff filed a Note of Issue on January 17, 2014. In October, 2014 defendants Marinko Djokic and Ingrid Guzman moved for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint and all cross-claims against them. By decision and order dated October 21, 2014, this court granted Djokic's motion for an order dismissing plaintiff's complaint and all cross-claims against Djocik and Guzman only.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendants submit a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; and an affirmed medical report from board certified orthopedist, Dr. Lisa Nason.

Plaintiff, age 26, contends that as a result of the accident she sustained, inter alia, a partial tear of the supraspinatus tendon of the right shoulder, a disc herniation at L5-S1 requiring a lumbar discectomy, and a disc bulge at C4-C5.

Plaintiff asserts that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 plaintiff, Jessica Canelo, a commercial sales assistant at TD Bank, testified on November 1, 2013. She stated that the subject accident took place on a Friday night at approximately 10:00 p.m. She was in a vehicle owned by her friend Jessica

Mosquera and being operated by Djokic. She stated Djokic was driving because he was a designated driver. Ms. Canela stated she was a passenger in the rear seat and Jessica Mosquera was a front seat passenger. They were on Astoria Boulevard heading toward the Grand central Parkway. When they approached the intersection with 77th Street, she observed that the traffic signal was red. The driver, Djokic, brought his vehicle to a gradual stop at the red traffic signal. She stated that his vehicle was stopped for thirty seconds when it was struck in the rear by the Bedoya vehicle pushing it into the intersection. After the collision she exited the vehicle and sat on the sidewalk. She left the scene in a cab with her friend Pedro and they were driven to the emergency room at New York Hospital. She did not speak to the police at the scene. A few weeks after the accident she went to the 115th Precinct because her name was not listed as a passenger in the police report. She showed the officer documents from the hospital and he prepared a revised police report adding her as a passenger. She stated that she missed five days from work due to her injuries

At the hospital she had complaints of not being able to breath and numbness in her right arm and pain in her neck and back. She was treated at the emergency room and discharged the same day. Two days after the accident she commenced a course of physical therapy due to continued pain in her neck, back, right arm and right shoulder. She continued physical therapy at Yellowstone Medical Rehabilitation four times per week for six to eight months. She then continued her treatments at a rate of three times per week for another four months and stopped because her no fault payments were terminated and she could no longer afford to pay out of pocket. In August 2012, as she was still experiencing neck and back pains, she underwent a surgical procedure known as a percutaneous discectomy performed by Dr. Mian. After the procedure, as her condition was not improving, she continued with physical therapy treatments. She testified that as of the time of the deposition she was still feeling pain in her neck and back on a daily basis and feeling intermittent pain in her right shoulder.

Dr. Lisa Nason, an orthopedic surgeon retained by the defendant, examined the plaintiff on March 10, 2014. The plaintiff reported to Dr. Nason that she injured her neck, right shoulder, and lower back when her vehicle was struck on August 19, 2011. She presented with pain in the cervical spine, pain in the right shoulder and pain in the lumbar spine. Dr. Nason performed objective gonioscopic range of motion testing which revealed no limitations of range of motion of the plaintiff's cervical spine, lumbar spine and right shoulder. The doctor's

diagnosis was status post cervical sprain/strain, resolved; status post right shoulder contusion, resolved; and status post lumbar percutaneous discectomy, resolved. She concludes that the plaintiff shows no objective evidence of disability.

Defendant's counsel contends that the medical report of Dr. Nason, together with the plaintiff's testimony at her examination before trial stating that she only missed one week of work following the accident is sufficient to demonstrate that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney, Mark J. Lindner, Esq., submits his own affirmation as well as the affirmed MRI reports of radiologist, Dr. Mark Allan Shapiro; the affirmed surgical report and examination reports of Dr. Shahid Mian; the affirmed medical report and records of Dr. John J. McGee; and the affidavit of the plaintiff.

In her affidavit dated August 6, 2014, plaintiff states that following the accident she was initially examined by Dr. McGee at Yellowstone Medical Rehabilitation. Upon his advice she began physical therapy at a rate of 3 - 4 times per week lasting for six months. She then began treating with orthopedic surgeon Dr. Mian who recommended that she undergo surgery to her lower back. On August 31, 2012 Dr. Mian performed a discectomy on the lumbar spine at an ambulatory surgical center. She states that once no-fault ceased paying for her treatments she stopped medical treatments as she could not afford to pay for her care out of pocket. She states that despite undergoing physical therapy and surgical procedure she still feels pain in her back, neck and shoulder.

Dr. Shapiro reviewed the MRI films of the plaintiff's cervical spine, lumbar spine, and right shoulder. He found a focal bulge at C3-C4, and a left foraminal herniation at L5-S1.

Dr. McGee submits an affirmation stating that he first examined the plaintiff on August 31, 2011 in connection with her accident of August 19, 2011. At that time his physical

examination showed significant loss of range of motion of the plaintiff's cervical and lumbar spines which he found were causally related to the subject accident.

Dr. Mian, plaintiff's treating orthopedic surgeon performed surgery on the plaintiff in August 2012 and recently re-examined her on August 18, 2014. At the recent examination he found that her bulging discs and herniated disc and the need for surgery were causally related to the accident in question. In addition he states that his physical examination performed with a goniometer revealed that the plaintiff still suffers from significant loss of range of motion of the cervical spine, lumbar spine and right shoulder. He states that the injuries to the lumbosacral spine are permanent. He states that permanency is also expected in the plaintiff's cervical spine and right shoulder.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept. 2000]).

Here, the proof submitted by the defendant, including the affirmed medical report of Dr. Nason, together with the plaintiff's testimony at her examination before trial that she only missed one week from work immediately following the accident, are sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a

serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. McGee, Shapiro and Mian, attesting to the fact that the plaintiff sustained bulging discs and a herniated disc in the lumbar and cervical spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her cervical and lumbar spines and right shoulder both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in treatment by submitting an affidavit stating that no-fault had terminated her coverage and she could not afford to pay for further treatment out of pocket (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants, JONATHAN BEDOYA, MARINKO DJOKIC and INGRID GUZMAN, for an order granting summary judgment dismissing the complaint of plaintiff JESSICA CANDELA, pursuant to Insurance Law § 5102, is denied.

This matter remains on the calendar of the Trial Scheduling Part on February 3, 2015.

Dated: January 22, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.