

Bartlett v Espinosa

2015 NY Slip Op 30556(U)

April 7, 2015

Sup Ct, Queens County

Docket Number: 11360/2013

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

- - - - - x

WENDYANNE BARTLETT, Index No.: 11360/2013
Plaintiff, Motion Date: 03/27/15
- against - Motion No.: 17
Motion Seq.: 3
KENNY ESPINOSA and RUBEN D. ESPINOSA,

Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendants, KENNY ESPINOSA and RUBEN D. ESPINOSA, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 11
Reply Affirmation.....12 - 14

In this negligence action, the plaintiff, Wendyanne Bartlett, seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on February 25, 2012, between the vehicle operated by plaintiff, Wendyanne Bartlett, and the vehicle owned by defendant, Ruben D. Espinosa and operated by defendant, Kenny Espinosa. At the time of the accident, plaintiff, Wendyanne Bartlett, was operating her vehicle on the Brooklyn Queens Expressway at the base of the Kosciuszko Bridge, Queens County, New York. The plaintiff's vehicle was stopped in heavy traffic when her vehicle was hit in the rear by the vehicle being operated by defendant, Kenny Espinosa. The plaintiff allegedly sustained serious physical injuries as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on June 12, 2013. Issue was joined by service of defendants' verified answer dated September 10, 2013. A Note of Issue was filed on September 4, 2014. By decision and order dated February 23, 2015, this Court granted the plaintiff's motion for partial summary judgment on the issue of liability and granted a trial on the issue of serious injury and damages only. This matter is presently on the calendar of the Trial Scheduling Part for August 4, 2015.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Katie A. Walsh, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. Lisa Nason; the affirmed radiological report of Dr. Sheldon P. Feit; and the transcript of the examination before trial of plaintiff, Wendyanne Bartlett.

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.

Dr. Nason, an orthopedist retained by the defendants, examined the plaintiff on March 24, 2014. The plaintiff told Dr. Nason that she injured her neck and lower back when her vehicle was struck in the rear on February 25, 2012. The plaintiff presented with pain in the cervical spine and pain in the lumbar spine. At the time of the accident the plaintiff was employed as a respiratory therapist. Dr. Nason performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of the plaintiff's cervical spine and lumbar spine. Her assessment of the plaintiff's medical condition was status post cervical sprain/strain, resolved, and status post lumbar sprain/strain, resolved. Dr. Nason states that based upon her examination there was no objective evidence of disability.

Dr. Feit, a radiologist, reviewed the MRI films taken of the plaintiff's lumbosacral spine. He finds desiccatory changes at L2-3, L3-4, L4-5 and L5-S1. He states that he observed a bulging disc at L5-S1 compressing on the thecal sac. There is a mild disc bulge at L4-5 as well as a mild bulge at L2-3. He states that his review of two MRIs of the plaintiff's lumbosacral spine reveals pre-existing degenerative changes. He states that the disc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity. He states that there are no post-traumatic changes identified and no abnormalities causally related to the accident of February 25, 2012.

In her examination before trial taken on February 19, 2014, the plaintiff, Wendyanne Bartlett, age 51, testified that she was involved in a motor vehicle accident on Saturday, February 25, 2012. She stated she was wearing her seat belt at the time of the collision. She is employed as a respiratory therapist with All Care Medical in Plainview, New York. On the date of the accident she was proceeding westbound on the Brooklyn-Queens Expressway. She was stopped for five seconds when her vehicle was struck in the rear by the vehicle operated by the defendant. The force of the impact propelled her vehicle forward into the vehicle in front of hers.

Ms. Bartlett stated that following the impact she felt pain in her middle and lower back. She did not receive medical treatment at the scene and she did not request an ambulance. She left the scene driving her vehicle and proceeded to a patient's house who was expecting her. She spent 45 minutes with that patient and went to a second patient's home. Plaintiff first sought medical treatment a few days following the accident with chiropractor, Dr. Blatt. After examining the patient on the initial visit Dr. Blatt determined that plaintiff had injured her back as a result of the automobile accident. She treated with Dr. Blatt for several months until her no fault benefits were terminated. She then continued treatment utilizing her private health insurance. Dr. Blatt also referred her for MRI studies of her back. She stated that she missed three weeks from work immediately following the accident and then returned on a full time basis. She stated that in October 2013 she injured her right knee when her knee gave out as she was leaving a patient's house and has not been able to return to work since. She states that she also aggravated her lower back condition when she tripped.

Defendant's counsel contends that the medical reports of Drs. Nason and Feit, as well as plaintiff's deposition testimony in which she stated that she returned to work caring for patients

three weeks following the accident, are 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 his 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, Martin A. Lerner, Esq., submits his own affirmation as well as a copy of the police accident report; a copy of the plaintiff's bill of particulars; an excerpt from the transcript of the plaintiff; an affidavit from the plaintiff, dated March 4, 2015; an affirmation from radiologist, Dr. Lisa Corrente; and an affidavit from Dr. Blatt.

In her affidavit the plaintiff states that following the accident of February 25, 2012, she first sought treatment with Dr. Blatt on February 29, 2012. She states that she returned to her job three weeks after the accident despite having pain in her back. She states that she continues to have constant pain in her back. She states that on October 5, 2013, while leaving the home of a client she stumbled and wrenched her lower back.

The plaintiff has also attached an affirmation from radiologist, Dr. Lisa A. Corrente which states that she interpreted three MRI examinations of the plaintiff's lumbosacral spine taken on March 16, 2012, April 30, 2012 and November 29, 2013. Although she states that copies of her reports interpreting the MRIs are annexed to the motion papers the reports are not attached to the court's copy of the plaintiff's affirmation in opposition.

In his affidavit dated March 9, 2015, Dr. Blatt states that the plaintiff treated at his office on a continuous basis from February 29, 2012 through August 7, 2012 and again from January 16, 2013 through March 1, 2013. The plaintiff returned to his office after exacerbating her back condition when she tripped in October 2013. On his initial examination he found constant low back pain with limitations of range of motion of the lumbar spine. He states that the MRI performed on March 16, 2012 of the lumbar spine showed disc bulges in the lumbar region. He states that he has treated the plaintiff for three years and her symptoms have made only a

slight improvement despite his treatment. He states that he re-examined the plaintiff on March 7, 2015 at which time her range of motion measured goniometrically showed continued significant limitation of range of motion of the lumbar spine. He states that in his opinion she has reached maximum medical improvement. The plaintiff's chiropractor reports that he is aware of the exacerbation of her back injury in 2013. However, he also states that despite the subsequent injury, in his opinion the plaintiff's injuries are causally connected to the motor vehicle accident which occurred on February 25, 2012 and she has sustained injuries in the motor vehicle accident which constitute a permanent consequential limitation to her daily function and constitutes a serious and permanent injury.

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]).

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition, and defendants' reply thereto, this Court finds that the proof submitted by the defendants, including the affirmed medical report of Drs. Nason and Feit, together with the plaintiff's testimony at her examination before trial that she only missed three weeks of 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 affidavit of Dr. Blatt attesting to the fact that the plaintiff sustained bulging discs in the lumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her lumbar spine 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]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: April 7, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.