Volpe v Echeverria
2015 NY Slip Op 30685(U)
April 14, 2015
Supreme Court, Suffolk County
Docket Number: 03109/2013
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

Lodovica Volpe,

Plaintiff,

-against-

Nicole Echeverria and Iris Ibarrondo,

Defendants.

Clerk of the Court

Index No.: 03109/2013

Motion Sequence No.: 001; MD
Motion Date: 8/8/14
Submitted: 10/17/14

Motion Sequence No.: 002; MD
Motion Date: 9/12/14
Submitted: 10/17/14

Motion Sequence No.: 003; XMG
Motion Date: 11/5/14
Submitted: 11/5/14

Attorney for Plaintiff:

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Upon the following papers numbered 1 to 37 read upon these motions and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; 12 - 23; Notice of Cross Motion and supporting papers, 24 - 44; Answering Affidavits and supporting papers, 34 - 35; Replying Affidavits and supporting papers, 36 - 37; it is

ORDERED that the motion (# 001) by the defendants for summary judgment is denied, having been superseded by their subsequent motion for summary judgment (# 002) and such the motion (# 002) by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain serious injuries as defined in Insurance Law § 5102 (d) is denied; and it is further.

ORDERED that the motion (# 003) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability is granted, as movant demonstrated that plaintiff's vehicle was stopped or stopping when it was struck in the rear by defendant's vehicle, and no triable issue of fact has been raised that would defeat summary judgment (*see* ***Robayo v Aghaabdul,*** 109 AD3d 892, 971 NYS2d 317 [2d Dept 2013]; *see also* ***Xian Hong Pan v Buglione,*** 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]), and this matter shall be placed on the calendar for a trial on the issue of damages.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when her vehicle was rear-ended by a vehicle owned by defendant Iris Ibarrondo and operated by defendant Nicole Echeverria. The accident allegedly occurred in the northbound lane of Higbie Lane in West Islip, New York, on October 19, 2012. The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff has opposed the motion and has cross-moved for an order awarding summary judgment in her favor on the issue of liability.

By her bill of particulars, the plaintiff alleges that as a result of the subject accident, she sustained certain soft tissue injuries, including C4-C5 central focal disc herniation deforming the thecal sac and L1-L2 disc bulge deforming the thecal sac.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 the plaintiff's limitations, with an objective basis, correlating the plaintiff's

limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the defendants made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the defendants' examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On March 11, 2014, the moving defendants' examining orthopedist, Dr. Teresa Habacker, examined the plaintiff using certain orthopedic and neurological tests including a straight leg raising test. Dr. Habacker found that all the test results were negative or normal, and that there was no spasm or tenderness in the plaintiff's cervical spine. She also found that there was no spasm in the plaintiff's lumbar spine, while palpation of the lumbar spine revealed tenderness at L4. Dr. Habacker performed range of motion testing on the plaintiff's cervical and lumbar spine using a goniometer, and reported range of motion testing results that when compared to normal findings were all normal. Dr. Habacker opined that the plaintiff had no orthopedic disability at the time of the examination, and that she may continue normal daily living activities or regular work duties without restriction (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

At her deposition, the plaintiff testified that she was a full-time homemaker at the time of the accident It was her testimony that the next day after the accident, she was treated in the emergency room and released. She wore a sling on her left arm for a week, and she received treatment from a chiropractor, Dr. Beach, from October 2012 through March 2013. The plaintiff also testified that when she was involved in an unrelated slip and fall accident in 2011, she was treated by Dr. Beach for approximately two months, and that she had no back problem for six months prior to the subject accident. The plaintiff further testified that at the time of the accident, she had health insurance through his husband's employer. She was cut off from no-fault benefits in February or March 2013 and had not had any medical treatment or consultation since March 2013, except a routine check-up. Moreover, the plaintiff testified that there is no activity that she is unable to perform, except for rescheduling a parent/teacher conference or putting off grocery shopping to the next day. Her deposition testimony established that her injuries did not prevent her from performing "substantially

all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Dunbar v Prahovo Taxi, Inc.***, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]; ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]).

In opposition, the plaintiff contends that she did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, the plaintiff submits, *inter alia*, the affirmation of her treating radiologist, Dr. Harold Tice, dated July 15, 2014, with two MRI reports of the plaintiff's cervical and lumbar spine, taken on November 30, 2012; the sworn letter report of her treating chiropractor, Dr. Nadine Beach, dated September 15, 2014; and the unsworn letter report of Dr. Beach, dated October 22, 2012, which is without probative value (*see* CPLR 2106; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]).

In her September 15, 2014 letter report, Dr. Beach states that on October 22, 2012, three days after the subject accident, she administered range of motion testing on the plaintiff's cervical and lumbar spine. She found that there were range of motion restrictions in both cervical and lumbar spine. On September 15, 2014, approximately one year and 11 months after the subject accident, Dr. Beach again administered range of motion testing on the plaintiff's cervical and lumbar spine. Computerized digital range of motion testing of the cervical spine revealed flexion at 30/50 degrees, extension at 30/60 degrees, right lateral flexion at 22/45 degrees, left lateral flexion at 20/45 degrees, left rotation at 40/80 degrees and right rotation at 0/80 degrees. Range of motion testing of the lumbar spine showed left lateral flexion at 12/25 degrees, right lateral flexion at 15/25 degrees, flexion at 45/60 degrees and extension at 20/25 degrees. Moderate to severe spasm was noted in the upper trapezius muscles bilaterally, the levator scapulae muscles bilaterally and the rhomboid muscles bilaterally. Moderate spasm was also noted in the sternocleidomastoid muscles bilaterally as well as in the lumbar paraspinal muscles. Dr. Beach also reviewed the reports of x-rays taken on October 22, 2012 of the plaintiff's cervical and lumbar spine as well as the reports of MRI studies taken of the cervical and lumbar spine on November 30, 2012. Dr. Beach stated that she treated the plaintiff for several months, and that her range of motion had not improved greatly for almost two years after the subject accident. She concluded that the impairment to the plaintiff's cervical and lumbar spine is permanent and that plaintiff "has suffered a significant limitation of the use of her cervical and lumbar spine" and that plaintiff's injuries are causally related to the underlying motor vehicle accident.

Two MRI reports of the plaintiff's cervical and lumbar spine lumbar spine, taken by Dr. Tice, indicated that the plaintiff had a herniated disc at C4-C5 deforming the thecal sac but without extension to the spinal cord or neural foramina. A bulging disc deforming the thecal sac at L1-L2with a partial loss of disc space height, as well as a transitional vertebra of the S1 vertebral body, was noted.

Such evidence, coupled with the plaintiff's affidavit, is sufficient to raise a triable issue of fact (see ***Mela v Gentile,*** 306 AD2d 388, 761 NYS2d 482[2d Dept 2003]; *see also* ***Singh v Varano,*** 306 AD2d 340, 760 NYS2d 545 [2d Dept 2003]).

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Xian Hong Pan v Buglione,*** 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]; *see also* ***Kimyagarov v Nixon Taxi Corp.,*** 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007], citing ***Carhuayano v J & R Hacking,*** 28 AD3d 413, 414, 813 NYS2d 162; ***Milskiy v Solanky,*** 8 AD3d 353, 777 NYS2d 734; ***Gaeta v Carter,*** 6 AD3d 576, 775 NYS2d 86). The plaintiff established her *prima facie* entitlement to judgment as a matter of law, and the defendant failed to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Cortes v Whelan,*** 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]).

Dated: April 14, 2015

William B Rebolini

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

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