

Elmore v Panek

2017 NY Slip Op 33374(U)

November 2, 2017

Supreme Court, Erie County

Docket Number: Index No. 804872/2016

Judge: E. Jeannette Ogden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court, Part 35, held in and for the County of Erie in the City of Buffalo, New York on the 26TH day of September, 2017.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

LENORA ELMORE

Plaintiff

v.

DECISION AND ORDER
Index No. 804872/2016

LUCILLE PANEK

Defendant

APPEARANCES: SPADAFORA & VERRASTRO, LLP
Joseph A. Todoro, Esq., for Plaintiff

HAGELIN SPENCER LLC
Richard J. Porter, Esq. for Defendant

PLEADINGS REVIEWED: Notice of Motion, Affirmation of Daniel Dubnicki, Esq. with Exhibits and Memorandum of Law in Support of Defendant's Motion for Summary Judgment on the Issues of Serious Injury.

Notice of Cross-Motion and Affirmation of Joseph Todoro, Esq. in Response to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Cross-motion for Summary Judgment on negligence, with Exhibits.

Reply Affirmation of Richard J. Porter, Esq. in further support of Defendant's motion for summary judgment and in opposition to Plaintiff's Cross-Motion for Summary Judgment on the issue of negligence.

Plaintiffs commenced this personal injury action to recover damages for alleged serious injuries sustained as a result of a rear end motor vehicle collision between a motor vehicle operated by Plaintiff, Lenora Elmore, and a motor vehicle operated by Defendant, Lucille Panek that occurred on May 13, 2013.

Defendant moves for Summary Judgment dismissing Plaintiffs' complaint on the grounds that she has not sustained a qualifying serious injury within the meaning of Insurance Law §5102(d) as a result of the motor vehicle accident. Plaintiff opposes and cross moves for summary judgment on the issues of serious injury and Defendant's negligence. Defendant opposes Plaintiff's cross motion.

Following oral argument of the motions, Defendant's motion for summary judgment was denied and the Court reserved decision of Plaintiff's cross motion for summary judgment on the issue of negligence in order to allow Defendant time to reply thereto in writing. Plaintiff's cross-motion is granted for reasons hereinafter setforth.

Plaintiff, in her Affidavit and Verified Bill of Particulars, alleges to have suffered serious injury under the categories of (1) permanent consequential limitation of use of a body organ or member, (2) significant limitation of use of a body function or system, and (3) a medically determined injury of a non-permanent nature which prevented Plaintiff from performing substantially all of the acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment (hereinafter referred to as 90/180) of the NY Insurance Law §5102.

In support of her motion, Defendant submits the affirmed Independent Medical Examination

(IME) report of Plaintiff by Dr. John Leddy dated May 3, 2017 who opined that Plaintiff sustained a temporary lumbar muscle strain in the motor vehicle accident and there is no medical evidence of limitation, disability or permanency. Defendant further contends that even though there may be objective medical proof of Plaintiff's injury, the complaint must be dismissed because a pre-existing condition to Plaintiff's lumbar spine which was caused by her chronic obesity and tobacco use that was symptomatic prior to the motor vehicle accident is a contributing factor to the cause of Plaintiff's injury.

The Court finds that this evidence establishes Defendant's burden with respect to the claimed categories of serious injury, thereby shifting the burden to the Plaintiff to establish the existence of triable issues of fact.

Plaintiff offered medical records of Dr. Michael Calabrese, in proper evidentiary form, opining that Plaintiff sustained a significant loss of use of her musculoskeletal and nervous system, resulting in a significant limitation of normal use and function of her spine and upper and lower extremities that adversely impacted her ability to perform her customary and daily household activities in excess of 90 out of the 180 days immediately following the accident and that her consequential limitations are permanent.

With respect to the 90/180 category, Plaintiff's sworn deposition testimony and the report of Dr. Calabrese indicate that she was unable to perform certain normal, customary activities such as standing, bending, personal care, bathing, intimate activity, and household duties. This testimony raises triable issues of fact regarding the 90/180 category in that there is a question of fact whether Plaintiff's normal, customary activities were curtailed to a great extent within the statutory period.

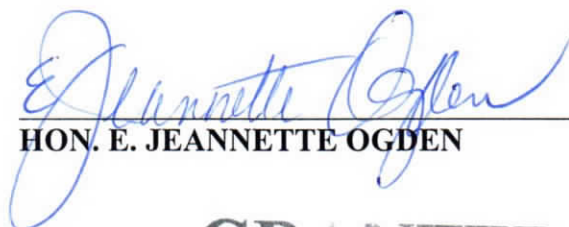
The conflicting reports of Dr. Leddy and Dr. Calabrese combined with the Plaintiff's testimony are sufficient to enable Plaintiff to meet her burden of establishing questions of fact which preclude the granting of summary judgment on the issues of serious injury. Where there is a difference of opinion

regarding the nature, cause and extent of plaintiff's injuries, triable issues of fact for resolution by a jury are created (*Cook v. Peterson*, 137 A.D.3d 1394 [4th Dep't 2016]). Accordingly, Defendant's motion for summary judgment for failure of the Plaintiff to establish serious injury as well as Defendant's motion for summary judgment for an Order establishing the Plaintiff sustained a serious injury within the meaning of Insurance Law §5102 (d) are both denied.

Plaintiff cross-moves for summary judgment on the issue of Defendant's negligence as the sole proximate cause of the motor vehicle collision and submit the transcripts of the deposition testimony of the Defendant in support of the motion. The Defendant testified that she was looking at the traffic, turned her head away for a second and then realized that Plaintiff's vehicle was stopped in front of her and she collided with the rear of Plaintiff's vehicle. Thus, there is no factual dispute that Defendant's actions were the "sole" proximate cause of the collision. Questions of fact remain regarding whether the collision was the sole cause of Plaintiff's injuries. Therefore, it is hereby

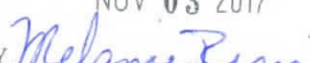
ORDERED that Defendant's and Plaintiff's motions for summary judgment on the issues of serious injury within the meaning of N.Y. Insurance Law §5102 (d) are **DENIED**, and it is further

ORDERED that Plaintiff's motion for summary judgment on the negligence of Defendant is **GRANTED**.


HON. E. JEANNETTE OGDEN

DATED: Buffalo, New York
Nov. 2, 2017

GRANTED

NOV 03 2017
BY 
MELANIE RUSZAJ
COURT CLERK