

**Smith v Ameriprise Auto & Home Ins. Agency, Inc .**

2017 NY Slip Op 33385(U)

December 19, 2017

Supreme Court, Steuben County

Docket Number: Index No. 2015-1280 CV

Judge: Marianne Furfure

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This opinion is uncorrected and not selected for official publication.

State of New York Supreme Court  
County of Steuben

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ERIN S. SMITH and  
KARL N. SMITH,  
Plaintiffs,

vs.

AMERIPRISE AUTO & HOME  
INSURANCE AGENCY, INC.,  
Defendant

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DECISION

Index No. 2015-1280 CV

*Appearances:* *Welch, Donlon & Czarples, Corning (Michael Donlon, of counsel) for Plaintiffs*

*Hagelin Spencer, LLC, Buffalo (William Swift, of counsel) for Defendant*

This matter comes before the court on defendant's motion for summary judgment for dismissal of plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102 (d). Defendant also contends that the cause of action seeking damages for loss of consortium must be dismissed because it is a derivative claim which is not recoverable in a supplemental underinsurance motorist coverage (SUM) claim. Plaintiff opposes defendant's motion and moves for summary judgment claiming that she is entitled to a finding of serious injury on her 90/180-day claim as a matter of law, as well as on the issues of negligence, plaintiff's economic loss in excess of

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DECISION



Judith M. Hunter, County Clerk

2015-1280CV  
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Clerk: PB

basic economic loss, plaintiff's timely notice of claim and defendant's failure to disclaim coverage, and exhaustion of the tortfeasor's policy.

The derivative claim is dismissed at the outset as plaintiff conceded at oral argument that the SUM policy on which she bases her claim does not cover a derivative claim for loss of consortium. Therefore, defendant's motion to dismiss the derivative claim is granted.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). If the proponent fails to make this showing, the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Stokes v. Brown*, 2 AD3d 1373, 1374 [4<sup>th</sup> Dept. 2003]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial (*Gonzalez v. 98 Mag Leasing Corporation*, 95 NY2d 124, 129; *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). In reviewing a motion for summary judgment, the evidence must be considered in the light most favorable to the opponent (*Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

To satisfy the serious injury threshold set forth in Insurance Law Section 5102 (d), there must be objective proof of injury (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]). Subjective complaints alone are insufficient (*Gaddy v.*

*Eyler*, 79 NY2d 955, 957-958 [1992]; *Licari v. Elliott*, 57 NY2d 230, 239 [1982]). The extent or degree of physical limitation can be established by presenting, either an expert's opinion that plaintiff has suffered a specific percentage of loss of use, or an expert's qualitative assessment of plaintiff's condition based on objective medical evidence that compares plaintiff's limitations to the normal purpose, function, and use of the affected body organ, member, or system (*Toure v. Avis Rent A Car Systems, Inc.*, *Id.* at 350; *Parkhill v. Cleary*, 305 AD2d 1088, 1089 [4<sup>th</sup> Dept. 2003]). To prove serious injury under the 90/180 category, plaintiff must show objective evidence of a medically determined injury or impairment of a non-permanent nature, together with evidence that plaintiff's activities were curtailed to a great extent, not just some slight curtailment (*Gaddy v. Eyler*, *Id.* at 957; *Zeigler v. Ramadhan*, 5 AD3d 1080 [4<sup>th</sup> Dept. 2004]).

Plaintiff claims that, as a result of the auto accident, she suffered a permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and a non-permanent medically determined injury or impairment that prevented her from performing her usual daily activities for 90 days of the 180 days following the injury. Defendant asserts that there is no objective evidence to support plaintiff's claim of serious injury under any of the categories alleged by plaintiff.

Defendant relies upon plaintiff's medical records, plaintiff's deposition testimony, and the results of an independent medical examination (IME) conducted

by Dr. Huntoon, more than three years after the accident. Dr. Huntoon opined that plaintiff suffered a mild, temporary cervical sprain as a result of the motor vehicle accident and that she has no other injuries to her neck, cervical or thoracic spine and upper back related to the accident. He found that plaintiff's herniated disc was a pre-existing degenerative condition that was clinically insignificant with no objective evidence that it caused her any limitations. He also concluded that her spinal subluxation pre-dated the accident, as did her headaches, finding that plaintiff has a long and well-documented history of preaccident headaches. Dr. Huntoon also opined that the accident did not exacerbate any of plaintiff's existing medical complaints and that her limitations were not substantial. He also claimed that plaintiff had a one-and-a-half year unexplained gap in treatment. This evidence is sufficient to meet defendant's initial burden of establishing a prima facie case that plaintiff's injuries did not meet the statutory serious injury threshold and were not caused by the accident.

The burden of proof then shifts to plaintiff to come forward with sufficient proof to raise triable issues of fact concerning the nature, extent, cause and permanency of her alleged injuries (*Gonzalez v. 98 Mag Leasing Corporation*, Id. at 129; *Alvarez v. Prospect Hospital*, Id. at 324). In opposition to defendant's motion, plaintiff submitted her own affidavit, as well as the sworn affidavit of Dr. Cilip, her treating physician; and Dr. Frankie, her chiropractor. Dr. Cilip began treating plaintiff for varicose veins in December, 2012, approximately one month before the accident.

At that time, plaintiff did not report any neck, back or headache pain, had full range of motion in her spine, and did not exhibit neck or other involuntary spasms. After the motor vehicle accident, Dr. Cilip began treating plaintiff for pain in her neck. He stated that he observed severe and involuntary spasms in plaintiff's neck, and he was also able to cause plaintiff to experience involuntary spasms by palpating her neck. He opined that these spasms caused a straightening of the spine, which was observed in an x-ray taken shortly after the accident. Dr. Cilip stated that this finding was consistent with plaintiff's spasms. He stated that involuntary spasms are objective evidence of injury to the muscles of the neck and cannot be feigned or faked. Further, he stated that the injuries plaintiff suffered were related to the motor vehicle accident because plaintiff did not have these symptoms prior to the accident. He also stated that, at this time, almost five years after the accident, plaintiff's pain and physical limitations would be "significantly elevated" if she did not continue with palliative care. He stated that plaintiff's long-term diagnosis was sprain of ligaments and cervical spine, cervicalgia, and chronic pain syndrome, all caused by the accident and all permanent.

Plaintiff also presented the sworn affidavit of Dr. Frankie, her chiropractor, who had been treating plaintiff "sporadically" from April, 2006, to April, 2012. He stated that after the accident on January 16, 2013, plaintiff's treatments have been "frequent, steady and consistent." Dr. Frankie ordered an MRI two days after the accident, which revealed a straightening of the cervical lordosis and a 3mm central

disc herniation at "C 5-6." He explained that "straightening of cervical lordosis is when the normal curvature of the cervical spine straightens due to involuntary muscle spasms in the patient's neck." He stated that this is an objective indication of an important and significant injury caused by the motor vehicle accident. He further stated that plaintiff suffers from involuntary muscle spasms involving her cervical spine and upper back which are more consistent and severe than those he observed pre-accident. He also detected trigger points in plaintiff's spinal area which he attributed to injuries plaintiff suffered in the MVA. He states that plaintiff objectively measured moderate to severe range-of-motion deficits after the MVA and consistently tested positive on the Soto-Hall test, an objective orthopedic test that measures radicular pain. Dr. Frankie opined that the symptoms he has observed are persistent and permanent and "will probably worsen as plaintiff ages." This evidence is sufficient to raise a question of fact on whether plaintiff suffered a permanent consequential limitation or a significant limitation of use.

Defendant also moved for summary judgment on plaintiff's claim that, as a result of the accident, she sustained a non-permanent medically determined injury or impairment which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Plaintiff cross moved for summary judgment on this claim.

Defendant's expert, Dr. Huntoon, opined that plaintiff did not suffer a qualifying injury and that, at most, she suffered a mild, temporary cervical sprain and had no other injuries to her neck, cervical or thoracic spine and upper back. He attributed plaintiff's ongoing complaints of pain to a degenerative disc condition that he found to be clinically insignificant, headaches and spinal subluxation all of which he claimed pre-dated the accident. He stated that there was no objective evidence that the motor vehicle accident caused plaintiff any limitations beyond two and one half months after the accident. This satisfied defendant's initial burden for summary judgment (*Wilson v. Colosimo*, 101 AD3d 1765, 1766 [4<sup>th</sup> Dept. 2012]).

In response, plaintiff testified that she missed two to three weeks of work immediately after the accident and only returned to work intermittently because, even though she was in pain, she had to work through tax season. Further, she testified that she can no longer walk her dogs together because she cannot hold both leashes at the same time; she has trouble getting out of bed in the morning because of the drugs she has to take; she can no longer go to the gym to work out; and her children have to help her with the laundry and cooking. Although defendant's medical expert concluded that plaintiff's injuries were either pre-existing or clinically insignificant, plaintiff's experts do not agree. Plaintiff's affidavit together with the objective medical evidence she presented as set forth above, raises a question of fact whether, as a result of the accident, she sustained a non-permanent medically determined injury or impairment which prevented her from performing substantially

all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Perl v. Meher*, Id. at 218-219; *Lake v. Safeco Ins. Co. of Am.*, 147 AD3d 1407, 1408 [4<sup>th</sup> Dept. 2017]). Therefore, defendant's motion for summary judgment dismissing the complaint on the basis that plaintiff did not suffer a serious injury is denied and plaintiff's motion for summary judgment on her claim of serious injury under the 90/180 claim is also denied.

Plaintiff has also moved for summary judgment on the issue of economic loss because the loss she sustained as a result of the accident is in excess of basic economic loss allowed under "No-Fault" insurance. Although a claim for economic loss does not require the plaintiff to have sustained a serious injury, she still must produce evidence in admissible form to support her claim (*Wilson v. Colosimo*, Id. at 1767). In this case, plaintiff's medical bills were uncertified and so not in admissible form (See *Ordway v. Columbia County Agric. Socy.*, 273 AD2d 635, 637 [3<sup>rd</sup> Dept. 2000]). Additionally, there is a question of fact on the question of causation. Although plaintiff's motion for summary judgment on this claim is denied, her right to present proof at trial of her economic loss is preserved (*Cicco v. Durolek*, 147 AD3d 14867, 1488 [4<sup>th</sup> Dept. 2017]).

Plaintiff also moved for summary judgment on her claim that the tortfeasor who rear-ended plaintiff's vehicle, was negligent as a matter of law. Defendant opposes plaintiff's motion and contends that the matter before the Court is based on

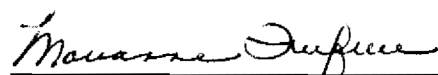
plaintiff's claim that defendant breached the terms and condition of the SUM policy. Therefore, this is a contract action, not a tort claim and negligence is not at issue in this case. Plaintiff's motion for summary judgment is denied because a finding of negligence is not at issue in this insurance policy contract action seeking SUM insurance coverage.

Plaintiff's motion for summary judgment on the issues of timely notice of claim and exhaustion of underlying policy limits is also denied because these issues have not been raised in this action. The issues were not set forth in plaintiff's complaint, nor were they raised in defendant's answer as an affirmative defense and, therefore, they are not at issue in this case.

Defendant's attorney to submit order.

Dated: *December 19, 2017*

ENTER:



Hon. Marianne Furfure  
Acting Supreme Court Justice