Cabrera v Dortch

2012 NY Slip Op 32019(U)

July 12, 2012

Supreme Court, Suffolk County

Docket Number: 08-29162

Judge: Joseph C. Pastoressa

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 08-29162
CAL. No. 11-01794MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-31-12
ADJ. DATE 4-4-12
Mot. Seq. # 001 - MD
002 - MD

---X

ANA CABRERA,

Plaintiff,

- against -

WILLIAM DORTCH, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS TRANSPORTATION DIVISION, COUNTY OF SUFFOLK and KEVCO ELECTRICAL CONTRACTING CORP.,

Defendants.

---X

KEEGAN & KEEGAN, ROSS & ROSNER, LLP
Attorney for Plaintiff, Action 3, Ana Cabrera
147 N. Ocean Avenue, P.O. Box 918
Patchogue, New York 11772

ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
Attorney for Defendants, Actions 1, 2, & 3, Dortch, Suffolk County Department of Public Works and County of Suffolk
2701 Sunrise Highway, P.O. Box 2
Islip Terrace, New York 11752

MCCARTHY & RODRIGUEZ, ESQS.
Attorney for Defendant, Action 1 & 3, Kevco Electrical
One Huntington Quadrangle, Suite 2
Melville, New York 11747

Upon the following papers numbered 1 to 21 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 11; Notice of Cross Motion and supporting papers (002) 12-14; Answering Affidavits and supporting papers 15-19; Replying Affidavits and supporting papers 20-21; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, William Dortch, Suffolk County Department of Public Works Transportation Division, and County of Suffolk, for summary judgment dismissing the complaint on the basis that plaintiff's injuries do not meet the serious injury threshold as defined by Insurance Law §5102 (d), is denied; and it is further

ORDERED that this cross motion (002) by the defendant Kevco Electrical Contracting Corp. for summary judgment dismissing the complaint on the basis that plaintiffs' injuries do not meet the serious injury threshold as defined by Insurance Law §5102 (d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Ana Cabrera, on May 21, 2007, while she was a passenger on a bus owned by defendant Suffolk County and operated by defendant William Dortch. The accident occurred at the corner of Montauk Highway and Atlantic Avenue, Blue Point, New York, when the vehicle owned by Kevco Electrical Contracting Corp. and the vehicle being operated by William Dortch came into contact.

William Dortch, Suffolk County Department of Public Works Transportation Division and the County of Suffolk, seek summary judgment dismissing the complaint on the basis the plaintiff has not sustained a serious injury within the definition of Insurance Law §5102(d). Defendant Kevco Electrical Contracting Corp. (Kevco) incorporates by reference those procedural, factual, and legal arguments contained in motion (001), as well as the evidentiary submissions, for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained a serious injury within the definition of Insurance Law § 5102 (d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York,49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co.,79 AD2d 1014 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (Licari v Elliot, 57 NY2d 230).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to

"present evidence in competent form, showing that plaintiff has no cause of action" (Rodriquez v Goldstein, 182 AD2d 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (DeAngelo v Fidel Corp. Services, Inc., 171 AD2d 588 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (Cammarere v Villanova, 166 AD2d 760 [3d Dept 1990]).

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 Inc., 96 NY2d 295 [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 "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 plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, (supra).

In support of both motions, the defendants have submitted, and/or incorporated by reference, inter alia, an attorney's affirmation; a double sided copy of the transcript of the examination before trial of Ana Cabrera dated June 15, 2009, which is not in admissible form pursuant to 22 NYCRR 202.5 (a) and is not considered; an unsigned but certified copy of the testimony of Ana Cabrera at the hearing conducted pursuant to General Municipal Law 50 (h) dated November 26, 2007, which is not objected to by the plaintiff and is considered (see Zalot v Zieba, 81 AD3d 935 [2d Dept 2011]); a copy of the summons and complaint and plaintiff's verified bill of particulars; a copy of the County of Suffolk's answer with a counterclaim asserted against plaintiff Ana Cabrera; a copy of Kevco's answer with a cross claim asserted against the County of Suffolk defendants; a copy of the report of the independent medical examination of the plaintiff by Lee M. Kupersmith, M.D. dated August 4, 2009 with curriculum vitae annexed; and a copy of the report of the independent neurological examination of the plaintiff by Richard A. Pearl, M.D. dated July 28, 2009 with curriculum vitae annexed.

Ana Cabrera testified to the extent that on May 21, 2007, the date of the accident, she was employed by Edible Arrangements five days a week. She stated that she missed three weeks from work due to the injuries she sustained. On the date of the accident, she finished work for the day and took bus #40, which traveled east on Montauk Highway towards Patchogue. After the accident, she walked five blocks to her friend who took her home. Upon arriving at home, she couldn't stop crying, so she took a pill and fell asleep. When she went to get up at about 8:00 p.m., she couldn't get out of bed and felt pain all over her body, from her neck down to her lower back. Two days later she saw a chiropractor, Dr. Escamilla, who began treating her three days a week with electrical stimulation and massage until the beginning of August, 2007. In September, 2007, she began treating with him again, twice a week. Since the accident, she cannot mop or vacuum, or pick up heavy things. She was terminated from Edible Arrangements because she missed three weeks from work.

By way of her bill of particulars, the plaintiff alleges that as a result of the subject accident she sustained straightening of the cervical lordosis; disc bulge at C4-5; herniated discs C5-6 and C6-7 resulting in left sided cord flattening at these levels, causing permanent limitation and discomfort as well a significant radicular symptoms on the right.

The reports of the examining physicians submitted in support of this motion do not exclude the possibility that the plaintiffs suffered serious injury within the meaning of Insurance Law §5102 and do not establish that the plaintiffs' injuries were not causally related to this accident; therefore, the moving parties are not entitled to summary judgment (see Peschanker v Loporto, 252 AD2d 485 [2d Dept 1998]).

Both Dr. Kupersmith and Dr. Pearl set forth the medical records and diagnostic test reports which they reviewed, including MRI's of the plaintiff's cervical and lumbar spine, and left shoulder, and upon which they based their impressions. However, the defendants have failed to support their respective motions with copies of the medical records and reports for the MRI studies. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (see Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2d Dept 1984]).

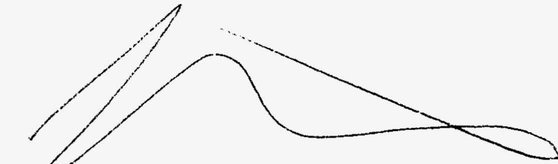
Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (Jankowsky v Smith, 294 AD2d 540 [2d Dept 2002]). A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (Hussein, et al. v Harry Littman, et al., 287 AD2d 543 [2d Dept 2001]). While the plaintiff alleged that she suffered a disc bulge at C4-5 and herniated discs C5-6 and C6-7 resulting in left sided cord flattening at these levels, the examining physicians have not commented on the herniated discs and have not ruled out that she did not sustain such injuries. Dr. Kupersmith opined that the plaintiff sustained cervical and lumbar sprains/strains resolved. Dr. Pearl's impression was that the plaintiff sustained a cervical sprain. Thus, factual issues exist which preclude summary judgment on the issue of whether the plaintiff sustained such injuries and whether they were caused by the accident. Although the plaintiff claims to have cervical radiculopathy, Dr. Pearl opined that the plaintiff did not sustain a neurological injury. However, he has not set forth the tests which he performed that rule out cervical radiculopathy.

Additionally, as to the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (Blanchard v Wilcox, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; see Uddin v Cooper, 32 AD3d 270, [1st Dept 2006]; Toussaint v Claudio, 23 AD3d 268 [1st Dept 2005]), defendants'physicians do not opine on this category of serious injury, thus raising further factual issue.

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see Agathe v Tun Chen Wang, 98 NY2d

345 [2006]); see also, Walters v Papanastassiou, 31 AD3d 439 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept 2008]); Krayn v Torella, 40 AD3d 588 [2d Dept 2007]; Walker v Village of Ossining, 18 AD3d 867 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motions (001) and (002) by the defendants for dismissal of the complaint on the basis that the plaintiff has failed to meet the serious injury threshold as defined by Insurance Law § 5102 (d) is denied.



Dated: July 12, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

TO: SIBEN & SIBEN, LLP
Attorney for Plaintiff, Action # 1
90 East Main Street
Bay Shore, New York 11706

SCHMELKIN ASSOCIATES, P.C.
Attorney for Plaintiff, Action # 2
11 Park Place, 10th Floor
New York, New York 10007