

<b>Lendof v Melgan-Castro</b>
2012 NY Slip Op 32287(U)
August 29, 2012
Supreme Court, Queens County
Docket Number: 28278/2010
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

MARIA LENDOF, Index No.: 28278/2010  
Plaintiff, Motion Date: 06/14/12  
- against - Motion No.: 20  
Motion Seq.: 2

LUIS A. MELGAN-CASTRO and  
NICHOLAS M. RICCI,

Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by defendant, LUIS A. MELGAN-CASTRO, for an order pursuant to CPLR 3212 granting said defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 7  
Affirmation in Opposition-Affidavits-Exhibits.....8 - 13  
Reply Affirmation.....14 - 16

This is a personal injury action in which plaintiff, Maria Lendof, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on June 19, 2010, on the entrance ramp to the Jackie Robinson Parkway, near Metropolitan Avenue, Queens County, New York.

The plaintiff, who was a passenger in the vehicle owned and operated by Nicholas M. Ricci, alleges that she was injured when the Ricci vehicle was struck in the rear by the Lincoln Town car owned and operated by defendant Luis A. Melgan-Castro while the Ricci vehicle was completely stopped in traffic.

The plaintiff commenced this action by filing a summons and complaint on November 10, 2010. Issue was joined by service of Ricci's verified answer dated December 9, 2010, and by Melgan-Castro's verified answer dated December 22, 2010. Defendant Melgan-Castro now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Cary S. Nosowitz, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of radiologist, Dr. Mark Decker; the affirmed medical report of orthopedic surgeon, Dr. Alan M. Crystal; a copy of the police accident report (MV-104AN); the affirmed medical report of neurologists Dr. Aeric Hausknecht and Dr. Stephanie Dubow; a copy of the report of accident reconstruction expert Robert S. Fijan, Ph.D; and a copy of the transcript of the examination before trial of Plaintiff, Maria Lendof.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, a labral tear of the right shoulder; disc bulges at T4-5, T5-6, T10-11, C7-T1; disc herniations at T7-8, T8-9, C2-3, C4-5, C5-6, C6-7; and aggravation of degenerative cervical derangement. In her supplemental bill of particulars, plaintiff states that she also sustained aggravation of pre-existing neck problems consisting of pain and vertigo which is alleged to be permanent in nature. She states that she was confined to bed for two weeks after the date of the accident and confined to her house for two or three months after the accident. Plaintiff also states that she has been out of work from June 19, 2010 to the present time and that she receives disability payments.

Plaintiff contends 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.

In an affirmed report dated April 12, 2011, Dr. Mark Decker, a musculoskeletal and spine specialist, reviewed the MRI of plaintiff's right shoulder taken on July 23, 2010 and found that there was no tear of the of the supraspinatus tendon, no rotator cuff tear, and no evidence that a traumatic injury was sustained. He only found degenerative changes which he stated were not causally related to the accident in question. Dr. Decker also reviewed the MRI of the plaintiff's thoracic spine and found no evidence of herniation although he did see degenerative disc disease with multilevel bulging, not causally related to the subject accident. His review of the plaintiff's cervical spine MRI indicated no herniations, although he did find disc bulges which he attributed to degenerative disc disease.

Dr. Alan M. Crystal, an orthopedic surgeon retained by the defendants, examined Ms. Lendof, age 46, on August 3, 2011. She presented with neck pain and right shoulder pain. His objective range of motion testing showed that the plaintiff did have significant limitation of range of motion of the cervical spine and right shoulder. He states that in his opinion there is no basis to causally relate the injuries of record to the accident of June 19, 2010. He states that "because of the lack of any objective neurological findings and the high prevalence of herniated discs in asymptomatic individuals, it is my firm opinion and conclusion that there is no basis to causally relate the alleged injuries of record of the cervical spine to the accident of June 19, 2010." He states that her degenerative changes can cause axial neck pain.

The report of the accident reconstruction specialist, Dr. Fijan, concludes that the accident did not significantly contribute to a tear or other pathology of the plaintiff's right shoulder joint and that the accident did not contribute in any significant way to disc bulges or herniations or other pathologies associated with with the plaintiff's cervical spine.

In her examination before trial, taken on May 18, 2011, plaintiff testified that on the date of the accident, a Saturday, she was a restrained front seat passenger in the vehicle operated by her fiancé, Nicholas Ricci. They were on their way to the Poconos and their vehicle was stopped at a stop sign and in heavy traffic on an entrance ramp to the Jackie Robinson Parkway. After being stopped for several minutes, their vehicle was struck in the rear by the Lincoln Town Car operated by defendant Melgan-Castro. The Town Car was being operated as a livery cab. Plaintiff testified that she overheard the driver of the cab state to the police that he was bending down to reach for something and looking somewhere else and he was sorry. She told

the police at the scene that she injured her neck. She declined an ambulance and she and her husband left the scene in their own vehicle and went home. The following Monday, plaintiff sought medical treatment from her physician, Dr. Hershfield. He recommended painkillers and referred her for x-rays. She then began treating with chiropractors at Healthmakers in Forest Hills. She goes two or three times a week for treatment of her neck and back and right shoulder. She is treated with chiropractic care and acupuncture. She also went for MRIs for her neck back and shoulder. She was told that the MRIs indicated disc herniations in her cervical spine and back and also showed a torn rotator cuff. She stated that she is also being treated by a neurologist at New York Eye and Ear Hospital for vertigo. She is employed by the Department of Human Resources and is covered by medical insurance through GHI. She was working full time at the time of the accident but was not able to return to work since the date of the accident because she is not able to sit for long hours and she experiences vertigo all day long. She was treated for vertigo prior to the accident. However, she stated that prior to the accident the vertigo was not that bad. However, since the accident she suffers from vertigo on a daily basis. She was told by her neurologists, Dr. James and Dr. Singh that because of the vertigo she is not yet able to return to work and she should continue with therapy. She also testified that she has pain in her neck, back and right shoulder on a daily basis

Defendant's counsel contends that the medical reports of Drs. Crystal, Decker and Fijan, as well as the plaintiff's deposition testimony are sufficient to establish, prima facie, 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 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.

In opposition, plaintiff's attorney, Alan T. Rothbard, Esq., submits his own affirmation as well as the affirmation of Dr. Paul Ackerman; a supplemental verified bill of particulars; the radiological report of Dr. Diamond, an affirmed report of Dr. Christopher Burrei; the affirmed report of Dr. Davis, and the report of neurologist, Dr. Singh. The supplemental bill of particulars served on October 19, 2011 states that as a result of the occurrence, plaintiff sustained aggravation of pre-existing neck problems

consisting of pain and vertigo.

Dr. Ackerman, an orthopedist, states that he examined Ms. Lendof initially on July 28, 2010 and subsequently on August 19, 2010 and September 3, 2010. In his initial examination he noted that plaintiff had restriction in range of motion of the right shoulder and cervical spine. After reviewing the MRI of her right shoulder he concluded that she sustained a labral tear of the right shoulder which was causally related to the accident of June 19, 2010. He recommended arthroscopic surgery due to pain in the right shoulder and decreased mobility and range of motion.

The MRI reports of radiologist Dr. Diamond states that he observed disc herniation and disc bulges in the cervical spine and the thoracic spine. The plaintiff was examined by Dr. Singh on March 5, 2010. At that time he found that her headaches and vertigo, which were preexisting, were exacerbated due to the accident and occurred with more frequency and severity. He states that the vertigo prevents her from performing her work including driving and activities of daily living. He states that the plaintiff's vertigo condition, which was exacerbated by the accident is a permanent vestibular disability with significant limitations of the neurological system.

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). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345; Gaddy v Eyler, 79 NY2d 955).

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; 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 admissible evidence submitted by the defendant fails to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. Firstly, Dr. Crystal found significant limitations of range of motion in the plaintiff's right shoulder and cervical spine. Secondly, the plaintiff's bill of particulars clearly sets forth that the plaintiff was unable to return to work since the date of the accident. However, Dr. Crystal failed to relate his findings to the 90/180 category of serious injury for the period of time immediately following the subject accident. Thus, the defendant's motion papers failed to adequately address the plaintiff's claim, which was set forth in the bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (see Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Udochi v H & S Car Rental Inc., 76 AD3d 1011 [2d Dept. 2010]; Strilcic v Paroly, 75 AD3d 542 [2d Dept. 2010]; Bright v Moussa, 72 AD3d 859 [2d Dept. 2010]; Encarnacion v Smith, 70 AD3d 628 [2d Dept. 2010]; Negassi v Royle, 65 AD3d 1311 [2d Dept. 2009]; Alvarez v Dematas, 65 AD3d 598 [2d Dept. 2009]; Smith v Quicci, 62 AD3d 858 [2d Dept. 2009]). Thirdly, defendant testified in her examination before trial and states in her supplemental bill of particulars that her vertigo was permanently exacerbated by the accident and that she required treatment for same. The defendant's examining physician failed to address this aggravation of her vertigo which is alleged to be a permanent injury.

Therefore, the evidence submitted by defendant is insufficient to demonstrate that there are no triable issues of fact with respect to the alleged permanent and significant vertigo condition (see Galindo v Kohli, 2012 NY Slip Op 30991U [2d Dept. 2012]; Pleasant v M & Lenny Taxi Corp., 94 AD3d 1072 [2d Dept. 2012]; Safer v Silbersweig, 70 AD3d 921 [2d Dept. 2010]; Menezes v Khan, 67 AD3d 654 [2d Dept. 2009]; McFadden v Barry, 63 AD3d 1120 [2d Dept. 2009]; Staubitz v.

Yaser, 41 AD3d 698 [2d Dept. 2007]; Hughes v Cai, 31 AD3d 385 [2d Dept. 2006]).

Thus, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, that plaintiff had not had sustained serious injuries within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Inasmuch as the defendants did not meet their prima facie burden, it is unnecessary to consider the sufficiency of the plaintiff's papers in opposition (see Delayhaye v Caledonia Limo & Car Serv., Inc., 61 AD3d 814 [2d Dept. 2009]; Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept. 2008]; Ali v Rivera, 52 AD3d 445 [2d Dept. 2008]).

Accordingly, based on the foregoing, it is hereby

ORDERED that the motion by the defendant LUIS A. MELGAN-CASTRO for summary judgment dismissing the plaintiff's complaint is denied.

Dated: August 29, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**