Malave v Michel

2012 NY Slip Op 32289(U)

August 23, 2012

Supreme Court, Suffolk County

Docket Number: 08436/2011

Judge: William B. Rebolini

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

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Kim A. Malave,

Plaintiff,

-against-

Keri Michel, Kurt Kroll and Richard Caputo,

Defendants.

Index No.: 08436/2011

Motion Sequence No.: 001; MD
Motion Date: 4/25/12
Submitted: 7/30/12

Motion Sequence No.: 002; MD
Motion Date: 4/25/12
Submitted: 7/30/12

Clerk of the Court

Attorney for Plaintiff:

Schwartzappel Partners, P.C.
300 Jericho Quadrangle, Suite 180
Jericho, NY 11753

Attorney for Defendants
Keri Michel and Kurt Kroll:

Martyn, Toher & Martyn, Esqs.
330 Old Country Road, Suite 211
Mineola, NY 11501

Attorney for Defendant Richard Caputo:

Robert P. Tusa, Esq.
898 Veterans Memorial Hwy., Suite 320
Hauppauge, NY 11788

Upon the following papers numbered 1 to 36 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers (001), 1 - 10; Notice of Cross Motion and supporting papers, 11 - 17; Answering Affidavits and supporting papers, 18 - 36; it is

ORDERED that motion (001) by the defendants Keri Michel and Kurt Kroll and the cross-motion (002) by the defendant Richard Caputo for an order pursuant to CPLR 3212 awarding summary judgment dismissing the complaint on the basis the plaintiff Kim A. Malave has not met the serious injury threshold as defined by Insurance Law §5102(d) are denied.

The plaintiff seeks damages for personal injuries arising out of a motor vehicle accident which occurred on April 3, 2009, on Route 27A approximately 100 feet west of Cedar Place, in Mastic, New York. As a result of this accident, Kim Malave alleges that she sustained injuries consisting of bilateral carpal tunnel syndrome; left endoscopic carpal tunnel release with dissection of the undersurface mobilizing ulnar bursa and synovial tissue on December 16, 2009; right endoscopic carpal tunnel release and dissection on the undersurface mobilizing ulnar bursa and synovial tissue on January 21, 2010; posterior bulging disc impressing upon the thecal sac at C2/3; posterior bulging disc impressing upon the thecal sac at C3/4; posterior bulging disc impressing upon the thecal sac at C5/6; bulging disc right predominant at C3/4; left sided radiculopathy at C7; chronic bilateral radiculopathy at C5/6 and C6/7; positive Soto Hall test; decreased range of motion; severe inflammatory facet joint changes on the left at T2, T6, T9, and T10; severe inflammatory facet joint changes on the right at T12; severe inflammatory facet joint changes bilaterally at T3, T4, T5, T7, and T11; L5-S1 superimposed broad herniated disc, right predominant, impressing on the thecal sac and medial margin of the exiting left S1 root, with compression and posterolateral displacement of the exiting right S1 nerve abutting the L5 nerve roots; L1/2 diffuse bulging disc, impressing on the thecal sac; L5-S1 bulging disc; right sided L5-S1 radiculopathy; Schmorl's node formation surrounding T12/L1; L2; superior endplate Schmorl's node; L2/3 through L4/5 facet hypertrophy, encroaching on the thecal sac posterolaterally; L5/S1 disc hydration loss; anterior disc extension and spur formation; L5/S1 reactive endplate changes; positive bilateral Elys test; positive bilateral Hibbs test; positive left sided Lasagues test and decreased range of motion; trigger point injections into the musculature of the lumbar spine and right sacroiliac joint; injections of Marcaine, Lidocaine, and Depo Medrol into the lumbar space on April 24, 2009 and June 19, 2009; contusion and sprain/strain of the left arm; spasms of the left leg; and pain and numbness in the left foot.

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, 455 NYS2d 570 [1982]).

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, 582 NYS2d 395, 396 [1st Dept 1992]). Once the 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, 567 NYS2d 454, 455 [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, 587 NYS2d 692 [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, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 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 "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, 746 NYS2d 865 [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 their motion (001), defendants Michel and Kroll have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendants' respective answers with cross claims, and plaintiff's verified bill of particulars; the transcript of the examination before trial of Kim A. Malave; and the reports of Isaac Cohen, M.D. concerning his independent orthopedic examination of the plaintiff dated January 5, 2011, Maria Audrey DeJesus, M.D. concerning her independent neurological examination of the plaintiff dated January 24, 2012, and Scott Coyne, M.D. concerning his independent review of the MRIs of the plaintiff's cervical spine and lumbosacral spine, which were both conducted on June 30, 2009. In support of the cross-motion (002), defendant Richard Caputo has submitted, *inter alia*, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; and has incorporated by reference the exhibits and evidentiary proof submitted with motion (001).

It is the determination of this Court that the defendants failed to establish *prima facie* entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). It is determined that even if the defendants provided the copies of the medical records which their experts reviewed and on which they base their opinions in part, as required pursuant to CPLR 3212, expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]); ***Hornbrook v Peak Resorts, Inc.*** 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case. The moving papers also set forth factual

issues which preclude summary judgment as a matter of law.

Upon examination of the plaintiff, Dr. Maria Audrey DeJesus has not set forth her range of motion findings for left and right rotation of the lumbar spine. Additionally, she has not opined on the radicular and nerve injuries alleged by the plaintiff, and the finding of the testing performed on her, and she has not ruled out that these injuries were causally related to the accident. While Dr. Isaac Cohen set forth that he reviewed the plaintiff's MRI reports, he does not rule out that these injuries, consisting of herniated and bulging cervical and lumbar discs, were causally related to the accident. Dr. Cohen set forth that he cannot explain the correlation between the motor vehicle accident and the development of carpal tunnel syndrome in both wrists, which required surgery, and he has not ruled out a causal connection to the accident.

Dr. Cohen acknowledged the various bulging and herniated discs reported in the MRI studies relative to the plaintiff's cervical and lumbar spines. He continued that the work-up performed on the plaintiff's cervical and thoracolumbar spine areas demonstrates preexisting degenerative conditions which were of no clinical significance at the time of the evaluation. However, he does not set forth a basis for such opinions.

Dr. Coyne opined that there are no cervical disc herniations, but stated that there are degenerative disc changes with disc dehydration and annular disc bulging. Although he opined that the degenerative disc changes are chronic and pre-existed the accident, he does not state the basis for this opinion and has not supported his report with the evidentiary findings set forth in the original MRI reports. Nor does he rule out that the bulging cervical disc is causally related to the accident. While Dr. Coyne has set forth that there is no evidence of focal herniation of any lumbar discs, Dr. Cohen has indicated in his report that there is a broad based disc herniation at L5/S1, thus raising factual issues. Again, Dr. Coyne has set forth a conclusory opinion that there was no trauma to the plaintiff's lumbar spine causally related to the within accident, but he has not set forth the basis for such opinion.

Based upon the foregoing, the defendants failed to address all of the plaintiff's claimed injuries, and to establish that such injuries were not causally related to the within accident (*see* ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2d Dept 2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2d Dept 2007]; ***Wade v Allied Bldg. Products Corp.***, 41 AD3d 466, 837 NYS2d 302 [2d Dept 2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2d Dept 2005]).

Defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the 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 (***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]); ***Zhong Lin v New***

York City Transit Auth., 2009 NY Slip Op 30488U [Sup Ct, Queens County 2009]), and they do not opine on that category of injury. At her deposition, the forty- seven year old plaintiff testified that upon the occurrence of the accident, she experienced pain in her head, neck, both wrists, and back. She testified as to the chiropractic care and treatment which she received, the injections into her back, MRI's to her neck and back, and surgery on both wrists for carpal tunnel syndrome, followed by physical therapy. She also testified about specific activities, such as gardening and cooking, that she enjoyed before the accident but can no longer accomplish.

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, 746 NYS2d 865 [2006]); *see also*, ***Walter v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [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, 867 NYS2d 339 [2nd Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, the motion and cross-motion by the defendants for dismissal of the complaint on the basis that plaintiff has not met the serious injury threshold are denied.

Dated: August 23, 2012

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

______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**