Alicea v Simeon
2012 NY Slip Op 32776(U)
November 7, 2012
Supreme Court, Suffolk County
Docket Number: 09-36593
Judge: Denise F. Molia
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SHORT FORM ORDER

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INDEX No. 09-36593
CAL. No. 12-00525MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 8-10-12
ADJ. DATE 9-28-12
Mot. Seq. # 001 - MD

CARMEN ALICEA,

Plaintiff,

- against -

BERTIE SIMEON,

Defendant.

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-13 ; Replying Affidavits and supporting papers 14-15; Other 16-17; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Bertie Simeon, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Carmen Alicea, has failed to sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that the branch of the motion which seeks dismissal of the second cause of action on the issue of Property Damage to the plaintiff's vehicle has been rendered academic by settlement of the same and is denied as moot.

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on Friday, April 13, 2007, on Stuyvesant & Washington Avenue, in Brentwood, New York, when a vehicle operated by the plaintiff, Carmen Alicea, was struck by a vehicle operated by defendant Bertie Simeon.

The defendant now seeks summary judgment on the basis that Carmen Alicea did not sustain a serious injury as defined by Insurance Law §5102 (d). The plaintiff opposes the defendant's application.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth***

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Century-Fox Film Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 435 NYS2d 340 [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, 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 this motion, the defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendant's answer with various discovery demands, and plaintiff's verified and supplemental verified bills of particulars; the expert report of Chandra M. Charma, M.D. dated April 15, 2011 concerning the independent neurological examination of the plaintiff; the examination before trial of Carmen Alicea; and a copy of a release of the property damage claim with proof of payment in the amount of two thousand seven hundred fifty-one and 15/100 dollars.

Based upon the proof that the property damage claim was settled and payment was tendered by Lincoln General Insurance Company by check dated September 27, 2007, and the release for property damage was duly executed by the parties on September 17, 2007, that part of the defendant's application for dismissal of the second cause of action for property damage has been rendered academic and is denied as moot.

By way of her verified bill of particulars, Carmen Alicea alleges that as a result of the subject accident she sustained injuries consisting of an L4-5 posterior disc bulge with flattening of the ventral thecal sac; straightening of the cervical lordosis; C2-3 through C7-T1 disc hydration loss; C3-4 posterior disc bulge; C4-5 and C5-6 posterior disc herniations with ventral CSF impression at those levels; C4-5 central canal stenosis; C6-7 and C7-T1 posterior, more prominent disc herniations with ventral CSF impression and central canal stenosis; C6-7 increased herniation on the left resulting in ventral cord impression; C7-T1 cord abutment; C6-7 diminishing ventral cord impression; C6-7 increasing ventral cord impression; insult to the muscular skeletal system and neuroperipheral system of both the cervical and lumbar spine; headaches; spinal radiculitis; necessity for pain and anti-inflammatory medications; limited ranges of motion; post traumatic stress disorder; and loss of activities and enjoyment of life. It is noted that by stipulation dated March 9, 2012, the plaintiff has withdrawn the claim for post traumatic and psychological distress.

Based upon a review of the foregoing evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment on the issue of whether the plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendant's expert, Chandra M. Charma, M.D. has not provided copies of the medical records which defendant expert stated were reviewed and upon which the expert opinion was based in part, including the MRI reports of the plaintiff's lumbar and cervical spine, records from Southside Hospital; x-ray report of the cervical and lumbar spine, and the report of Walter Priestly, D.C., 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]), which evidentiary proof has not been provided in the moving papers.

Although the plaintiff testified that she was treated for her back and neck pain by Walter Priestly, D.C. following the accident, no report from defendant's chiropractic expert concerning an independent chiropractic examination has been submitted by the moving defendant, leaving this court to speculate as to the findings (***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996]). Although the plaintiff testified that she received two injections into her lumbar spine at a hospital, those records have not been provided to this court and the expert does not comment upon the necessity for the administration of the injections, or rule out that such administration was not causally related to the subject accident. It is additionally noted that after the accident,

the plaintiff also treated with Dr. Blanco, her private attending physician, whose records also have not been provided.

Dr. Charma obtained range of motion measurements of the plaintiff's cervical and lumbar spine with a goniometer. The diagnosis rendered by Dr. Charma was cervical and lumbar sprain, resolved, and normal neurological examination. However, Dr. Charma's report is conclusory and unsupported. He does not address the issue concerning the multiple cervical and lumbar herniations which the plaintiff alleges to have sustained in this accident, and does not rule out that these injuries were caused by the accident, leaving this court to speculate as to those claims. Although the plaintiff has alleged that she suffers from headache and cervical and lumbar radiculitis, Dr. Charma, does not opine as to these injuries, or rule out that they were caused by the accident, again, leaving it to this court to speculate as to the same, and raising further factual issues.

Based upon the multiple factual issues and lack of supporting evidentiary proof, it is determined that the defendant failed to establish prima facie that the plaintiff did not sustain a serious injury as set forth in the first categories of injuries as defined by Insurance Law § 5102 (d).

Turning to the second category of injuries defined in Insurance Law § 5102 (d), it is determined that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant's physician's affirmation 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 (***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]), and the examining physician does not comment on the same. Accordingly, there are factual issues concerning this category of injury.

The plaintiff testified that she is employed as a data entry clerk at by UFC Aerospace. On the day following the accident, she experienced pain all over her body, and still struggles with the pain in her neck and back, for which she treated with Dr. Priestly for more than six months. She stopped treatment because the insurance company would no longer cover the visits, and thus, she could not complete the injections to her neck and back. Prior to this accident, she did not have pain in her neck or back, and had never been diagnosed with any condition involving her neck or back. Due to the pain she was experiencing, she was unable to perform her usual job at her place of employment as she could no longer carry some of the boxes and could not lift. She has not been able to resume lifting or carrying since then as she still has the pain in her back and neck, seven days a week, lasting all day long. She still inputs information on the computer, but has to sit and take it easy. She takes Aleve and uses patches for the pain. She continued that the pain in her neck is causing problems with her job. She develops headaches, cannot focus, and has to take Excedrin Migraine. She loves gardening and can no longer garden at all. She stopped her membership at the gym as she can no longer perform those activities. She has trouble grabbing her daughter and doing activities with her. Thus, there are factual issues concerning this second category of injuries.

These factual issues raised in defendant's moving papers preclude summary judgment, as the defendant failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) under either category (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48

[2d Dept 2006]). Inasmuch as the moving party's in motion (001) has failed to establish 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 [2d 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]) as the burden has not shifted to the plaintiff.

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint is denied in its entirety.

Dated: November 7, 2012

Hon. Denise F. Molia
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**