Gates v Vultaggio
2013 NY Slip Op 33239(U)
December 19, 2013
Supreme Court, Suffok County
Docket Number: 11-36553
Judge: Jerry Garguilo

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 11-36553
CAL No. 13-00883MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-9-13
ADJ. DATE 11-13-13
Mot. Seq. # 002 - MD

DEBORAH GATES,

Plaintiff,

- against -

WILLIAM VULTAGGIO,

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 1-9; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 10-14; Replying Affidavits and supporting papers 15-17; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff failed to sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Deborah Gates, seeks damages for personal injuries alleged to have been sustained on December 29, 2010, at approximately 12:44 p.m., on Sunrise Highway at or near its intersection with Broadway, in the Town of Oyster Bay, New York, when plaintiff's stopped vehicle was struck in the rear by the vehicle operated by defendant William Vultaggio.

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

In support of this application, the defendant submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; the sworn reports of Edward A. Toriello, M.D. dated November 26, 2012 concerning his independent orthopedic examination of the plaintiff, and Mark J. Zuckerman, M.D., undated, concerning his independent neurological examination of the plaintiff on December 18, 2012; and the transcript of the examination before trial of Deborah Gates dated September 25, 2012.

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 medically 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*).

The plaintiff alleges in her bill of particulars that as a result of this accident, she has sustained injuries consisting of: C5-6 disc herniation deforming the thecal sac abutting the spinal cord demonstrating left neural foramina encroachment impinging the exiting left C6 nerve root with associated left neural foraminal narrowing; C2-3 disc bulge abutting the anterior margin of the thecal sac; C4-5 disc bulge deforming the thecal sac; L4-5 disc bulge with superimposed left neural foramina disc herniation abutting the exiting left L4 nerve root with left lateral recess extension abutting the L5 nerve root; L1-2 and L2-3 disc herniations deforming the thecal sac with bilateral neural foramina extension at L2-3, and right proximal neural foramina extension at L1-2; L3-4 disc bulge with superimposed left neural foramina disc herniation autting the exiting L3 nerve root; L5-S1 disc bulge; headaches; dizziness; neck pain; shoulder pain; and back pain.

Upon review and consideration of the defendant's evidentiary submissions, it is determined that the moving party has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Deborah Gates did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Copies of the medical records, diagnostic studies, including EMG/nerve conduction testing, EEG, and MRI reports for the testing and examinations performed on the plaintiff have not been provided as evidentiary proof as required pursuant to CPLR 3212. Dr. Toriello and Dr. Zuckerman set forth that each reviewed the MRI reports of the plaintiff's cervical spine and lumbar spine, and various records, which have not been provided with the moving papers and were relied upon, in part, in rendering opinions with regard to plaintiff's injuries. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that 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]).

Dr. Toriello set forth that the range of motion examination is a subjective test under the voluntary control of the individual being tested, implying issues of credibility. He further stated "[a]pparently there were x-rays of the lumbar spine that were done in March 2010 which indicate that she may have had a problem with her lumbar spine which antedated the accident in December of 2010" which he stated he would be happy to review if they become available. This is a conclusory and unsupported opinion which raises factual issues as it is not known what his opinion would be if he reviewed those x-rays. Dr. Toriello opined that based on the history as given by the claimant, review of records, and the physical examination, the injuries appear to be causally related to the accident. Dr. Toriello did not offer an opinion with regard to the plaintiff's claims of herniated and bulging cervical and lumbar discs, and does not rule out that they were caused by the subject accident, precluding summary judgment.

Dr. Zuckerman set forth that the report of a vestibular nystagmograph performed on the plaintiff did not provide an interpretation for him, but he stated the plaintiff no longer experiences headaches and dizziness and that she did not strike her head in the accident. However, she testified that she struck her head on the visor. Dr. Zuckerman made reference to various reports, however, he cannot determine who provided the treatment to the plaintiff. Dr. Zuckerman stated what the findings of the MRIs of the cervical and lumbar spines were, but he has not ruled out that such findings of herniated and bulging discs were caused by the subject accident, raising factual issues. Although he stated that the nerve conduction and EMG tests of the lower extremities of May 22, 2012, as diagnosed by Dr. Guy, reveal bilateral L5 radiculopathy, he opined that the tests were not useful and not diagnostic, as he felt the results were

indicative of acute findings without clinical evidence of lumbosacral or cervical radiculopathy, raising factual issues again. Dr. Zuckerman stated that there was self-limitation of ranges of motion, raising issues of credibility which preclude summary judgment. However, Dr. Zuckerman did note deficits in some of his cervical and lumbar range of motion findings, even when comparing his findings to what he considered the normal range of motion values. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]).

It is noted that Dr. Toriello and Dr. Zuckerman compared their respective range of motion findings for plaintiff's cervical and lumbar spine to different normal range of motion values, leaving this court to speculate as to which normal range of motion values are correct. Additionally, Dr. Zuckerman compared his range of motion findings to a range of normal values. When the normal range of motion is set forth within a range or spectrum, it leaves it to this court to speculate as to the actual normal ranges of motion without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]).

Based upon the foregoing, defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined in the first category of serious injury in Insurance Law § 5102 (d).

It is noted that the movant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physician's affidavit 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 expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that upon impact, she felt pain in her neck, head, and lower back. By the following morning, she had headaches, was nauseous, and was experiencing dizziness. She thereafter received chiropractic care and treatment, x-rays, and MRIs of her neck and lower back. She followed up with a neurologist, Dr. Farrugia, and had an EEG and a balance test. Dr. Barkin, an orthopedist, sent her for physical therapy, which she attended one to two times a week for six weeks. She then received treatment from Dr. Guy, for pain management for her back pain, and was administered a series of three epidural injections into her lower back. Two weeks prior to her testimony, she was administered a facet block to her lower back. She testified that she suffers from back pain every day, even sitting. She can no longer do yard work and housework without restriction, and has difficultly standing and bending. She can no longer bowl, walk, or run as she did several times a week before the accident. Her problem with standing affects her job at Home Depot. Although she is an electrician, she can no longer perform that type of work and has had to turn down jobs. Prior to this accident, she had never injured her back. Based upon the foregoing, summary judgment is precluded as to the second category of injury.

The factual issues raised in the defendant's moving papers preclude summary judgment as the defendant has 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* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law, 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]).

Accordingly, motion (002) is denied.

Dated: 12/19/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION