

Ross v Goldfarb

2017 NY Slip Op 32660(U)

November 22, 2017

Supreme Court, Bronx County

Docket Number: 301267/2013

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX

-----X **Index No. 301267/2013**

Michelle Ross,
 Plaintiff,

-against-

DECISION & ORDER

Richard Goldfarb,
 Defendant.

Present:
 Hon. Julia I. Rodriguez
 Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review defendant's motion for summary judgment.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Brief in Support of Motion	2
Affirmation in Opposition & Exhibits	3
Brief in Opposition	4
Reply Affirmation & Exhibits	5

This action arises from a two-vehicle accident which occurred in New Jersey on February 24, 2011; Plaintiff, a Pennsylvania resident, was the driver of a vehicle insured by Allstate Property and Casualty Insurance Company ("Allstate"). Both plaintiff and her husband are named insureds under the policy. Defendant was a New York resident at all relevant times. In her Bill of Particulars, plaintiff alleged injuries to her jaw, cervical spine, lumbar spine, right arm and left leg.

Defendant now moves for summary judgment dismissing the complaint on the ground that the New Jersey "Deemer Statute" (N.J.S.A. 17:28-1.4) applies in this case and plaintiff's personal injury claims are barred by the qualified immunity of the New Jersey "Verbal Threshold" set forth in N.J.S.A. 39:6A-8, *et seq.*

In opposition, plaintiff contends that: (1) the "Deemer Statute" is inapplicable here because plaintiff was driving her husband's vehicle at the time of the accident and (2) in any event, plaintiff's injuries meet the New Jersey "Verbal Threshold."

The parties do not dispute that New Jersey law is applicable for purposes of the instant motion.

As an initial matter, the court finds that the so-called “Deemer Statute” is applicable here because both plaintiff and her husband were named insureds under the Allstate policy. In pertinent part, the “Deemer Statute” provides that:

any liability insurance policy subject to [N.J.S.A. 17:28-1.4] shall be construed as providing the coverage required herein, and any named insured, and any immediate family member as defined in . . . (C.39:6A-8.1), under that policy, shall be subject to the tort option specified in . . . (C.39:6A-8).

The tort option specified in C.39:6A-8, the so-called “Verbal Threshold,” limits personal injury lawsuits by owners, registrants, operators and passengers in motor vehicle accidents to those plaintiffs who have “sustained a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.” The parties do not dispute that if the “Verbal Threshold” applies, based upon her alleged injuries, plaintiff would only be able to recover damages if she sustained a “permanent injury.” An injury is considered permanent when “the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment.” *See* N.J.S.A. 39:6A-8(a).

In support of summary judgment, defendant submitted, *inter alia*, the medical reports of: (1) **Martin Barschi**, a Board Certified Orthopedic Surgeon; (2) **Lewis Rothman**, a Board Certified Radiologist; (3) **John G. Esposito, Jr.**, a Board Certified Oral and Maxillofacial Surgeon; and (4) **James W. Dwyer**, a Board Certified Orthopedic and Spine Surgeon.

Dr. Barschi conducted an orthopedic evaluation on January 12, 2017. He listed the medical records he reviewed, including the EMG studies of the upper extremities conducted on September 11, 2014, MRI reports of the cervical spine dated April 11, 2011 and October 21, 2014, and lumbar spine dated February 15, 2012 and October 21, 2014. Barschi conducted range of motion testing of the cervical spine, lumbar spine, both shoulders, elbows, wrists and

hands, and examined the lower extremities; he found limitations in range of motion of plaintiff's cervical spine and lumbar spine associated with "pain but no paraspinal muscle spasm" and limitations in range of motion of her shoulders associated with "pain going towards her neck" but reported that she had a negative Hawkins test for rotator cuff tearing and she had no tenderness in the subacromial space of either shoulder. Barschi reported that her hips, knees, ankles and feet did not have any "positive relevant orthopedic findings." Barschi also reported that she did not have any "significant positive findings" on EMG testing or MRI testing. Barschi opined that plaintiff "sustained soft tissue injuries to her neck and back" and noted that MRI testing of the cervical spine and lumbar spine "twice did not reveal any evidence of significant internal derangement or nerve root involvement or neural foraminal narrowing." Barschi also opined that plaintiff "presents with subjective complaints to her neck and back that are not substantiated by clinical objective orthopaedic findings on physical examination such as muscle spasm, muscle atrophy or loss of reflexes." Barschi concluded that further orthopedic treatment or physical therapy relating to the accident would "neither be indicated nor necessary."

Dr. Rothman reviewed plaintiff's radiological images and reports and found chronic degenerative change at C6/7 of her cervical spine and no evidence of fracture or disc herniation; chronic degenerative disc disease of her lumbar spine manifest by disc desiccation, disc space narrowing and a disc bulge at L3/4; chronic deformity of the left temporomandibular joint and bilateral discal dislocation in the closed mouth position with recapture on the left. Rothman found no evidence of acute posttraumatic abnormality of her cervical spine, lumbar spine or bilateral temporomandibular joints.

Dr. Esposito conducted an oral evaluation on January 12, 2017. He listed medical records he reviewed, including MRIs performed on 4/11/11 and x-rays and the notes (from 7/7/11 to 7/1/12) of Dr. Klemens, a dentist who treated plaintiff after the accident. Esposito reported that, prior to the accident, plaintiff was missing teeth numbers 1, 4, 16, 17, 19 and 32 but had no previous injury to her jaw. Esposito reported "no deviation upon opening or closing of the mandible" but that plaintiff's jaw became "sore" if she opened her mouth too wide. Esposito opined that "[p]alpation of the muscles of mastication and associated musculature is

positive for significant soreness in the right and left masseters and pterygoids.” Esposito diagnosed plaintiff with “internal derangement both right and left temporomandibular joints with concomitant myofascial syndrome- right and left masseter muscle areas.” However, Esposito concluded that plaintiff had no “disability.”

Dr. Dwyer initially conducted an examination of plaintiff on February 15, 2012. Dwyer reported that plaintiff’s range of motion of her cervical spine was diminished by 25% flexion, 50% left rotation, 25% right rotation; her lumbar spine range of motion was diminished by 50% flexion and 25% extension; Tingel’s test was positive at her left wrist and left elbow; and positive left sided straight leg raise and positive left sided Lasegue sign with an antalgic gait. Dwyer reviewed MRIs of plaintiff’s cervical spine, lumbar spine and jaw, and reported “a loss of the normal cervical lordosis and a central disc herniation at C6/C7 level with a high intensity zone/annular tear superimposed,” mild desiccation of L3/4 disc and a “mild broad-based bulb-sized protrusion at L4/L5 level;” and an “anterior dislocation of both condyles of the mandible.” His impression was “traumatic cervicolumbar sprain; herniated nucleus pulposus cervical spine; left ulnar neuritis/entrapment; rule out left lumbar radiculopathy; and rule out herniated nucleus pulposus.” Dwyer noted that plaintiff had no history of cervical or lumbar spine disorders prior to the accident. Dwyer examined plaintiff again on August 15, 2012. He reported that she was “10% improved” and that the range of motion of her lumbar spine was diminished by 50% flexion and 25% extension; straight leg raising was positive on the left side at 60 degrees; positive left sided Lasegue sign; lumbar spine desiccation at the L3/L4 disc with mild disc bulges at L3/L4 and L4/L5. His impression was “traumatic cervical lumbar sprain; herniated nucleus pulposus, cervical and lumbar spine; Coccydynia; cervical radiculitis.” She was examined again in his office on August 23, 2012. At that time, her cervical spine and lumbar spine revealed full range of motion with some pain, and a spasm in her cervical spine. No focal deficits were observed involving the upper and lower extremities. Plaintiff was examined again on October 4, 2012 with a chief complaint of pain and was diagnosed with Coccydynia and lumbar discogenic pain. On December 3, 2012, plaintiff underwent an L3/L4 midline translumbar epidural injection and was diagnosed with lumbar radiculitis. She was examined

again on December 13, 2012 and was diagnosed with cervical and lumbar strain injury; cervical disc herniation; cervical annular tear; and lumbar tear. She was examined again on August 7, 2014 with a chief complaint of “lower back pain with radiation to the left lower extremity.” Her range of motion of the cervical spine and lumbar spine were within normal limits. She was diagnosed with cervical and lumbar strain injury with cervical and lumbar radiculitis. She was again examined on October 2, 2014 with chief complaints of “neck pain to the left upper extremity” and “lower back pain with radiation to the left lower extremity.” She was diagnosed with cervical and lumbar radiculitis and cervical and lumbar disc herniations. She was last examined on October 23, 2014 and was diagnosed with cervical and lumbar radiculitis, cervical disc herniation and lumbar discogenic pain. Based upon the medical examinations and treatment she received in his office, and a review of her diagnostic studies, Dwyer concluded that plaintiff’s “injuries, treatment and condition” are directly related to the accident and are “considered permanent in that she will never regain the level of functioning maintained prior to this motor vehicle accident.” Dwyer also concluded that plaintiff will require surgery in the future as a result of the injuries to her spine.

In opposition to summary judgment, plaintiff submitted, *inter alia*, the medical report of **Dr. Dwyer**, discussed *supra*, and the medical report of **Michael Brooks**, a Board Certified Radiologist. Dr. Brooks reviewed the MRI of plaintiff’s cervical spine dated 4/11/11 and diagnosed a disc herniation at C6-C7 superimposed upon a chronic and pre-existing degenerative disc disease. Brooks concluded that “[f]rom the appearance of the examination, the traumatic event in question would be the cause of this disc herniation.”

* * * * *

“All a plaintiff need to do to vault the threshold set forth in N.J.S.A. 39:6A-8(a) is to prove by objective clinical evidence, supported by a physician certification, under penalty of perjury, an injured caused by the accident fitting into one of the six statutorily defined threshold categories.” *See Serrano v. Serrano*, 183 N.J. 508, 518, 874 A.2d 1058 (2005). Plaintiff need not show that the injury was ‘serious’ . . . or had caused ‘a serious life impact.’ *See Davidson v. Slater*, 381 N.J. 22, 27, 884 A.2d 235 (2005) citing *DiProspero v. Penn*, 183 N.J. 477, 506, 874

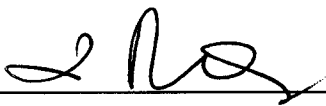
A.2d 1039 (2005). Here, plaintiff claims a permanent injury within a reasonable degree of medical probability. A permanent injury is shown, within the meaning of the statutory threshold requirement, when plaintiff's evidence proves that the injured body part has not healed to function normally and will not heal to function normally with further medical treatment. *See Davidson v. Slater, supra*. New Jersey courts have consistently held that the submission of medical evidence of the existence of a herniated disc and a medical opinion that the injury was proximately caused by an automobile accident presents a factual issue for resolution at trial by a jury. *See Juarez v. J.A. Salerno & Sons, Inc.*, 185 N.J. 332, 334, 886 A.2d 178 (2005); *DiProspero, supra*, at 506; *Serrano, supra*, at 518-19; *Pardo v. Dominguez*, 382 N.J. Super. 489, 491-493, 889 A.2d 1099 (App. Div. 2006).

After consideration of the parties' submissions, the Court finds that the differing and/or contradictory medical opinions expressed by the parties' respective doctors, including the findings of disc herniation by Drs. Dwyer and Brooks, raise issues of fact and credibility as to whether plaintiff sustained a permanent injury within the meaning of New Jersey's "Verbal Threshold" requirement.

The Court notes that, while defendant contends that plaintiff's claims involve the exaggeration of pre-existing conditions which require a comparative medical analysis, plaintiff claims that she was asymptomatic prior to the accident.

Accordingly, defendant's motion for summary judgment, dismissing the complaint, is **denied**.

Dated: Bronx, New York
November 22, 2017



Hon. Julia I. Rodriguez, J.S.C.