Posanti v Oliveira

2013 NY Slip Op 30542(U)

March 12, 2013

Supreme Court, Suffolk County

Docket Number: 09/30349

Judge: Denise F. Molia

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SHORT FORM ORDER

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INDEX No. 09-30349
CAL No. 12-00757MV

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 5-10-12
ADJ. DATE 11-30-12
Mot. Seq. # 004 - MD
005 - MG; CASEDISP

---X

BARBARA POSANTI,

Plaintiff,

- against -

GLAYDSON OLIVEIRA and ID TRUCKING,

Defendants.

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GLAYDSON OLIVEIRA and ID TRUCKING,

Third-Party Plaintiffs,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT and RICHARD T. STECK,

Third-Party Defendants.

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Upon the following papers numbered 1 to 53 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 46 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 47 - 53 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the third-party defendants for summary judgment and the motion by defendants/third-party plaintiffs for summary judgment are consolidated for the purposes of this determination; and it is further

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ORDERED that this motion (004) by the third-party defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the third-party complaint is denied as moot; and it is further

ORDERED that this motion (005) by defendants/third-party plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff failed to sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on March 7, 2009 in a motor vehicle accident that occurred on Flintlock Drive at or near its intersection with William Floyd Parkway in Shirley, New York. Plaintiff alleges that a truck owned by defendant ID Trucking and operated by defendant Glaydson Oliveira (Oliveira) struck her vehicle. Defendants ID Trucking and Oliveira commenced a third-party action against Suffolk County Police Department and Richard T. Steck (Steck) alleging that the police vehicle operated by Steck, a police officer of the Suffolk County Police Department, initially struck the ID Trucking truck operated by defendant Oliveira causing the police vehicle and/or the truck to collide with plaintiff's vehicle.

By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including, disc bulges at the L1-2 and L2-3 intervertebral disc levels, annular disc bulges at the L3-4 and L4-5 intervertebral disc levels, a focal central disc herniation at the L5-S1 intervertebral disc level, and ventral spurs at the L1-2 intervertebral disc level, low back pain, left arm pain, chest pain, and cervical sprain and strain. In addition, plaintiff alleges that following said accident she was confined to bed and home for approximately six months. Plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants/third-party plaintiffs now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff failed to sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident. They assert, among other things, that all of plaintiff's injuries pre-dated the subject accident and thus, were not causally-related to said accident, and that plaintiff does not claim that the subject accident aggravated or exacerbated her pre-existing injuries or conditions. In support of their motion, defendants/third-party plaintiffs submit, among other things, the summons and complaint, their answer, plaintiff's bill of particulars, the third-party summons and complaint, the third-party verified answer and counterclaim, the third-party verified bill of particulars, the deposition transcript of plaintiff, the affirmed report dated June 2, 2011 of Matthew M. Chacko, M.D., the addendum to said report dated May 29, 2012, the affirmed reports dated June 23, 2011 and May 17, 2012 of orthopedist Isaac Cohen, M.D., the affirmed report of radiologist David A. Fisher, M.D., plaintiff's medical records from the office of Dr. John Celantano, plaintiff's Brookhaven Memorial Hospital emergency room records from January 14, 2001, the report of plaintiff's chest x-ray on September 11, 2006, and the report dated June 23, 2009 of Alexander S. Finger, M.D.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff testified at her deposition on April 6, 2011 that she injured her back and left shoulder as a result of the subject accident, and that following the accident she was treated at Brookhaven Memorial Hospital where x-rays were performed, she received pain medication, she was told to see her primary care physician, and then she was released. Plaintiff responded no when asked whether prior to said accident, she had any kind of medical condition concerning her back or left shoulder and whether she had diagnostic testing performed on those areas. She responded that she did not remember when asked whether she treated with Dr. Celentano for lower back pain in 1999, 2001 and 2005 and whether she was treated at a hospital on January 17, 2001 for lower back pain. In addition, plaintiff testified that within approximately one week after the accident she saw her treating physician Dr. John Celentano who treated her less than 10 times and then referred her to Brookhaven Orthopedic, by which time her left shoulder was "okay." She saw Dr. Finger at Brookhaven Orthopedic and through his office she received therapy twice a week consisting of a TENS unit and heating pad for "a couple of months" and was sent for an MRI of her back. Plaintiff also testified that she has been employed as a bookkeeper/secretary at Shirley Auto Body, that her husband is her boss, that prior to said accident she was working Monday through Friday 9 a.m. to 5 p.m., that she does the billing, payroll and filing, and that as a result of the accident she missed at least four months of work. According to plaintiff, since returning to work she has

been working only one or two days a week for "a couple of hours. She did not remember whether any of her physicians directed her not to work during the time period that she missed work or whether any of her physicians told her that she could return to work with modified duties. Plaintiff further testified that for the first three months after the accident not only could she not work at all, she could not do any housekeeping or gardening or lift heavy objects, and she could only watch her grandchildren with assistance. She explained that currently she cannot sit for long periods of time, walk up and down stairs, carry anything heavy, or garden.

By his affirmed report dated June 2, 2011, Dr. Chacko indicated that he performed a neurological evaluation of plaintiff on said date and that his findings included straight leg raising "up to 70-80 degrees bilaterally, 90 being normal" and "[a]ctive range of motion testing of the lumbar spine using goniometer showed flexion 45 degrees-60 degrees normal, lateral flexions 15 degrees-25 normal, and extension 15 degrees-25 normal." He noted that there was no report of tenderness and no muscle spasm detected on palpation to the cervical, thoracic or lumbar areas. Dr. Chacko's diagnosis included history of lumbar strain, resolved from an objective neurological standpoint. He opined that plaintiff exhibited mild limitation of lumbar range of motion but that said movements are voluntary and are fully under the control of the person being examined and thus, not truly objective findings. Dr. Chacko further opined that there was no objective clinical evidence of any permanency or residual effects from the subject accident nor of any neurological disability. Dr. Chacko was subsequently provided with plaintiff's medical records from 2000 to 2010 including those of plaintiff's primary care physician, Dr. Celentano, and prepared an addendum to his report dated May 29, 2012. In said addendum, Dr. Chacko reported that the records indicated that plaintiff had been treated for back, hip and neck complaints in the past and that plaintiff appeared "to have chronic back pain for which she was seen by her physician on multiple occasions over the last several years." He opined that the subject accident "may have temporarily exacerbated a pre-existing back problem" but that based on his June 2, 2011 evaluation, he did not find any evidence of neurological residuals or permanency from said accident.

Dr. Cohen indicated in his affirmed report dated June 23, 2011 that he performed an orthopedic evaluation of plaintiff on that date and that range of motion measurements were taken with a goniometer and/or a bubble inclinometer and/or by visual evaluation. With respect to plaintiff's lumbosacral spine, Dr. Cohen found that plaintiff's muscles were supple and non-tender on palpation with no trigger points or spasms present and that her range of motion was "satisfactory normal" with forward flexion to 60 degrees (normal 60 degrees), extension of 30 degrees (normal 25 degrees), right and left lateral bending "in the 30-degree range degrees" (normal 25 degrees), and left and right rotation to 30 degrees (normal up to 30 degrees). He added that straight leg raising performed bilaterally in a sitting position was negative to 90 degrees (normal 90 degrees). Dr. Cohen diagnosed status post motor vehicle accident, lumbosacral strain superimposed over degenerative disc disease of the lumbar spine area, normal cervical spine examination as well as left upper extremity examination, and normal chest wall examination. He opined that plaintiff sustained mild soft tissue complaints which resolved uneventfully without any evidence of sequelae or permanency. Dr. Cohen also noted the "objective work up performed demonstrated some degenerative disc disease in the lumbar spine area compatible with a chronic preexisting condition with no evidence of any acute posttraumatic findings documented." He further opined that "the MRI findings documented in the work up were completely preexistent in nature and degenerative without evidence of any acute findings documented." Upon receipt of additional

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medical records, Dr. Cohen provided an addendum dated May 17, 2012 to his report and indicated that said records did not change his original opinion. He noted that the additional records indicated that plaintiff had some mild complaints of neck and back discomfort documented by her primary care physician, Dr. Celentano, over an extensive period of time.

Dr. Fisher states in his affirmed report that he reviewed x-rays of plaintiff's lumbar spine performed on March 24, 2009 showing diffuse degenerative changes and the MRI of the lumbar spine performed on June 16, 2009 that revealed degenerative changes throughout the lumbar spine and a mild disc bulge at L5/S1 but no herniations. In conclusion, Dr. Fisher indicates that according to the medical records that have been provided, plaintiff has a long-standing history of back pain with complaints noted on office reports dated as early as January 6, 1998 and July 19, 1999. He states that based on his review of the studies, he found no radiographic evidence of traumatic or causally related injury to plaintiff's lumbar spine.

Aggravation or exacerbation of a pre-existing condition is an element of special damages which must be specially pleaded and proven before recovery therefor can be allowed (*see* ***Behan v Data Probe Intern., Inc.***, 213 AD2d 439, 623 NYS2d 886 [2d Dept1995]; *see also* ***Rodgers v New York City Tr. Auth.***, 70 AD3d 917, 896 NYS2d 112 [2d Dept 2010]). Notably, plaintiff is not alleging that the subject accident exacerbated or aggravated her prior injuries and/or conditions. Therefore, the relevant inquiry is whether the subject accident caused plaintiff's alleged injuries and whether any of those injuries constituted serious injuries under Insurance Law § 5102 (d) (*see id.*). Here, defendants/third-party plaintiffs demonstrated through the submission of plaintiff's medical records that plaintiff had made prior complaints concerning, and received treatment years before the subject accident for, conditions and injuries to the same parts of her body as alleged in this action. In addition, the records revealed that plaintiff had been in a prior motor vehicle accident in 2006 and underwent a brain CT scan because she had lost consciousness and had headaches. The medical experts of defendants/third-party plaintiffs established that plaintiff had a long-standing history of lower back pain, neck pain and left shoulder pain, with degenerative changes noted in her spine and acromioclavicular joints bilaterally in a chest x-ray from 2006, and no evidence of traumatic or causally related injury to her lumbar spine in her March 2009 lumbar spine x-rays or June 2009 lumbar spine MRI. Thus, defendants/third-party plaintiffs submitted competent medical evidence demonstrating, prima facie, that plaintiff's alleged injuries were not caused by the subject accident (*see* ***Oku v MTA BUS Co.***, 101 AD3d 691, 955 NYS2d 370 [2d Dept 2012]). In addition, they showed that plaintiff did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102 (d) inasmuch as she did not sustain a causally-related injury (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

In opposition to the motion, plaintiff contends that the medical experts of defendants/third-party plaintiffs relied on inadmissible, uncertified, unsworn medical records of plaintiff in rendering their reports in support of the motion, and that there are issues of fact as to whether plaintiff's injuries qualify as a serious injury. In support of her opposition, plaintiff submits a narrative affirmation dated November 20, 2012 from Alexander S. Finger, M.D., the report of an MRI of plaintiff's lumbar spine

performed on June 16, 2009 together with the affirmation of the interpreting radiologist Kornelia Teslic, M.D., plaintiff's affidavit, and plaintiff's deposition transcript.

Initially, the Court notes that a defendant's examining physician may rely on the unsworn medical reports and uncertified medical and hospital records of an injured plaintiff's treating medical care providers in rendering an opinion and said reports and records may be considered in support of a defendant's motion for summary judgment based on plaintiff's failure to establish "serious injury" (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]; *see also* ***Elshaarawy v U-Haul Co. of Mississippi***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Itkin v Devlin***, 286 AD2d 477, 729 NYS2d 537 [2d Dept 2001]). Likewise, a nonmoving plaintiff in a serious injury case may rely upon the unsworn report of plaintiff's treating physician once it has been submitted by the moving defendant (*see* ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692).

Dr. Finger states in his affirmed report that plaintiff first came to his office on March 24, 2009 with a history of low back pain which plaintiff reported began two weeks prior in the subject motor vehicle accident. He opines that the injuries suffered by plaintiff were significant as a result of the subject accident and states that "[w]hile she was noted to have arthritic changes with an x-ray and MRI, to the best of my knowledge I do not believe she had any symptoms of this prior to this accident. I feel that the accident exacerbated the arthritis that she had in her back and also caused muscle injury as well. It is also my opinion, based on the patient's history, the accident caused her disk herniations." Dr. Finger's report is not probative inasmuch as he relied on plaintiff's subjective representation that her back injuries were asymptomatic at the time of the subject accident, and plaintiff is not claiming that the subject accident aggravated and/or activated pre-existing, asymptomatic degenerative conditions in her lumbar spine (*see* ***Varveris v Franco***, 71 AD3d 1128, 898 NYS2d 213 [2d Dept 2010]; *compare* ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]). In addition, Dr. Finger's report is speculative as to causation inasmuch as Dr. Finger fails to address plaintiff's 2006 motor vehicle accident (*see* ***Varveris v Franco***, 71 AD3d 1128, 898 NYS2d 213; ***Joseph v A and H Livery***, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]). Moreover, Dr. Teslic affirms her report on plaintiff's lumbar spine MRI taken on June 16, 2009 in which she diagnosed L4-5 annular disc bulge, L5-S1 focal central disc herniation, degenerative changes of the facet joints at L5-S1 bilaterally, and ventral (prevertebral) spurs at L1-2 intervertebral disc level but provides no opinion as to causation (*see* ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]).

Plaintiff's own affidavit is insufficient to raise an issue of fact regarding serious injury (*see* ***Riley v Randazzo***, 77 AD3d 647, 908 NYS2d 445 [2d Dept 2010]). A plaintiff's complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury (*see* ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]; *see also* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114). Therefore, the motion by defendants/third-party plaintiffs for summary judgment dismissing the complaint on the ground that

plaintiff failed to sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident is granted.

Inasmuch as the complaint is dismissed, the third-party complaint is also dismissed, and the motion by the third-party defendants for summary judgment dismissing the third-party complaint is denied as moot (*see generally* ***Davis v Cottrell***, 101 AD3d 1300, 956 NYS2d 248 [3d Dept 2012]).

Dated: 3-12-13

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

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION