

Igloria v Maciasveloz
2013 NY Slip Op 30663(U)
April 1, 2013
Supreme Court, Queens County
Docket Number: 11961/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

ROSEMARIE IGLORIA, Index No.: 11961/2011
Plaintiff, Motion Date: 03/12/13
- against - Motion No.: 57
Motion Seq.: 1

CESAR MACIASVELOZ,
Defendant.

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The following papers numbered 1 to 16 were read on this motion by defendant, CESAR MACIASVELOZ, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 7
Affirmation in Opposition-Affidavits-Exhibits-Memo.....8 - 13
Reply Affirmation.....14 - 16

This is a personal injury action in which plaintiff, ROSEMARIE IGLORIA, seeks to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on October 14, 2010 on 56th Avenue at its intersection with 90th Street, Queens County, New York. The plaintiff alleges that she was injured when her vehicle was struck in the rear by the vehicle owned and operated by defendant, CESAR MACIASVELOZ.

The plaintiff, age 36, commenced this action by filing a summons and complaint on May 17, 2011. Issue was joined by service of defendant's verified answer dated August 15, 2011. Defendant now moves for an order pursuant to CPLR 3212(b),

granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, William B. Stock, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed neurological report of Dr. Jean Robert Desrouleaux; the affirmed orthopedic medical report of Dr. Lisa Nason; the affirmed radiological report of Dr. Audrey Eisenstadt; and a copy of the transcript of the examination before trial of plaintiff, Rosevirgin Igloria.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, disc protrusion at C4-5 and C5-6. Plaintiff states that she was not confined to bed as a result of the accident but was confined to her home for approximately one week immediately subsequent to the accident.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Jean-Robert Desrouleaux, a board certified neurologist retained by the defendant, examined Ms. Igloria on March 15, 2012. She told Dr. Desrouleaux that she was involved in a motor vehicle accident on October 14, 2010 in which she injured her neck, left shoulder and right wrist. She did not seek emergency room treatment. She presented with complaints of neck, left shoulder and right wrist pain. Dr. Desrouleaux performed quantified and comparative range of motion tests. He found normal range of motion of the plaintiff's cervical spine, shoulders and lumbar spine. He stated that the plaintiff's neurological examination was normal. He states that based upon his examination there is no objective evidence of causally related neurologic disability as it relates to the accident of 10/14/10. There was no objective clinical evidence of radiculopathy. He explains that the positive Tinel's test was incidental and the plaintiff's right wrist carpal tunnel syndrome was unrelated to the accident.

Dr. Nason, a board certified orthopedic surgeon, retained by the defendant, examined the plaintiff on March 15, 2012. The plaintiff presented with pain in the cervical spine, pain in the left shoulder and pain in the right wrist. Her objective range of motion testing revealed no limitations of range of motion of the cervical spine, left shoulder or right wrist. She states that based upon her examination there is no objective evidence of orthopedic disability or permanent impairment related to the subject accident. She states that the plaintiff was currently working and could continue to do so. She states that the right wrist complaint, positive Tinel sign and right carpal tunnel syndrome are unrelated to the accident of 1/14/10 and the right carpal tunnel syndrome was an unrelated finding. Her diagnosis was status post cervical sprain/strain, resolved; status post left shoulder contusion, resolved; and status post right carpal tunnel syndrome, unrelated.

Dr. Audra Eisenstadt reviewed the MRI of the plaintiff's cervical spine taken on January 15, 2011, three months following the accident. She states that mild bulging of the C4-5 and C5-6 intervertebral disc levels was seen. There were no disc herniations. She states that the CT Scan of the plaintiff's brain was also normal. She states that the disc dessication is degenerative in nature and not related to the subject accident. She also explains that the disc bulging is not caused by trauma but was degeneratively induced.

Plaintiff testified at her examination before trial on February 10, 2012. She stated that at the time of the accident she was leaving work and was driving a black Mercedes on her way home. She was proceeding on 56th Avenue and stopped at a stop sign at the intersection of 90th Street. She was stopped for about a minute when her vehicle was struck in the rear with a heavy impact by defendant's mini-van. She did not request an ambulance and she drove her vehicle away from the scene after speaking with the police. She stated that her chest hit the steering wheel and her head hit the headrest. Plaintiff testified that she began to feel pain in her neck, shoulder, upper back and right wrist three days after the accident. At that time she saw her primary physician Dr. Huang who recommended that she see Dr. Gupta an orthopedist. Dr. Gupta examined her and then referred her to Dr. Sohal for pain management and physical therapy. She testified that at the time of the accident she was employed full time at Ocean Promenade Nursing Home as a physical therapist and is presently working there in the same capacity. She stated that she missed two or three days from work in the two weeks following the accident and less than a week in the first month. Plaintiff states that she still experiences numbness and tingling in her

right hand and she still has pain in her neck, shoulder, and upper back.

Defendant's counsel contends that the medical reports of Drs. Nason, Desrouleaux and Eisenstadt, as well as the plaintiff's deposition testimony in which she stated that she returned to work one week following the accident, are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney, Harold Solomon, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated January 23, 2013; the affirmed medical report of Dr. Ajendra Sohal; and the unaffirmed radiological report of Dr. Michael Rhee.

Dr. Rhee states that an MRI of the plaintiff's cervical spine was performed on January 15, 2011 at Advanced Radiological Imaging. His impression was that "there are minimal disc protrusions at C4-5 and C5-6. There is no spinal stenosis or neuroforaminal encroachment."

Dr. Sohal first examined the plaintiff on November 4, 2010, at which time the plaintiff complained of pain in her neck, left shoulder and lower back. He found limitations of range of motion of the cervical spine and left shoulder which he found to be causally related to the subject accident. He treated the plaintiff with Lidocaine injections. His most recent examination was on October 13, 2012. At that time, she complained of continued neck pain, left trapezius pain and carpal tunnel syndrome. Dr. Sohal's examination on that date showed that plaintiff continued to have limitations of range of motion of the cervical spine. He states that the plaintiff sustained an injury to her cervical spine and left shoulder attributable to the subject accident. He states that she has sustained a consequential limitation of use of a body organ and/or member and a permanent significant limitation of use of a body function and system. He states that her injuries are permanent in nature.

In her affidavit, plaintiff states that subsequent to the accident she treated with Dr. Gupta five times. She then saw Dr. Sohal from whom she received physical therapy and trigger point injections in the cervical spine region. She stopped treating in January 2011 when no fault denied her benefits and she could not afford treatment on her own.

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by the defendant, including the affirmed medical reports of Drs. Nason, Desrouleaux and Eisenstadt, as well as the plaintiff's deposition testimony in which she stated that she returned to work one week following the accident are sufficient to meet defendant's prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Although Dr. Desrouleaux found that the plaintiff's Tinel's test was positive he stated that plaintiff suffered from carpal tunnel syndrome and that the positive finding was unrelated to the accident.

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Sohal and Rhee, attesting to the fact that the plaintiff sustained bulging discs in the cervical spine as a result of the accident and finding that the plaintiff had limitations in range of motion of her cervical spine,

both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in treatment by submitting her own affidavit stating that no-fault had stopped her benefits and she could not afford to pay for treatment on her own. Further, Dr. Sohal opined that any further treatments would be palliative in nature as the plaintiff was not making any further permanent progress in increasing her range of motion (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: April 1, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.