Anderson v Sosa
2013 NY Slip Op 31128(U)
May 17, 2013
Supreme Court, Suffolk County
Docket Number: 11-2796
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

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INDEX No. 11-2796
CAL No. 12-00802MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9-10-12 (001)
MOTION DATE 9-12-12 (002)
ADJ. DATE 2-27-12
Mot. Seq. # 001 - MD
002 - MD

---X

CAMARA ANDERSON,

Plaintiff,

- against -

JOSE B. SOSA,

Defendant.

---X

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Upon the following papers numbered 1 to 31 read on this motion and amended motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9; 31; (002) 10-20; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 21-28; Replying Affidavits and supporting papers 29-30 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Jose B. Sosa, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Camara Anderson, did not sustain a serious injury as defined by Insurance Law § 5102 (d), has been rendered academic by the amended notice of motion (002) which seeks the identical relief and accordingly, is denied as moot; and it is further

ORDERED motion (002) by the defendant, Jose B. Sosa, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Camara Anderson, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this action, the plaintiff, Camara Anderson, seeks to recover damages for personal injuries allegedly sustained in a motor vehicle accident on May 9, 2010 at 3:35 p.m. The accident allegedly occurred on Sycamore Avenue near its intersection with Route 454 in Suffolk County, New York when the vehicle operated by the defendant, Jose B. Sosa, struck the plaintiff's vehicle as defendant was making a left turn.

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

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]).

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*).

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, and plaintiff's verified bill of particulars; the curriculum vitae and expert report of Richard Lechtenberg, M.D. dated November 20, 2011 concerning the independent neurological examination of the plaintiff; the curriculum vitae and expert report of Robert Israel, M.D. dated November 29, 2011 concerning the independent orthopedic examination of the plaintiff; photographs; the reports of Jonathan S. Luchs, M.D. concerning his independent radiology review of the MRI of the plaintiff's cervical spine dated January 5, 2011, and the MRI of the plaintiff's lumbar spine of January 6, 2011, and the MRI of the plaintiff's thoracic spine of January 5, 2011; and a copy of the examination before trial of plaintiff which is neither signed nor certified and is inadmissible pursuant to CPLR 3116 (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]).

By way of the plaintiff's verified bill of particulars, Camara Anderson alleges that as a result of the subject accident, injuries were sustained consisting of L5-S1 central/right paracentral disc herniation with moderate thecal sac compression and right lateral recess stenosis; lumbar sprain/strain; lumbago syndrome; need for future surgery, medical care and physical therapy for the lumbar spine; difficulty ambulating with weakness, limitation of motion and restriction of function with pain radiating to the lower extremities; disc herniation at T7-8; disc herniation at T8-9; thoracic sprain/strain; need for future medical care and physical therapy of the thoracic spine; pain and weakness and diminished strength of the thoracic spine with limitation and restriction of motion and function, difficulty ambulating relating to the thoracic spine; bulging disc at C3-4; bulging disc at C-5; cervical sprain/strain; need for future surgery, medical care, and physical therapy of the cervical spine; and severe pain and tenderness of the cervical spine with weakness, diminished strength, limitation of motion, restriction of use and impairment of function, with difficulty and pain turning the head and neck from side to side with difficulty sleeping and with pain radiating to both shoulders and the upper extremities.

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 neurology expert, Richard Lechtenberg, M.D. and defendant's orthopedic expert, Dr. Israel, set forth that they did not review any medical records, leaving this court to speculate if their respective opinions would be affected by the information contained in the plaintiff's medical records, thus, creating factual issues and precluding the granting of summary judgment. In support of this application, the defendant has not provided copies of the medical records, including the MRI reports of the plaintiff's lumbar/thoracic and cervical spine, 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.

Dr. Lechtenberg stated that upon his examination of the plaintiff on November 20, 2011, the plaintiff had been receiving physical therapy and chiropractic manipulations intermittently, and felt worse than he did immediately following the accident. He continued that the plaintiff complained of nervousness, dizziness, clumsiness and falling; he has pain in his neck and back, and numbness in his limbs; he has discomfort with walking, bending, sitting and lifting; and, his sleep and sexual function have been disturbed. Dr. Lechtenberg set forth credibility issues to be determined by the trier of fact by stating that the plaintiff insisted that he could not perform maneuvers that he subsequently performed incidentally (*see* ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]). Issues of credibility are for the jury to determine (*see* ***Lalla v Connolly***, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]). Upon examination, Dr. Lechtenberg ascertained a deficit in lumbar forward flexion of ten degrees, and a deficit of fifteen degrees in lateral flexion. Dr. Lectenberg disagrees with Dr. Israel as to the normal thoracic lateral flexion as Dr. Lechtenberg stated the normal was thirty degrees and Dr. Israel set forth the normal as forty-five degrees. Dr. Israel does not provide a measurement with regard to plaintiff's lumbar rotation.

Neither Dr. Lechtenberg nor Dr. Israel address plaintiff's claims of herniated and bulging lumbar, thoracic, and cervical discs, thus raising factual issues concerning their opinion as to causation. Dr. Luchs, defendant's radiology expert, has not submitted his curriculum vitae to qualify as an expert in this matter. The copies of the reports for plaintiff's MRI studies of his neck, thoracic spine, and lumbar spine have not been provided to this court by the moving defendants, thus leaving this court to speculate as to whether Dr. Luchs and plaintiff's treating physician have the same interpretation of those films. Dr. Luchs set forth in a conclusory and unsupported statement that the disc bulges of the thoracic spine at T7-8 and T8-9 are associated with degenerative disc disease and predate the accident, however, causation and duration of such findings have not been addressed by Dr. Luchs, raising factual issues to further preclude summary judgment.

As to plaintiff's lumbar spine, Dr. Luchs has set forth once again in an unsupported opinion that the central disc protrusion at L5-S1 with inferior extrusion and high signal on the posterior annulus reflects chronic degenerative disc disease, however, he has not set forth an opinion with regard to duration and causation, precluding summary judgment. Dr. Luchs stated that his review of plaintiff's cervical MRI demonstrates degenerative disc disease most prominent at C4-5 and C5-6 with degenerative disc bulges as well as uncovertebral joint hypertrophy and arthropathy at C5-5, and C3-4 resulting in neural foraminal narrowing. He opined that these findings predate the accident, however, Dr. Luchs has failed to set forth a basis for this opinion.

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 category of injuries, defined by Insurance Law § 5102 (d).

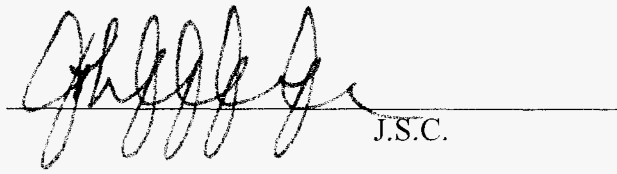
Turning to the second category of injuries defined in Insurance Law § 5102 (d), it is determined that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant's physician's affirmation insufficient to

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 second category of injury which preclude summary judgement.

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 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]).

Accordingly, motion (002) by the defendant for summary judgment dismissing the complaint is denied in its entirety.

Dated: 17 May 2013



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**