Kelly v Soman
2013 NY Slip Op 33079(U)
December 3, 2013
Sup Ct, Suffolk County
Docket Number: 11-27322
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-27322
CAL No. 13-00620MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-17-13
ADJ. DATE 9-5-13
Mot. Seq. # 002 - MD

HELEN KELLY,

Plaintiff,

- against -

LISA SOMAN and CAROL SOMAN,

Defendants.

LITE & RUSSELL, ESQS.
Attorney for Plaintiff
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West Islip, New York 11795

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Defendants
875 Merrick Avenue
Westbury, New York 11590

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated April 18, 2013 , and supporting papers 1-8; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated August 12, 2013, and supporting papers 9-14; (4) Reply Affirmation by the defendant, dated August 16, 2013, and supporting papers U15-16; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (002) by the defendants, Lisa Soman and Carol Soman, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Helen Kelly, has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

This action arises out of an automobile accident which occurred on August 21, 2010, on Jenkins Street at or near the intersection of Sunrise Highway, in the Town of Babylon, New York, when the vehicle operated by the plaintiff, Helen Kelly, and the vehicle operated by defendant, Lisa Soman, and owned by defendant Carol Soman, came into contact. The plaintiff alleges that as a result of this accident she sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

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]).

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 defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, and plaintiff's verified bills of particulars; a copy of the transcript of the plaintiff's examination before trial dated October 26, 2012; and the signed report of Dr. Naunihal Sachdev Singh, M.D. December 13, 2012 concerning the independent neurology examination of the plaintiff.

In opposing this application, the plaintiff has submitted, inter alia, an attorney's affirmation; the affirmed report of the plaintiff's treating chiropractor, Dr. William F. Palmer; the affirmation of Steven Winter, M.D. certifying the MRI films of plaintiff's cervical spine taken on October 16, 2010; affidavit of Dr. William F. Palmer, D.C. certifying his medical records of the plaintiff; a copy of the transcript of the plaintiff's examination before trial of October 26, 2012; and the affidavit of Helen Kelly.

By way of her bills of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of cervical curvature straightening; disc hydration loss at C2-3, C3-4, and C5-6 with diminished disc height at C3-4; posterior disc bulge at C2-3 impressing upon the thecal sac; posterior disc bulge at C3-4 with superimposed, right posterolateral disc herniation extruded in the right anterior recess and neural foramen, narrowing both structures; central disc herniation at C4-5 abutting the ventral cord and with left posterolateral component that encroaches into the left neural foramen; large extruded left posterolateral component of otherwise broad disc herniation at C5-6 causing impression on the left ventral cord with extension into the left anterior recess and neural foramen causing narrowing of these structures with right lateral component disc herniation encroaching into the right anterior recess and neural foramen; posterior disc bulge at C6-7 impressing upon the thecal sac; reversal of cervical lordosis with apex at C5-6; neck pain; headaches; tenderness on palpation of trapexius muscle, elevator scapulae muscle and the cervical spine; cervicalgia; decreased neck and upper extremity range of motion; positive Soto-Hall, Lindner's test, and foramina compressing test; cervical spinal stenosis; upper extremity nerve root compression; cervical radiculopathy; tingling in the right posterior forearm; pain in the finger of the right hand, primarily in the 4th digit and secondary in the mid finger with localized pain at the metacarpo-phalangeal joints area; weakness of both arms; tightness and trigger points in the cervical and upper thoracic paraspina muscles; pain upon palpation of the right third and fourth digits; mild and generalized paresthesia in the right arm; radiculopathy at the right C5 and C6 nerve roots; and weakness in the right upper extremity affecting the brachioradialis and biceps.

Based upon a review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under either category of injury

The moving papers contain Dr. Singh's report of concerning the independent neurological examination of the plaintiff. Dr. Singh set forth the records and reports concerning plaintiff's care and treatment relating to the injuries sustained in this accident. Additionally, x-ray reports of plaintiff's cervical

spine, MRI report of plaintiff's cervical spine, and the report of the EMG and NCV studies performed on the plaintiff's upper extremities were reviewed by Dr. Singh. However, a copy of those records and reports have not been provided with the moving papers. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the 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]). Thus, the court is left to speculate as to the contents of the reports and results of the MRI of plaintiff's cervical spine, precluding summary judgment.

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]). Dr. Singh reported a deficit of twenty degrees in determining the plaintiff's left and right lateral rotation, thus raising factual issues in the moving papers concerning whether the plaintiff suffered a serious injury. It is also noted that although the plaintiff claims to have sustained multiple herniated and bulging cervical discs as a result of this accident, no report from an orthopedist has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising further factual issues.

Although Dr. Singh reviewed plaintiff's EMG and NCV studies, Dr. Singh does not report the findings set forth in those studies and does not rule out that the plaintiff did not suffer cervical radiculopathy as asserted in her bill of particulars. Dr. Singh does not rule out that the herniated and bulging cervical discs, which the plaintiff alleges were caused by this accident, are causally related to the subject accident. Again, the court is left to speculate as to these injuries as well, precluding summary judgment.

Accordingly, defendants have not demonstrated prima facie entitlement to summary judgment as to the first category of serious injury defined in Insurance Law § 5102 (d).

The defendants' expert has offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and defendants' expert did not examine the plaintiff during that statutory period (*see* ***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]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that following the accident, she sought chiropractic care and treatment for pain and stiffness in her neck, arms, upper back, and for headaches. She was experiencing tingling in both of her arms. She treated with her chiropractor for about five months, about two to three times a week. At the time the plaintiff gave testimony, she was still treating with her chiropractor every Saturday. She also saw Dr. Palumbo who prescribed anti-inflammatory medication and recommended physical therapy which she received twice a week for six weeks. She continued the exercises thereafter at home. She still experiences headaches every morning upon awakening, and she has a hard time keeping her head up. She still experiences neck pain. She can only perform limited gardening, cannot play golf or tennis any longer, and cannot attend the gym. Her sleep is interrupted by pain. She must use a certain pillow for sleeping. She has difficulty lifting things, taking the laundry downstairs, and cannot blow dry her hair. If she drives for

too long or looks out the window on the train, her shoulders and neck become tired and she cannot turn her head back. She has had to hire help to clean her house every other week. She experiences neck pain when she is typing at the law office where she works as an office manager. When reading, she has to hold the book up, or bend her neck down, but her neck then becomes stiff. Thus, there are factual issues concerning whether or not the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident.

Based upon the foregoing, the defendants have failed to establish that the plaintiff did not sustain a serious injury under the second category of injury set forth in Insurance Law § 5102 (d).

In view of the foregoing, the factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy their 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 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), the burden has not shifted to the plaintiff to raise a sufficient trial 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, the defendant's motion (002), for summary judgment dismissing the complaint is denied.

Dated: 12/3/17

PETER H. MAYER, J.S.C.