Camarda v Coupe

2014 NY Slip Op 33347(U)

December 8, 2014

Supreme Court, Suffolk County

Docket Number: 12-609

Judge: W. Gerard Asher

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SHORT FORM ORDER

INDEX No. 12-609
CAL. No. 14-00720MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-19-14
ADJ. DATE 7-22-14
Mot. Seq. # 001 - MD

ELAINE CAMARDA,	:	SURIS & ASSOCIATES, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	999 Walt Whitman Road, Suite 201
	:	Melville, New York 11747
- against -	:	
	:	ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
JAMES R. COUPE,	:	Attorney for Defendant
	:	2701 Sunrise Highway, Suite 2, P.O. Box 389
Defendant.	:	Islip Terrace, New York 11752

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (0011) 1-10; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 11-19; Replying Affidavits and supporting papers 20-21; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendant James R. Coupe pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiff, Elaine Camarda, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This is a negligence action wherein the plaintiff, Elaine Camarda, seeks damages for serious personal injuries she alleges she sustained in an automobile accident on September 4, 2009, on Woodside Avenue, at its intersection with Hospital Road in the Town of Brookhaven, Suffolk County, New York, when her vehicle, and the vehicle operated by defendant James Coupe, came into contact.

The defendant now seeks summary judgment on the basis that the plaintiff's claimed injuries fail to meet the threshold imposed 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 (***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 90 days during the 180 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; copies of the pleadings and plaintiff's bill of particulars; a copy of the transcript of the examination before trial of the plaintiff; and the sworn reports of Teresa Habacker, M.D. dated January 25, 2014 concerning her independent orthopedic examination of the plaintiff, Stanley Ross, M.D. dated January 27, 2010 concerning his independent orthopedic examination of plaintiff, and Sheldon P. Feit, M.D. concerning his

independent radiology review of the MRI conducted of plaintiff's cervical spine.

By way of her verified bill of particulars, the plaintiff alleges as a result of the subject accident, she sustained injuries consisting of broad based central disc herniation at L4-5 slightly eccentric leftward indenting the ventral aspect of the thecal sac; central disc herniation at L3-4 indenting the ventral surface of the thecal sac and contributing to mild spinal stenosis; diffuse disc bulge at L3-4; diffuse disc bulge at L2-3 indenting the ventral surface of the thecal sac; painful and restricted ranges of motion of the lumbar spine; lumbar nerve root injury; lumbar radiculopathy; myofascitis and spasm in the lumbar paraspinal musculature; lumbar spine sprain/strain; severe pain, tenderness, stiffness, spasm, trigger points, malposition, misalignment, fixations, subluxations, restricted motion; stretching, pulling and/or tearing of the muscles, tendons and/or ligaments; positive kemps test bilaterally for facet syndrome and nerve root irritation; need for future physical therapy, trigger point injections, and future epidural steroid injections; broad based right paracentral disc herniation at C5-6 abutting the spinal cord and causing mild spinal canal stenosis; posterior and slightly left paracentral disc herniation at C6-7 abutting the spinal cord and causing a mild spinal stenosis; circumferential disc bulge at C4-5 indenting on the ventral thecal sac causing spinal canal stenosis; cervical nerve root injury; cervical radiculopathy; cervical spine sprain/strain; weakness; spine instability; sensory deficits; cervical paraspinal and paravertebral muscle tenderness and spasm; positive foramina compression test bilaterally for cervical nerve root compression; cervical distraction positive for capsular/disc/ligamentous damage; right knee: derangement, chondromalacia patella, painful and restricted ranges of motion, tenderness and bruising; antalgic gait secondary to pain; posttraumatic headaches; bruising to the right chest and left lower abdomen; trapezius pain; sleep disturbances; dizziness; posttraumatic depression secondary to pain; anxiety secondary to pain; deficits in daily living with lifting, carrying, pushing, pulling, reaching, lifting, extending, cross-arm motion, shoulder/arm/hand elevation, movements of the neck and back, prolonged sitting, walking, jogging, running, jumping, bending, squatting, kneeling, ascending/descending stairs, lying down, sleeping, personal hygiene, and driving.

Dr. Habacher stated that there is nothing in the medical records or the examination to refute causality, and therefore there is a causal relationship for the diagnosis related to the accident. However, Dr. Habacher did not set forth the records and materials which she reviewed, and none of the medical records have been provided. It is not known if she reviewed all of plaintiff's medical records, including the MRIs of plaintiff's cervical and lumbar spine, and she does not comment upon the same. Said records, reports, and studies are not in evidence, leaving this court to speculate as to their contents, and whether Dr. Habacher's opinion would be affected by reviewing all the records and testing results, thereby precluding summary judgment.

While Dr. Habacher measured plaintiff's lumbar spine range of motion and compared her findings to the normal range of motion, she did not report any range of motion values for plaintiff's cervical spine, precluding summary judgment, as this court must speculate whether or not the plaintiff has any deficits in cervical spine range of motion. In comparing the normal range of motion values reported by Dr. Habacher and Dr. Ross, it is noted that they have reported inconsistent normal values. Dr. Ross failed to set forth the objective method employed to obtain the range of motion measurements of the plaintiff's lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when

examining the plaintiff (***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Dr. Ross has provided lumbar range of motion values set forth in terms of a spectrum or range of numbers rather than one definitive number, thus, the actual extent of the limitation is unknown, and the court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]), precluding summary judgment.

Although the plaintiff claims to have posttraumatic headaches, lumbar nerve root injury, lumbar radiculopathy; cervical nerve root injury; cervical radiculopathy; and disc herniations which indent and abut the spinal cord, a report by an independent examining neurologist has not been submitted, raising factual issues with regard to these claimed injuries and precluding summary judgment (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

Sheldon Feit, M.D. opined in a conclusory and unsupported opinion that the bulging cervical discs at C3-4 through C6-7 correspond to ventral epidural defects at the C4-5-C6-7 levels, with indentation on the cervical cord at C5-6 and C6-7, and that these findings are degenerative secondary to annular degeneration and/or chronic disease. He does not opine as to the duration of such degenerative changes and does not opine whether herniated discs are part of the degenerative changes he references, precluding summary judgment (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]).

In opposing defendant's application, the plaintiff has submitted her cervical spine MRI report by Dr. A. Zimmerman, M.D., wherein he set forth his interpretation of a disc bulge at C4-5, broad based right paracentral disc herniation abutting the spinal cord causing a mild spinal canal stenosis, and posterior and slight left paracentral disc herniation abutting the spinal cord, causing a mild spinal canal stenosis. Therefore, Dr. Feit's interpretation of plaintiff's cervical MRI films does not comport with the impressions of plaintiff's interpreting radiologist, raising factual issues to further preclude summary judgment. Dr. Feit has not commented upon plaintiff's lumbar spine MRI, and does not indicate that he reviewed the same. It is noted in plaintiff's opposing papers that the report of Michael Benanti, D.O. of BAB Radiology, sets forth his interpretation of plaintiff's lumbar spine MRI. Dr. Benanti's impression was central disc protrusion slightly eccentric leftward at L4-5 and disc bulge and concomitant central disc protrusion at L3-4 which are causing varying degrees of spinal canal stenosis. Defendant's examining physicians have not ruled out these findings.

Defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant's physicians affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted the 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]).

Plaintiff testified that at the time of the accident, she was employed as a clinical medical assistant at Brookhaven Memorial Hospital. She missed five days from work due to injuries sustained in the accident. She initially felt pain in her lower back, neck, and right knee and was treated at the Brookhaven

Hospital emergency room. She went for physical therapy at Eastern Island Medical through March 2010, for pain in her lower back, neck, and right knee. She takes Aleve twice a week for the pain which has continued. She experiences pain in her back every night, and it causes her to have difficulty sleeping. She has stiffness and pain in her neck and pain in her back and right knee. She has difficulty doing housework, picking up a laundry basket, maintaining her yard, lifting things, and has modified the way she does things. She denied prior or subsequent injuries to her lower back, neck, and right knee.

The factual issues raised in defendant's moving papers preclude summary judgment. The defendants failed to satisfy his 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 parties failed to establish their prima facie entitlement to judgment as a matter of law. 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 (001) by defendant for dismissal of the complaint for failure to meet the serious injury threshold is denied.

Dated: Dec. 8, 2014

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION