Kiley v Huntsman
2014 NY Slip Op 30660(U)
March 4, 2014
Sup Ct, Suffolk County
Docket Number: 08-3387
Judge: W. Gerard Asher

[* 1]

SHORT FORM ORDER

INDEX No. 08-3387

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 4-20-12 (#003)
MOTION DATE 8-1-12 (#004)
ADJ. DATE 2-19-13
Mot. Seq. # 003 - MG
004 - XMotD

LAUREN D. KILEY,	:	BISON & TROP, L.L.P.
	:	Attorney for Plaintiff
Plaintiff,	:	825 East Gate Boulevard, Suite 202
	:	Garden City, New York 11530
- against -	:	
	:	LEWIS JOHS AVALLONE AVILES, LLP
TIMOTHY M. HUNTSMAN,	:	Attorney for Defendant
	:	425 Broad Hollow Road, Suite 400
Defendant.	:	Melville, New York 11747

Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-8 ; Notice of Cross Motion and supporting papers 9-17 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 18 - 19 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is denied; and it is further

ORDERED that the portion of the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability is granted and the portion of the cross motion for an order setting this case down for an inquest as to damages is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on February 10, 2005. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including, disc bulging at C3-4 and C4-5; left C6-7 cervical radiculopathy; C6-7 prominent circumferential disc bulging with moderate central canal stenosis; C5-6 anterior and posterior osteophytes, disc space narrowing and disc bulging with mild central canal stenosis; numbness and tingling in left arm and fingers; pain radiating to the right posterior shoulder; and lumbar impairment. In addition, plaintiff alleges that following said accident she was confined to bed and

3-12-14

to her home for two months to April 2005. Plaintiff also claims that she was not employed on the date of the accident. The Court's computerized records indicate that a note of issue has not been filed in this action.

Defendant now moves for summary judgment dismissing the complaint of plaintiff on the ground that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Defendant's submissions in support of his motion include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, plaintiff's medical records, the affirmed report dated December 29, 2011 of defendant's examining orthopedist Isaac Cohen, M.D., and the affirmed report dated February 27, 2012 of defendant's examining neurologist, Richard Lechtenberg, 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 objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided 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]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). 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]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). 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, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

At her deposition on November 8, 2011, plaintiff testified that she did not go to the hospital immediately after the accident but later that same day she sought medical attention from her chiropractor, Dr. Douglas Wright, because her body felt sore. Prior to the accident, she had been seeing Dr. Wright solely for "maintenance" therapy. Plaintiff testified that she underwent physical therapy, massage therapy for her neck, and adjustments and underwent an MRI of her back. She could not recall the frequency of her therapy,

saying that treatment began three times a week then two times a week and may have varied to once a week, but she approximated that her treatment ended in the Fall of 2008. Plaintiff stated that during said period she also treated with Dr. Mitchell Cohn, a physician, with complaints of neck and back pain, at the same office. Plaintiff explained that she stopped treatment because she could not afford it but that she did have medical insurance which was accepted by Dr. Wright and Dr. Cohn and that her medical insurance did not refuse to provide coverage. She also stated that she did not feel any benefit from their treatment. Plaintiff testified that she later began treatment with Dr. Kechejian at the Pain Center at Syosset Hospital on November 9, 2009, based on the recommendations of her minister and her husband, and subsequently received approximately five lumbar spine epidural injections, the last being in October 2011. Plaintiff stated that she felt that the epidural injections were benefitting her pain. Plaintiff also testified that she had an incident in 1988 in which she underwent a prior MRI and learned that she had bulging or herniated discs in her lumbar spine, she received treatment from a different chiropractor for approximately one year and then stopped because she felt better. Then, in 1997 plaintiff had an incident while exercising to "Jazzercize" and saw an orthopedist at Huntington Hospital who diagnosed a muscular problem. Plaintiff further testified that she had no future appointments with any medical providers. She described her current complaints as sharp, constant neck pain, numbness down her right arm, tingling in her right fingers, and pain in her lower, right side, lumbar area with numbness down her right leg. According to plaintiff, she was bedridden for approximately six months from June 2005 to December 2005, leaving her house solely for treatment. Plaintiff informed that she started working, when she felt well enough to do so, in September of 2009 as a teacher's aide at "Scope's" after-school program in Northport, and since March 2011 she has also been working as a lunch aide in the Northport School District. She stated that her treating physicians told her not to vacuum or lift objects and suggested low impact activities such as walking and swimming.

By his affirmed report dated December 29, 2011, Dr. Cohen indicated that he performed an orthopedic evaluation of plaintiff on said date, and that plaintiff's current complaints consisted of neck pain and a burning sensation and pain radiating into her right arm. Dr. Cohen reported the following results of range of motion testing of plaintiff's cervical spine using a goniometer and/or bubble inclinometer: flexion and extension "in the 45 degree range" (normal flexion 50 degrees and normal extension 45 degrees), lateral bending to 45 degrees (normal 45 degrees), and right and left rotation 70 degrees (normal 80 degrees). He noted that plaintiff's paravertebral muscles were supple and non-tender, that Compression testing was negative, and that Spurling testing was negative bilaterally. Dr. Cohen found that hand grip, pinch and grasp for both hands was normal, that reflexes were present, equal and symmetrical in biceps, triceps and brachioradialis, and that there was no interosseous muscle atrophy. He also found that upper extremity motor strength was 5/5 with normal sensation and that there were no sensory deficits present. With respect to plaintiff's thoracolumbosacral spine, Dr. Cohen reported full range of motion, flexion "of about 60 degrees" (normal 60 degrees), hyperextension of 25 degrees (normal 25 degrees), right and left lateral bending "in the 25 degree range" (normal 25 degrees), and right and left lateral bending "to 25 degrees"(normal 25 degrees). He added that plaintiff walked with a normal heel/toe gait, that straight leg raising performed bilaterally by plaintiff in a sitting position was negative to 90 degrees (normal to 90 degrees). Dr. Cohen found normal reflexes present in knee jerks and heel cords, measurements of calves and thighs were equal and symmetrical, and that there was no lower extremity motor weakness, muscle atrophy or sensory deficits. He diagnosed cervical and thoracolumbosacral strains, resolved. Dr. Cohen concluded that plaintiff sustained mild soft tissue complaints to the neck and back as a result of the subject accident, which exacerbated her significant preexisting conditions. He opined that the positive findings

concerning plaintiff's cervical spine area were preexistent, spinal stenosis with spur formation, which is a condition that develops over an extensive period of time. Dr. Cohen noted that plaintiff has had lumbar spine complaints since 1997, that she has a history of lap band surgery, and that plaintiff is currently grossly overweight resulting in chronic back complaints. He stated that he could not establish a causal relationship between the subject accident and plaintiff's lumbar epidural injections 4 ½ years later. Dr. Cohen further opined that there was no evidence of sequelae or permanency related to the subject accident.

Dr. Lechtenberg indicated in his affirmed report dated February 27, 2012 that he performed a neurologic examination of plaintiff three days prior, and that plaintiff's current complaints consisted of neck and back pain, persistent tingling in her neck and shoulders, more so on the right, and numbness extending down her arms and legs. Among his findings were that plaintiff's gait, strength and motor tone were normal, there was no obvious atrophy or fasciculations, and that plaintiff could stand on her heels and toes. In addition, Dr. Lechtenberg indicated that although plaintiff reported decreased sensitivity to pin and touch on the left side of her body, it did not conform to any specific peripheral nerve or dermatomal pattern. He found that "[s]ensation was otherwise intact to pain, vibration, and position sense", Romberg sign was negative, and pain was absent on straight leg raising. Among his range of motion testing findings using visual observation and goniometric measurements, Dr. Lechtenberg reported that plaintiff's cervical spine "was approximately 15 degrees forward flexion (50 normal), 15 degrees extension (60 normal), 45 degrees lateral flexion (45 normal) and 80 degrees lateral rotation (80 normal)." He stated that plaintiff "voluntarily restricted excursions of the cervical spine because of complaints of pain. Incidental movements revealed a normal range of motion of the cervical spine." With respect to plaintiff's lumbar spine, Dr. Lechtenberg reported "approximately 60 degrees forward flexion (60 normal), 25 degrees lateral flexion to the right and 15 degrees to the left (25 normal), and 25 degrees extension (25 normal). She voluntarily restricted excursions of the lumbar spine because of complaints of pain. Incidental movements revealed a normal range of motion of the lumbar spine." He diagnosed "[s]tatus post cervical, thoracic and lumbar spine sprains, per records, resolved" and opined in conclusion that she currently had "no objective, clinical, neurologic deficits" and that plaintiff was not disabled from a neurologic standpoint and that there were no pre-existing conditions to affect her recovery.

Here, defendant failed to meet his prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Carr v Macaluso***, 64 AD3d 741, 882 NYS2d 654 [2d Dept 2009]; ***Scarano v Wehrens***, 46 AD3d 797, 847 NYS2d 644 [2d Dept 2007]; ***Cebularz v Diorio***, 32 AD3d 975, 822 NYS2d 118 [2d Dept 2006]). Defendant's examining orthopedist found 10 and 12.5 percent limitations in cervical range of motion testing in December 2011 and concluded that the subject accident exacerbated plaintiff's significant preexisting conditions and that her "grossly overweight" condition resulted in chronic back complaints (*see id.*). Two months later defendant's examining neurologist found significant, 70 and 75 percent, limitations of plaintiff's cervical spine (*see* ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Raguso v Ubriaco***, 97 AD3d 560, 947 NYS2d 343 [2d Dept 2012]). Although defendant's examining neurologist opined that plaintiff was voluntarily restricting her movements, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the limitations were voluntary (*see* ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]; ***Quiceno v Mendoza***, 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]; ***Mondert v Iglesia De Dios Pentecostal Cristo Viene, Inc.***, 69 AD3d 590, 892 NYS2d 493 [2d Dept 2010]; *see also* ***Farrah v Pinos***, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]).

Said contrasting findings of defendants' examining physicians raise issues of credibility which may not be decided by the Court (*see* ***Perl v Meher***,18 NY3d 208, 936 NYS2d 655).

Inasmuch as defendant failed to meet his prima facie burden, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Plaintiff cross-moves for partial summary judgment in her favor on the issue of liability and for an order setting this case down for an inquest as to damages on the ground that defendant attempted to make a U-turn from the shoulder of the road without waiting for plaintiff's vehicle to safely pass. In support of the motion, plaintiff submits the pleadings and bill of particulars, the police accident report, the deposition transcripts of the parties, the affidavit of Douglas Wright, D.C. and attached medical records, and the MRI report of plaintiff's radiologist, Melissa Sapan, M.D.

Plaintiff testified at her deposition on November 8, 2011 that the subject accident occurred at 8 a.m. shortly after leaving the high school parking lot and entering westbound Laurel Hill Road, a single lane road. She described the traffic as light, the weather as sunny and the roads as dry. Prior to the accident, plaintiff had been traveling approximately 20 miles per hour behind defendant's vehicle. According to plaintiff, defendant's vehicle, which was 50 to 100 feet in front of her, unexpectedly pulled over to the right hand side of the road, plaintiff slowed her vehicle, and then without signaling, defendant's vehicle made a U-turn in front of plaintiff's vehicle. Plaintiff turned her vehicle to the left attempting to avoid defendant's vehicle. The front passenger side of plaintiff's vehicle struck defendant's driver's side front panel. Her air bags did not deploy. Plaintiff drove her vehicle home after the accident.

At his deposition on January 6, 2012, defendant testified that prior to the accident he was intending to go to Northport High School and that he had no recollection of the accident.

Here, plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability against defendant by demonstrating that defendant was negligent in failing to see plaintiff's vehicle approaching and in crossing the path of plaintiff's vehicle when it was hazardous to do so (*see* ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; ***Socci v Levy***, 90 AD3d 1020, 935 NYS2d 332 [2d Dept 2011]; ***Almonte v Tobias***, 36 AD3d 636, 829 NYS2d 153 [2d Dept 2007]). Therefore, that portion of plaintiff's cross motion for partial summary judgment in her favor on the issue of liability is granted. However, plaintiff's request for an order setting this case down for an inquest as to damages is denied. Instead, once discovery is completed and a note of issue is filed and there has been compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages.

Dated: March 4, 2014

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION