

Rosen v DL Peterson Trust
2015 NY Slip Op 31531(U)
August 7, 2015
Supreme Court, Queens County
Docket Number: 8563/2013
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

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ILENE ROSEN, Index No.: 8563/2013
Plaintiff, Motion Date: 6/3/15
- against - Motion No.: 136
Motion Seq.: 5

DL PETERSON TRUST, LOUIS C. CARRINO
and JOSE A. RAMIREZ, QUEST DIAGNOSTICS
INCORPORATED AND QUEST DIAGNOSTICS
CLINICAL LABORATORIES,
Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants DL PETERSON TRUST, LOUIS C. CARRINO, QUEST DIAGNOSTICS INCORPORATED AND QUEST DIAGNOSTICS CLINICAL LABORATORIES (collectively hereinafter defendants) for an order pursuant to CPLR §3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) and for attorneys' fees and costs on this motion.

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In this action based in negligence, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a multi-vehicle chain reaction accident that occurred on December 31, 2012, on Jericho Turnpike approximately 50 feet west of Woodland Gate, Nassau County, New York.

Plaintiff alleges that she sustained injuries to her lumbar spine, cervical spine, right wrist, right leg, right hip, jaw, and teeth.

Plaintiff commenced this action by the filing of a summons and verified complaint on February 22, 2013. A supplemental summons and amended verified complaint were filed on or about October 14, 2013. Issue was joined by defendants by serving a verified answer on October 10, 2013 and an amended verified answer on April 23, 2014. Defendant Jose A. Ramirez served a verified answer on March 18, 2014.

In support of the motion, defendants submit two affirmations from counsel; a police report; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on March 6, 2014; the affirmed medical report of Kenneth E. Seslowe, M.D.; the affirmed medical report of Monette G. Basson, M.D.; the affirmed medical report of Evan Temkin, D.M.D.; and the comprehensive radiology review of A. Robert Tantleff, M.D..

On April 21, 2014, plaintiff underwent an independent orthopedic examination performed by Dr. Seslowe. At the time of the examination, plaintiff explained that she still has neck and back pain as a result of the subject accident and she still sees a chiropractor three times a week. Plaintiff had no complaints regarding her right hand or right hip. She stated that she is currently working for a mortgage company. Dr. Seslowe concludes that there is a resolved cervical and lumbosacral sprain; there is no evidence of radiculitis; there was a normal examination of the right wrist and right hip; and that plaintiff has an excellent prognosis.

On April 16, 2014, plaintiff underwent an independent neurological examination performed by Dr. Basson. Dr. Basson conducted range of motion testing using a baseline bubble inclinometer and found normal range of motion of the cervical spine and lumbar spine. Dr. Basson concludes that plaintiff has no objective abnormalities, there is no evidence of a herniated disc and there is no objective disability or need for tests or treatment.

On April 22, 2014, plaintiff underwent an independent dental examination performed by Dr. Temkin. Plaintiff explained that as a result of the subject accident, she sustained injury to teeth #8, 19, 30, 31, left and right temporomandibular joint dysfunction (TMJ) and neck pain. Plaintiff also explained that after the accident, she received an occlusal splint, she had

crowns placed on teeth #19, 30, 31 and a root canal on tooth #8. Plaintiff complained of headaches one to two times a week and TMJ pain. Dr. Temkin opined that there is no disability and there are no findings related to the subject accident which would preclude plaintiff from pre-accident activities of daily living.

Defendants also submitted Dr. Tantleff's review of the MRIs taken of plaintiff's cervical spine and lumbar spine. Dr. Tantleff opined that the findings are consistent with plaintiff's age and are not causally related to the subject accident. Dr. Tantleff further states that there are potential causes of pain unrelated to the subject accident including degenerative disc disease, degenerative neural foraminal stenosis and modic reactive change.

Defendants' counsel contends that the affirmed medical reports are sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a body organ or member; or a significant limitation of use of a body function or system. Counsel also contends that plaintiff, who was not confined to bed, and who was not employed at the time the subject accident occurred, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her, for not less than ninety days during the immediate one hundred eighty days following the occurrence, from performing substantially all of her usual daily activities.

In opposition, plaintiff submits her own affidavit; the affirmed medical report of James M. Liguori, D.O.; the affirmed medical report of Steven Schneider, D.C.; the affirmed medical report of Evan P. Mondshine, D.D.S.; and the affirmed radiologist report of William A. Weiner, D.O..

In his report, Dr. Liguori states that on January 10, 2013, plaintiff presented herself in his office for a neurologic consultation. Plaintiff complained of left-sided headaches, episodic lightheadedness, neck pain, radiating pain down her right arm, cold sensation of the hands, low back pain, radiating pain to the right leg and groin. He found status post head trauma with a post-concussion headache syndrome, cervical radiculopathy, and lumbosacral radiculopathy. Dr. Liguori opined that the injuries were causally related to the subject accident. Dr. Liguori recently examined plaintiff on April 13, 2015 and found that she still has range of motion limitations in her cervical spine and lumbar spine. He concludes that plaintiff has a partial permanent disability as a result of the injuries she sustained in the subject accident.

Dr. Schneider examined plaintiff on January 11, 2013, conducted range of motion testing on plaintiff's cervical spine and lumbar spine, and found limited ranges of motion. He also concludes that the injuries were causally related to the subject accident. Dr. Schneider recently examined plaintiff on April 14, 2015, and found limited ranges of motion in plaintiff's cervical spine and lumbar spine. He opines that plaintiff will be left with a permanent partial disability.

Dr. Mondshine initially examined plaintiff on January 31, 2013. Dr. Mondshine found limited range of motion in plaintiff's jaw, teeth fractures, and TMJ. Dr. Mondshine opined that plaintiff would require root canals and that the injuries were causally related to the subject accident. Dr. Mondshine recently examined plaintiff on April 9, 2015 and found range of motion limitations in plaintiff's jaw and TMJ.

The radiological report submitted in opposition by Dr. Weiner acknowledges disc herniations and bulges in plaintiff's cervical spine and lumbar spine.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's 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 the plaintiff's 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 the plaintiff 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 proof submitted by defendants, including the affirmed medical reports, together with plaintiff's testimony

that she was not confined to bed immediately following the accident, are sufficient to meet defendants' prima facie burden by demonstrating that 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]).

However, this Court finds that plaintiff raised a triable issue of fact by submitting the affirmed medical reports attesting to the fact that plaintiff sustained injuries as a result of the accident, plaintiff had significant limitations in range of motion both contemporaneous to the accident and in recent examinations, and concluding that plaintiff's limitations are disabling (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]). As such, 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]). Moreover, tooth fractures, which were alleged in plaintiff's verified bill of particulars, do constitute a serious injury within the meaning of Insurance Law § 5102(d) (see Autiello v Cummins, 66 AD3d 1072 [2009]; Moffitt v Mururay, 2 AD3d 1110 [2003]).

Plaintiff also adequately explained any gap in treatment by her doctors stating that she had reached her maximum improvement and no further treatment was necessary (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 motion by defendants for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: August 7, 2015
Long Island City, N.Y

ROBERT J. MCDONALD, J.S.C.