Whelan v Sutherland
2016 NY Slip Op 32702(U)
September 22, 2016
Supreme Court, Suffolk County
Docket Number: 11-10761
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

ORIGINAL

INDEX No. 11-10761
CAL. No. 15-02354MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-16-16
ADJ. DATE 7-7-16
Mot. Seq. # 007 - MD
Mot. Seq. # 008 - MD

CARLA WHELAN,

Plaintiff,

- against -

MICHELLE J. SUTHERLAND, DARLENE RICCIARDI and MICHAEL A. LEAVITT,

Defendants.

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Attorney for Defendant Michael Leavitt
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Upon the following papers numbered 1 to 41 read on these motions for vacating the note of issue and for summary judgment, etc ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; 9 - 22 ; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 24; 25 - 32 ; Replying Affidavits and supporting papers 33 - 41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 007) by defendant Michelle Sutherland for an order vacating the note of issue and striking the action from the trial calendar and directing plaintiff to comply with outstanding discovery is denied; and it is further

ORDERED that the motion (# 008) by defendant Michelle Sutherland for summary judgment in her favor on the ground that plaintiff did sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

Plaintiff commenced this action to recover damages for injuries sustained in two separate accidents, first in April 12, 2010 and then in May 20, 2010. The April 12, 2010 accident allegedly occurred on the westbound Long Island Expressway in the Town of Oyster Bay, New York, when plaintiff's vehicle was rear-ended by a vehicle owned and operated by defendant Michelle Sutherland and a vehicle owned and operated by defendant Darlene Ricciardi. The May 20, 2010 accident allegedly occurred on the westbound Long Island Expressway in the Town of Oyster Bay, New York, when plaintiff's vehicle was rear-ended by a vehicle owned and operated by defendant Michael Leavitt. By her bill of particulars, plaintiff alleges that, as a result of the April 12, 2010 accident, she sustained various injuries and conditions including herniated discs at C5-C6, C6-C7, and L5-S1; a bulging disc at L4-L5; lumbar radiculopathy at L4-L5; carpal tunnel syndrome and numbness in both hands; and numbness in left shoulder.

Defendant Sutherland moves for an order vacating the note of issue and striking the action from the trial calendar. Defendant Sutherland alleges that the deposition of defendant Michael Leavitt remains outstanding and that plaintiff has failed to provide authorizations that expire at the end of litigation.

In opposition, plaintiff 's counsel contends that since plaintiff received summary judgment on the issue of liability as against defendant Leavitt in 2014, defendant Sutherland's request for the deposition of defendant Leavitt should be denied, as moot.

The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]).

Here, moving defendant's attorney failed to submit an affirmation demonstrating that a good faith effort was, in fact, made to resolve the disclosure issue raised in this motion as required by 22 NYCRR 202.7 (a) (*see* ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; ***Natoli v Milazzo***, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]; ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Diel v Rosenfeld***, 12 AD3d 558, 784 NYS2d 379 [2d Dept 2004]). In any event, even if a proper affirmation of good faith had been included with the moving papers, moving defendant failed to demonstrate that the case is not ready for trial or that any factual allegation in plaintiff's certificate of readiness is erroneous.

Defendant Sutherland moves for an order granting summary judgment in her favor on the ground that plaintiff did sustain a "serious injury" as defined in Insurance Law § 5102 (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 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). 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]).

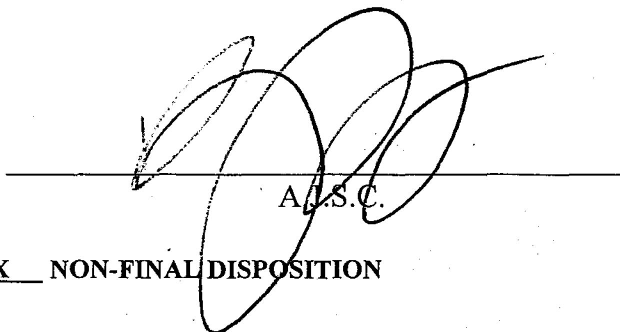
Here, defendant Sutherland failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On July 17, 2014, approximately four years and three months after the April 12, 2010 accident, moving defendant's examining orthopedist, Dr. John Leppard, examined plaintiff and performed certain orthopedic tests. Dr. Leppard also performed range of motion testing on plaintiff's wrists and right knee, using a goniometer to measure her joint movement. Dr. Leppard opined that plaintiff had full range of motion of her wrists and right knee. Dr. Leppard opined that plaintiff did not cooperate to measure accurate range of motion in her neck and back areas. Although Dr. Leppard stated that with respect to plaintiff's cervical spine, "[w]hen asked to rotate to right and left, tilt right and left and extend, [she] was able to do so," he did not provide specific range of motion testing results for plaintiff's cervical region (*see* ***Sentino v Valerio***, 72 AD3d 1063, 902 NYS2d 106 [2d Dept 2010]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Dr.

Leppard also failed to provide specific range of motion testing results for plaintiff's lumbar region. In view of the foregoing, Dr. Leppard's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

On July 24, 2014, moving defendant's examining neurologist, Dr. C.M. Sharma, examined plaintiff and performed certain neurologic tests. Dr. Sharma also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure her joint movement. Dr. Sharma found that plaintiff had range of motion restrictions in her lumbar spine: 0 degrees of flexion (90 degrees normal), 0 degrees of extension (30 degrees normal), 0 degrees of lateral flexion (30 degrees normal), and 0 degrees of rotation (30 degrees normal) (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Dr. Sharma found that plaintiff had full range of motion in her cervical spine: 40 degrees of flexion (45-60 degrees normal), 10 degrees of extension (45-60 degrees normal), 10 degrees of lateral flexion (30-60 degrees normal), and 30 degrees of rotation (45-60 degrees normal). Dr. Sharma provided ranges or spectrums of degrees up to 30 degrees for the normal standards of comparison for cervical lateral flexion (*compare* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589; *see* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922; *see also* ***Lee v M & M Auto Coach, Ltd.***, *supra*). In view of the foregoing, Dr. Sharma's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury to his left knee within the meaning of Insurance Law § 5102 (d).

Inasmuch as defendant Sutherland failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion 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]). Accordingly, defendant Sutherland's motion for summary judgment on the issue of serious injury is denied.

Dated: 9/22/16



A.J.S.C.

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