Lindstadt v Broderick
2017 NY Slip Op 30630(U)
January 25, 2017
Supreme Court, Suffolk County
Docket Number: 14-11150
Judge: Joseph Farneti

[* 1]

PUBLISH

SHORT FORM ORDER

INDEX No. 14-11150
CAL. No. 16-00507MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-16-16
ADJ. DATE 11-17-16
Mot. Seq. # 002 - MD

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LYNN A. LINDSTADT,

Plaintiff,

- against -

CAROL A. BRODERICK,

Defendant.

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MICHAEL F. PERROTTA, ESQ.
Attorney for Plaintiff
215 East Main Street, Suite 203
Huntington, New York 11743

KELLY, RODE & KELLY, L.L.P.
Attorney for Defendant
330 Old Country Road, Suite 305
Mineola, New York 11501

Upon the following papers numbered 1 to 27 read on this motion for summary judgment, etc.: Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 16 - 25; Replying Affidavits and supporting papers 26 - 27; Other A report of Dr. Nadine O'Neill ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for, among other things, summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on June 24, 2013, in a parking lot at the Tanger Factory Outlet Center at or near its intersection with Tanger Drive, in Riverhead, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained various injuries and conditions including a bulging disc at C3-C4, grade 1 spondylolisthesis at C7-T1 and L4-L5, grade 2 spondylolisthesis at L5-S1, and thoracic and lumbar radiculopathy. The compliance conference was held on March 3, 2016. On or about March 17, 2016, plaintiff served an amended bill of particulars claiming out-of-pocket expenses for personal aid and assistance.[1] Subsequently, a note of issue was filed.

[1] Although labeled as "supplemental," it is, in reality, an amended bill of particulars because it seeks a new category of damages which was not set out in the original bill.

Defendant now moves for, among other things, summary judgment dismissing the complaint on the ground that plaintiff did not 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]).

On December 14, 2015, approximately two years and six months after the subject accident, defendant's examining neurologist, Dr. Mathew Chacko, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Chacko found that the result of the straight leg raising test was positive. Dr. Chacko also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure his joint movement. Dr. Chacko found that plaintiff had range of motion restrictions: 30 degrees of flexion (50 degrees normal), 30 degrees of extension (60 degrees normal), 45 degrees of left rotation and 60 degrees of right rotation (80 degrees normal), and 25 degrees of lateral flexion (45 degrees normal) in her cervical spine and 30

degrees of flexion (60 degrees normal), 10 degrees of extension (25 degrees normal), and 10 degrees of lateral flexion (25 degrees normal) in her lumbar spine.

On December 28, 2015, moving defendants' examining orthopedist, Dr. Edward Toriello, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, Tinel's test, Phalen's test, and Finkelstein's test. Dr. Toriello found that all the test results were negative or normal. Dr. Toriello also performed range of motion testing on plaintiff's cervical and lumbar regions, shoulders, elbows, wrists and hands, using a goniometer and inclinometer to measure her joint movement. Dr. Toriello found that plaintiff had range of motion restrictions: 28 degrees of flexion (50 degrees normal), and 30 degrees of extension (60 degrees normal), 30 degrees of left rotation and 45 degrees of right rotation (80 degrees normal) in her cervical spine and 30 degrees of left rotation (70 degrees normal) in her lumbar spine. Dr. Toriello found that plaintiff exhibited normal joint function in her cervical lateral flexion and lumbar flexion, extension, lateral flexion, and right rotation.

On March 26, 2016, defendant's examining radiologist, Dr. Michael Winn, reviewed two X-ray examinations of plaintiff's lumbar and thoracic spines, performed on July 30, 2013, and four MRI examinations of her right ankle, lumbar spine, cervical spine, and right knee, performed on March 1, 2006, October 9, 2013, September 30, 2013, and January 29, 2015 respectively. Dr. Winn found that there were degenerative disc disease in plaintiff's cervical, lumbar and thoracic regions. With regard to the right knee, Dr. Winn found that there were some complex degenerative tears in the medial meniscus. As to an alleged preexisting condition, there is only Dr. Winn's conclusory notation, itself insufficient to establish that the plaintiff's pain might be chronic and unrelated to the accident (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Linton v Nawaz***, 62 AD3d 434, 879 NYS2d 82 [1st Dept 2009]). Moreover, Dr. Winn's X-ray and MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined the plaintiff (*cf.* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]).

Here, the defendant failed to make a *prima facie* showing that the 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]). Dr. Chacko and Dr. Toriello found substantial range of motion restrictions in plaintiff's cervical and lumbar regions (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Moreover, while Dr. Toriello found that plaintiff exhibited normal joint function in her cervical lateral flexion and lumbar flexion, extension, and lateral flexion, Dr. Chacko found that plaintiff had significant restriction in those regions. The conflicting medical opinions of the experts raise issues of credibility to be resolved by a jury (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). The reports of Dr. Chacko, Dr. Toriello, and Dr. Winn, therefore, are insufficient to establish a *prima facie* case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as defendant 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, the branch of defendant's motion for summary judgment on the issue of serious injury is denied.

Defendant also seeks an order granting leave to amend her answer to assert the affirmative defenses of failure to state a cause of action and lack of standing on the ground that plaintiff's out-of-pocket expenses were allegedly claimed for personal aid and assistance for her husband, who is not a party of this action. Generally, leave to amend a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (***Sample v Levada***, 8 AD3d 465, 467-468, 779 NYS2d 96 [2d Dept 2004]).

Here, the proposed affirmative defense of failure to state a cause of action and lack of standing are palpably insufficient or patently devoid of merit (*see* ***Reese v Jahan Contr.***, 120 AD3d 1399, 993 NYS2d 151 [2d Dept 2014]; ***Marcum, LLP v Silva***, 117 AD3d 917, 986 NYS2d 508 [2d Dept 2014]; Ferriola v DiMarzio, 83 AD3d 657, 658, 919 NYS2d 871 [2d Dept 2011]), since an alleged seriously injured automobile accident victim, as plaintiff in this action, is allowed to plead for basic economic loss recovery (*see* Insurance Law § 5104 [a], [c]; ***Dietrick v Kemper Ins. Co.***, 76 NY2d 248, 557 NYS2d 301 [1990]; ***Licari v Elliott***, *supra*). Accordingly, the branch of motion by defendant for leave to amend her answer to assert the affirmative defenses of failure to state a cause of action and lack of standing is denied.

In addition, defendant seeks an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint against her. Under CPLR 3211 (a) (7), the Court is limited to examining the pleading to determine whether it states a cause of action (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*see* ***Pacific Carlton Dev. Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see* ***Leon v Martinez***, *supra*; ***International Oil Field Supply Servs. Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Here, defendant's evidence failed to negate the facts pleaded by plaintiff that she spent out-of-pocket expenses relating her injuries from the subject accident (***Guggenheimer v Ginzburg***, *supra*). Accordingly, the branch of the motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action is denied.

Since no willful and contumacious conduct was established by defendant, her application for an order striking the amended bill of particulars as to the out-of-pocket expenses claim also is denied. The striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing

that the failure to comply with discovery demands was willful and contumacious (*see* ***Kihl v Pfeffer***, 94 NY2d 118, 700 NYS2d 87 [1999]; ***Alicino v Rochdale Vil., Inc.***, 142 AD3d 937, 37 NYS3d 557 [2d Dept 2016]; ***Arpino v F.J.F. & Sons Elec. Co., Inc.***, 102 AD3d 201, 959 NYS2d 74 [2d Dept 2012]).

Finally, defendant requests an order vacating the note of issue and striking the action from the trial calendar, claiming that discovery of the alleged out-of-pocket expenses has not been completed. Defendant also seeks to compel plaintiff to respond to discovery demands regarding her claim for out-of-pocket issues. The Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect." A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21 (e), however, must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21 [d]; *see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, defendant's motion for an order vacating the note of issue was not served within 20 days of the filing of the note of issue, that is, by March 22, 2016. Instead, the affirmation of service of the motion is dated July 12, 2016, and defendant failed to demonstrate that unusual or unanticipated circumstances developed after plaintiff's filing of the note of issue, and that she will be substantially prejudiced if additional pretrial disclosure is not permitted (*see* ***Tirado v Miller***, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]; ***Silverberg v Guzman***, 61 AD3d 955, 878 NYS2d 177 [2d Dept 2009]; ***Audiovox Corp. v Benyamini***, *supra*). In addition, 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]). Thus, the branch of defendant's motion for an order vacating the note of issue and compelling plaintiff to submit to further discovery as to the out-of-pocket expenses claim is denied. Defendant's remaining claims have been considered and are without merit.

Dated: January 25, 2017

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION