

Connelly v Baevsky

2019 NY Slip Op 34474(U)

May 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 68191/2017

Judge: Janet C. Malone

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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

-----X
CAROLYN CONNELLY and ANTHONY DIMAGGIO,

Index No. 68191/2017

Plaintiffs,

-against-

DECISION AND ORDER
Motion Sequence: 1

ANDREA BAEVSKY and JEFFREY BAEVSKY,

Defendants.

-----X
MALONE, J.

The following papers¹ numbered 1-2 were read and considered in determining Andrea Baevsky and Jeffrey Baevsky’s motion for Summary Judgment pursuant to CPLR R 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion ² for Summary Judgment/Affirmation in Support of Brian P. McDonough, Esq./Exhibits A-F	1
Affirmation of Christina M. Killerlane, Esq. in Opposition/Exhibits 1-5 ³ , 7-10	2

On the issue of whether Plaintiff Carolyn Connelly’s⁴ injuries meet the serious injury threshold under New York Insurance Law §5102(d), the Court grants Defendants Andrea Baevsky and Jeffrey Baevsky partial summary judgment as set forth herein.

¹ Defendant’s Counsel did not file reply papers.

² While the Notice of Motion states that the supporting papers include a Memorandum of Law, same was neither uploaded to the New York State Courts Electronic Filing system nor attached to the Court’s working copy.

³ Exhibit 6 was not considered by the Court as such records were not sworn to or affirmed under the penalties of perjury. See, CPLR § 4518(a) and *Irizarry v. Lindor*, 110 A.D.3d 846, 847 (2d Dept. 2013).

⁴ Plaintiff Anthony Dimaggio, who has a cause of action for loss of consortium, is not addressed in this Decision and Order as Defendants’ motion only addresses the injuries of his wife, Plaintiff Carolyn Connelly. See, Affirmation in Support of Brian P. McDonough, Esq. and Verified Complaint as Exhibit 1.

RELEVANT BACKGROUND

This negligence action arises out of a motor vehicle accident which occurred on February 8, 2016 in the Village of Port Chester, County of Westchester, State of New York when Plaintiff Carolyn Connelly's ("Ms. Connelly") vehicle was rear-ended by the vehicle purportedly owned by Defendant Jeffrey Baevsky and operated by Defendant Andrea Baevsky ("Defendants"). *See*, Affirmation in Support of Brian P. McDonough, Esq. at paragraph 3 and Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraphs 10-11; *see also*, Summons and Verified Complaint at paragraphs 4-7 and 9-10 as Exhibit 1.

Orthopedic & Neurosurgery Specialists, P.C. ("ONS") performed electrodiagnostic studies on Ms. Connelly on October 3, 2017, revealing no evidence of ulnar or median nerve neuropathy and on October 26, 2017 ONS performed MRI's on Ms. Connelly's cervical spine and right shoulder revealing some degenerative conditions. *See*, Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraph 22; *see also*, electrodiagnostic studies dated October 3, 2017 at Exhibit 7 and MRI's dated October 26, 2017 as Exhibit 8.

On October 30, 2017, Plaintiffs commenced the instant action and issue was joined on or about November 22, 2017. In response to Defendants' demand, Plaintiffs served a Verified Bill of Particulars dated January 18, 2018, that states Ms. Connelly has sustained a serious injury as defined by New York Insurance Law §5102(d) as her injuries have resulted in: 1) permanent consequential limitation of use of a body organ or member; and 2) significant limitation of use of a body function or system. The Verified Bill of Particulars also alleges that Ms. Connelly suffered injuries including but not limited to: C4-C5 disc bulge, C7-T1 disc bulge, cervical radiculopathy, cervical chronic pain due to trauma, decreased right side grip, numbness and tingling in fourth and fifth digit of the right hand, upper back pain, shoulder, cervical, and lumbar pain, Tinel's sign over

the cubital tunnel, decreased sensation of the ulnar nerve, decreased sensation of the right third phalange, severe MP joint hypertension, instability of the MP joint, loss of range of motion in the cervical spine and in the right shoulder, acute and chronic cervical sprain and strain, severe trauma with soft tissue injury, lower extremity multiple nerve root abnormalities, cervicgia, bilateral shoulder pain, loss of strength, range of motion, muscle wasting and numbness in her right arm, and spasms in her neck and right arm. *See*, Affirmation in Support of Brian P. McDonough, Esq. at paragraphs 5-6 and Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraphs 4-6; *see also*, Summons and Verified Complaint, Verified Answer to Complaint, and Verified Bill of Particulars as Exhibits 1-3.

On March 10, 2018 Ms. Connelly again presented to ONS for performance of an MRI of her right shoulder which still revealed some degenerative conditions. *See*, Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraph 23; *see also*, MRI dated March 10, 2018 at Exhibit 7.

On October 15, 2018, Ms. Connelly presented to Ronald L. Mann, M.D. for an independent orthopedic medical evaluation complaining of pain to her neck and right elbow with numbness and tingling down to the ring and pinky finger, and bilateral basilar thumb joint pain. At such time, Ms. Connelly reported that over a year ago she developed pain in both thumbs in the base area, but not directly after the accident which occurred in 2016. Dr. Mann's findings on examination of the cervical spine, revealed range of motion rotation right was 60 degrees and left 70 degrees while normal is 80 and examination of the right shoulder revealed forward flexion of 150 degrees and abduction of 150 degrees, while normal is 170 degrees. Dr. Mann's diagnosis included cervical sprain/strain, right shoulder sprain/strain, right elbow clinical cubital syndrome and basilar joint arthritis of the thumbs finding that the ulnar nerve neuropathy was not causally related to the

accident as the electrodiagnostic studies from October 3, 2017 indicated no evidence of ulnar or median neuropathy⁵. Dr. Mann also found that the basilar joint of the thumbs was not causally related to the accident, but rather an arthritic condition present in both wrists due to wear and tear which started after her accident. Dr. Mann finally states that Ms. Connelly is able to do all activities of daily living and returned to work after her accident and was able to work until June of 2018. *See*, report of Ronald L. Mann, M.D. as Plaintiffs' Exhibit E and Defendants' Exhibit 10.

On October 15, 2018, Ms. Connelly also presented to Michael I. Weintraub, M.D. FACP, FAAN, FAHA for an independent neurological examination complaining of right elbow locking, weakness in the hands, numbness in the fourth and fifth digits of random nature, stating that at the end of her work day, her hands "go numb." Ms. Connelly also complained of pain in the thumb joints in both hands, which she states is "new." Dr. Weintraub found that Ms. Connelly demonstrated on examination mild restriction of terminal movements of the neck, with subjective sensory changes in the right ulnar distribution and slight reduction of the right tricep jerk, compatible with cervical radiculitis. Dr. Weintraub stated that "based upon the history", if accurate, pre-existing degenerative changes were present in the neck. Dr. Weintraub further found no evidence of cubital tunnel syndrome during his examination and that the electrodiagnostic studies did not reveal any evidence of ulnar or median neuropathy⁶. Dr. Weintraub also stated that Ms. Connelly did not appear to be disabled as she can work and do activities of daily living. *See*,

⁵ Dr. Mann reviewed various medical records pertaining to Ms. Connelly including but not limited to her EMG dated October 3, 2017. *See*, report of Ronald L. Mann, M.D. at page 2 as Plaintiffs' Exhibit E and Defendants' Exhibit 10.

⁶ Dr. Weintraub reviewed various medical records pertaining to Ms. Connelly including but not limited to her EMG dated October 3, 2017. *See*, report of Michael I. Weintraub, M.D. FACP, FAAN, FAHA at page 4 as Plaintiffs' Exhibit 9 and Defendants' Exhibit F.

report of Michael I. Weintraub, M.D. FACP, FAAN, FAHA as Plaintiffs' Exhibit 9 and Defendants' Exhibit F.

Ms. Connelly was produced for her Examination Before Trial on June 8, 2018 and the Note of Issue was filed on November 5, 2018. Defendants now file the instant motion for summary judgment to dismiss the complaint⁷, which is opposed by Counsel for Ms. Connelly. *See*, Notice of Motion, Affirmation in Support of Brian P. McDonough, Esq. at paragraph 7 and Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraphs 7-9; *see also*, transcript of Examination Before Trial of Ms. Connelly and Note of Issue and Certificate of Readiness as Plaintiffs' Exhibits 5 and 4, respectively.

DISCUSSION

In moving for summary judgment contending there is no "serious injury" within the meaning of New York Insurance Law § 5102(d), Defendants must establish a prima facie case that Ms. Connelly's injuries are not serious through the affidavit of Dr. Mann and Dr. Weintraub who examined her on October 15, 2018, thereby shifting the burden to Ms. Connelly to proffer sufficient evidence demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law. *See, Gaddy v. Eyler*, 79 N.Y. 2d 955 (1992) and *Dufresne v. Cestra*, 185 Misc. 2d 383 (Sup. Ct. 2000).

Although the no-fault statute sets forth eight specific categories which constitute a serious injury, this Decision and Order only addresses whether Plaintiff has sustained: 1) a significant limitation of use of a body function or system and 2) a permanent consequential limitation of use

⁷ While Defendants also move to dismiss any and all cross-claims, there are no cross-claims before the Court. *See*, Notice of Motion.

of a body organ or member, as Counsel for Ms. Connelly limits her arguments to such categories⁸ arguing that Ms. Connelly has sustained a significant limitation and permanent consequential limitation to her cervical spine, right shoulder, and right hand, and that Defendants have failed to meet their burden with respect to such injuries. *See*, New York Insurance Law §5102(d) and *Licari v. Elliot*, 57 N.Y. 2d 230 (1982); *see also*, Affirmation in Support of Brian P. McDonough, Esq. and Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraphs 40, 46, 48, 82.

As to Ms. Connelly's alleged injuries to her cervical spine and right shoulder, upon examination, Dr. Mann found that she suffered from limited range of motion of at least ten (10) degrees to her cervical spine and right shoulder and Dr. Weintraub found that Ms. Connelly exhibited loss of range of motion to her cervical spine raising an issue of fact as to whether such limitations can be linked to the subject accident as both doctors fail to dispute these injuries were causally related to the subject accident. Further, while Ms. Connelly's medical records show that degenerative conditions may have existed in the cervical spine and right shoulder prior to the subject accident, neither of Defendants' experts link such conditions to the limited range of motion to her cervical spine or right shoulder in their respective physical examinations. *See, Lopez v. Senatore*, 65 N.Y.2d 1017 (1985); *Livai v. Amoroso*, 239 A.D.2d 565 (2d Dept. 1997); *see also*, Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraphs 52, 58-61, 63-64, 68, 72-73, 76, reports of Ronald L. Mann, M.D. and Michael I. Weintraub, M.D. FACP, FAAN, FAHA as Plaintiffs' Exhibit 9-10 and Defendants' Exhibit E-F and MRI's at Exhibits 7-8.

Additionally, while Dr. Mann states in his report that Ms. Connelly sustained a cervical sprain/strain and right shoulder sprain/strain, which alone are not serious injuries, objective

⁸ Although Counsel for Ms. Connelly also claims an alleged injury to Ms. Connelly's right arm, counsel fails to state which part of the right arm is being referred to. *See*, Affirmation of Christina M. Killerlane, Esq. in Opposition at paragraph 40.

medical tests of Defendants' experts show limited range of motion to Ms. Connelly's cervical spine and/or right shoulder, raising an issue of fact as to whether such loss represents a significant consequential or permanent limitation within the meaning of Insurance Law 5102(d). Therefore, Defendants' motion for summary judgment regarding Ms. Connelly's alleged cervical spine and right shoulder injuries is **denied**. See, *Rabolt v. Park*, 50 A.D.3d 995 (2d Dept. 2008) and reports of Ronald L. Mann, M.D. and Michael I. Weintraub, M.D. FACP, FAAN, FAHA as Plaintiffs' Exhibits 9-10 and Defendants' Exhibits E-F.

In the report of Dr. Mann, he opines that the ulnar nerve neuropathy is not causally related to the date of the accident and that the electrodiagnostic studies reviewed did not reveal any evidence of ulnar or median neuropathy. Dr. Mann also found that the basilar joint of the thumbs is not causally related to the subject accident as it is an arthritic condition, in both wrists due to wear and tear that started after the accident. Additionally, the report of Dr. Weintraub states his examination revealed no evidence of cubital tunnel syndrome and that the electrodiagnostic studies reviewed did not reveal any evidence of ulnar or median neuropathy. Therefore, the burden shifted to Ms. Connelly to show that the injuries in her right hand were serious injuries within the meaning of the Insurance Law through competent medical evidence. Upon review of Ms. Connelly's opposition papers, her Counsel failed to attach an expert report or proffer sufficient medical evidence to establish a causal relationship between the right hand injury and the subject accident which would rebut the showings made by Defendants. Therefore, Defendants' motion for summary judgment is **granted** to the extent that Ms. Connelly failed to demonstrate a serious injury to her right hand under either category of the Insurance Law discussed herein. See, *Georgia v. Ramautar*, 180 A.D.2d 713 (2d Dept. 1992) and *Valentin v. Pomilla*, 59 A.D.3d 184, 186 (1st Dept. 2009); see also, Affirmation of Brian P. McDonough, Esq., Affirmation of Christina M.

Killerlane, Esq. in Opposition, and reports of Ronald L. Mann, M.D. and Michael I. Weintraub, M.D. FACP, FAAN, FAHA as Plaintiffs' Exhibits 9-10 and Defendants' Exhibits E-F.

As Plaintiff's counsel filed a Note of Issue and Certificate of Readiness for Trial on November 5, 2018, this matter is scheduled for May 28, 2019 at 9:15 a.m. before the Settlement Conference Part, Courtroom 1600.

To the extent not addressed, the remaining relief is denied.

This constitutes the Decision and Order of this Court.

Dated: May 8, 2019
White Plains, New York

ENTER:



HON. JANET C. MALONE
Justice of the Supreme Court

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