

Camargo v Maitra

2007 NY Slip Op 31039(U)

May 1, 2007

Supreme Court, Queens County

Docket Number: 0004016/2005

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

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SANDRA CAMARGO,	x	Index Number <u>4016</u> 2005
Plaintiff,		Motion
- against -		Date <u>January 23,</u> 2007
ADHIRA MAITRA, et al.,		Motion
Defendants.		Cal. Number <u>6</u>
<hr/>		Motion Seq. No.: <u>3</u>
	x	

The following papers numbered 1 to 20 read on the motion of defendants Adhiraj Maitra and Anuradha Maitra (Maitra defendants) for summary judgment dismissing the claims against them on grounds that plaintiff has not suffered a "serious injury" within the meaning of Insurance Law § 5102; and on the cross motion of defendants Raymond Grullion (Grullion) and Alba Diaz (Diaz) for summary judgment in their favor on the issue of liability and on the grounds that plaintiff has not suffered a "serious injury."

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Notice of Cross Motion-Affidavits-Exhibits.....	5-8
Affirmations in Opposition-Affidavits-Exhibits...	9-16
Reply Affirmations.....	17-20

Upon the foregoing papers it is ordered that the motion is granted, and the cross motion is granted in part and denied in part as moot.

The Maitra defendants move for summary judgment dismissing plaintiff's claims against them. Plaintiff alleges that she suffered injuries when, on August 13, 2003, the car in which she was a passenger was hit by the vehicle owned and operated by the Maitra defendants. The accident occurred when the Maitra defendants were leaving a curbside parking space and their vehicle was impacted by the Grullion/Diaz vehicle. The Grullion and Diaz

defendants cross move for summary judgment in their favor in the issues of liability and on plaintiff's failure to establish a serious injury.

Plaintiff Camargo complains primarily of range of motion impairments, herniated discs, pain, and limitation of her activities.

In cases of this nature, defendants initially bear the burden of establishing that a plaintiff has not met the statutory requirements of proving a "serious injury." (Gaddy v Eyler, 79 NY2d 955 [1992].) The Maitra defendants proffer the affirmation of Alan Greenfield, M.D., who performed an MRI of plaintiff's cervical spine and determined that the disc bulges complained of by plaintiff, C4-C5 and C5-C6, were longstanding, degenerative in nature and unrelated to the accident in question. Defendants submit the MRI report of Joseph J. Gottesman, M.D., plaintiff's own doctor, who reported that, based upon his MRI, he found no significant disc bulges or herniations, and that the MRI of the lumbar spine was negative. Defendants submit the affirmations of Edward A. Torriello, M.D. and Daniel Feuer, M.D. that plaintiff's examinations were "normal" and that any injuries related to the accident were "resolved." Where a defendant has made this initial showing, the burden then shifts to the plaintiff to come forward with sufficient evidence to raise a triable issue of fact as to whether a serious injury has been suffered. (Gaddy v Eyler, supra.)

Plaintiff submits the affirmation of Serge Delaleu, M.D. who reports on various limitations in plaintiff's range of motion. However, the affirmant does not state that he performed the actual studies, some of which were performed before plaintiff came under his care. Therefore, the findings made based upon these reports lack the requisite evidentiary foundation and are inadmissible. (Webb v Johnson, 13 AD3d 54 [2004]; see Friedman v U Haul Truck Rental, 216 AD2d 266 [1995].) Nor does this doctor identify or append the reports, tests or studies relied upon by him to reach these conclusions. Most significant is the fact that Dr. Delaleu makes no mention in his affidavit of the findings of defendants' Dr. Greenfield, who found the very injuries complained of, those to the C4-C5 and C5-C6, to be degenerative and longstanding in nature.

The court finds that plaintiff's claims of serious injury do not meet the requisite standard of proof insofar as she fails to negate the existence of her pre-existing degenerative conditions as a causal factor of her alleged injuries. (Pommels v Perez, 4 NY3d 566 [2005]; Carter v Full Serv., 29 AD3d 342 [2006].) A diagnosis of bulging or herniated discs will not, in and of itself, constitute a serious injury. (Toure v Avis Rent-A-Car Sys., 98 NY2d 345 [2002].) A plaintiff must provide both objective

evidence of the limitations claimed, as well as demonstrate a causal relationship with relation to the claimed disc bulges. (Bucci v Kempinski, 273 AD2d 333 [2000]; Waaland v Weiss, 228 AD2d 435 [1996].) Nothing in plaintiff's affidavit addresses the existence of any pre-existing conditions. Consequently, the element of causation is not conclusively established. (Pommels v Perez, 4 NY3d 566 supra.)

Based upon the foregoing, the motion of the Maitra defendants for summary judgment dismissing the claims against them is granted. The cross motion of Grullion and Diaz is granted in part, inasmuch as plaintiff did not suffer a serious injury as defined by Insurance Law § 5102, and is denied in part as moot as to the question of liability insofar as the complaint is dismissed.

Dated: May 1, 2007

LAWRENCE V. CULLEN, J.S.C.