

Rivera v Hofstra Univ.
2010 NY Slip Op 32092(U)
July 22, 2010
Supreme Court, Nassau County
Docket Number: 007005/2008
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

_____ X

MIRIAM RIVERA,

Plaintiff,

Index No.: 007005/2008

Motion Sequence...02

-against

Motion Date...05/07/10

HOFSTRA UNIVERSITY and
JOHN A. HANABERRY 2ND,

Defendants.

_____ X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Response to Affirmation in Opposition.....X

Upon the foregoing papers, the Defendants' motion seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the complaint of the Plaintiff, MIRIAM RIVERA ("RIVERA") on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The Plaintiff's personal injury action arises out of a motor vehicle accident that occurred on August 27, 2007 at Mineola Boulevard, in the Village of Mineola, County of

Nassau, State of New York. At the time of the accident, the Plaintiff, RIVERA was the driver in a vehicle that was hit in the rear by a vehicle operated by the Defendant, JOHN A. HANABERRY 2ND and owned by the Defendant, HOFSTRA UNIVERSITY. The Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about April 16, 2008. Issue was joined by the service of the Defendants' Answer on or about August 21, 2008. In response to the Defendants' demand, the Plaintiff served a Verified Bill of Particulars on or about September 29, 2008.

The Plaintiff testified at her examination before trial that her vehicle was struck in the rear while it was stopped behind a bus. *See* the Examination Before Trial Transcript of RIVERA, p. 7, annexed to Defendants' Notice of Motion as Exhibit "C". The Plaintiff testified that as a result of the heavy impact, her head struck the steering wheel, her body went back and forward and her body pivoted over the door of the driver's side. *Id.* at p.7. The Plaintiff was wearing her seatbelt at the time of the accident. She further testified that she experienced immediate pain in her neck and shoulder at the accident scene. Shortly after the accident, an ambulance arrived and transported the Plaintiff to Winthrop Hospital. The Plaintiff was discharged the same day with instructions to follow-up with a physician. *Id.* at pp. 13-15. The next day, the Plaintiff was examined by a chiropractor with complaints of neck and back pain.

The Plaintiff claims that as a direct result of the subject accident, she suffered personal injuries. She contends that these personal injuries qualify as "serious injuries,"

pursuant to Article 51 of the New York State Insurance Law, which is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury. *See McKinney's Consolidated Laws of New York*, Insurance Law § 5102 (d).

The Plaintiff alleges that as a result of the accident she suffered the following injuries: (1) right paracentral herniation at C5-6; (2) disc bulge at C4-5; (3) straightening of the cervical lordosis; (4) C6-7 cervical radiculopathy; (5) cervical intervertebral disc syndrome with LHS radiculitis; (6) left forminal herniation at L4-5; (7) right forminal herniation at L3-4; (8) lumbar intervertebral disc syndrome with RHS radiculitis; (9) L5-S1 lumbar radiculopathy. *See* the Plaintiff's Bill of Particulars annexed to the Defendant's Notice of Motion as Exhibit "B".

Additionally, at the time of the accident, the Plaintiff was employed as a teacher's assistant at United Cerebral Palsy located at 380 Washington Avenue in Roosevelt, New York. The Plaintiff testified that as a result of the accident, she missed three (3) days of work. The Plaintiff further alleges that as a result of the injuries, her daily activities and

functions have been significantly altered. Specifically, the Plaintiff alleges that as a result of the accident, she is no longer able to lift objects, bend, help around her home, sit and stand for long periods of time, have a full workout session at the gym and play baseball with her son. The Plaintiff alleges that her social activities have been limited and that she suffers from many restless nights of sleep as she is awoken during the night solely because of the pain she experiences. *See* Affidavit of Plaintiff at ¶¶ 5, 6 and 8, attached to Plaintiff's Opposition as Exhibit "D". The Plaintiff further alleges that she is unable to reach for objects in a cabinet due to excruciating pain in her shoulder or reach around and comb her hair. She testified that she cut her hair because it was too long for her to comb it. *See* Plaintiff's Examination Before Trial Transcript, pp. 14-25, 41, attached to Defendant's Notice of Motion as Exhibit "C". Following the accident, the Plaintiff was put on "light duty" for approximately three (3) months wherein she did not perform heavy lifting in the form of transferring patients. The Plaintiff then requested a position as a supervisor at United Cerebral Palsy. *See* transcript of Plaintiff's Examination Before Trial at pp. 10 and 38-39, attached to Defendants' Notice of Motion as Exhibit "C".

On August 29, 2007, the Plaintiff was examined by her treating physician, Martin L. Plutno, D.C., due to severe pain on the left side of her neck and up her back. *See* Affidavit of Martin L. Plutno, D.C., sworn to March 2, 2010, annexed to Plaintiff's Opposition as Exhibit "A". The Plaintiff then began a regular course of therapy with Dr. Plutno three times a week for a period of six to seven months. Thereafter, the visits

decreased to twice a week. The treatment consisted of hot patches, adjustments on her back, massage, therapy and "needle patches". As of August 29, 2007, Dr. Plutno notes in his Affidavit in support of the Plaintiff's opposition, that her specific range of motion of the cervical spine with use of a goniometer was as follows: flexion 10 degrees/normal 45 degrees; extension 10 degrees/normal 45 degrees; left rotation 40 degrees/normal 80 degrees; right rotation 40 degrees/normal 80 degrees; left lateral flexion 15 degrees/normal 45 degrees; and right lateral flexion 20 degrees/normal 45 degrees. Dr. Plutno notes that these limitations have continued and were present as of December 1, 2007 by way of goniometer. See Affidavit of Martin L. Plutno, D.C., sworn to March 2, 2010, annexed to Plaintiff's Opposition as Exhibit "A".

Dr. Plutno further found that there was restricted range of motion of varying degrees of the lumbar spine due to numerous muscle spasms of marked intensities and produced upon palpation in those areas as well. Her specific range of motion of the lumbar spine as of August 29, 2007, with use of a goniometer, was as follows: flexion 50 degrees/normal 90 degrees; extension 10 degrees/normal 30 degrees; left rotation 10 degrees/normal 30 degrees; right rotation 20 degrees/normal 30 degrees; left lateral flexion 10 degrees/normal 30 degrees; and right lateral flexion 20 degrees/normal 30 degrees. Upon neurological examination of the Plaintiff, Dr. Plutno found that the lower extremity showed weakness in strength L4-tibialis anterior, L5 extensor hallicus longus, S1 peroneus longus and brevis as well as hyperesthesia on pin and brush exam. Dr. Plutno stated that the

following tests were elicited: Positive Kemps, Bechterew, Sitting, Bowstring, LaSegue, Sicard, Braggard & Goldwaiths. Dr. Plutno opined that these limitations continued and were present as of December 1, 2007, by way of a goniometer. These findings were again documented by an orthopedic evaluation by A. Naik, M.D. *See* Certification and Medical Report of Appasaheb Naik, M.D., dated September 17, 2007, annexed to Plaintiff's Opposition as Exhibit "C".

Dr. Plutno states that when he examined the Plaintiff again on September 19, 2009, she had the same restrictions in cervical range of motion and lumbar range of motion by way of a goniometer. Dr. Plutno indicates that these restrictions are permanent, based upon a reasonable degree of chiropractic certainty and are causally related to the motor vehicle accident of August 27, 2007 and are not degenerative in nature. Dr. Plutno further indicates that the cervical bulges and lumbar herniations were directly caused by the subject accident. *See* Affidavit of Martin L. Plutno, D.C., sworn to March 2, 2010, annexed to Plaintiff's Opposition as Exhibit "A".

The Plaintiff's diagnostic tests revealed the following: cervical spine MRI indicated straightening of the cervical lordosis with focal disc bulge at C4-5 and loss of height and signal and right paracentral herniation at C5-6. The diagnostic test of the lumbar spine revealed right foraminal herniation L3-4 and left foraminal herniation L4-5. *See* Affidavit of Martin L. Plutno, D.C., sworn to March 2, 2010, annexed to Plaintiff's Opposition as Exhibit "A".

The Plaintiff testified that she was also treated by Dr. Knight due to complaints of pain in her back and shoulder, numbness in her foot, hands, wrist and elbows. The Plaintiff was given two shots to ease the swelling, inflammation and pain. *See* Transcript of Plaintiff's Examination Before Trial, pp. 30-31, attached to Defendants' Notice of Motion as Exhibit "C".

As of September 19, 2009, the Plaintiff was released to home care and treatment. Her neck and lower back pain, related to the motor vehicle accident, had become chronic in nature with periodic exacerbations. *See* Affidavit of Martin L. Plutno, D.C., sworn to March 2, 2010, annexed to Plaintiff's Opposition as Exhibit "A".

On February 25, 2009, the Plaintiff was examined by Isaac Cohen, M.D., an orthopedic surgeon, at the request of the Defendants. Dr. Cohen found the Plaintiff's cervical and lumbar spine to be within the normal range of motion. He further found the Plaintiff to have normal range of motion of her left shoulder, elbows and right knee. Dr. Cohen concluded that the Plaintiff is able to work without restrictions and at her full capacity. *See* Affirmed Report of Isaac Cohen, M.D., dated February 25, 2009, attached to Defendants' Notice of Motion as Exhibit "D". Dr. Cohen's examination of the Plaintiff's cervical spine revealed flexion to 40 degrees (from 40-75 degrees normal); extension to 40 degrees (from 40-75 degrees normal); right and left lateral bending to 40 degrees (46 +/- 6.5 degrees normal) and right and left rotation to 75 degrees (78 +/- degrees normal).

Dr. Cohen's examination of the Plaintiff's shoulder revealed forward elevation to 160 degrees (167 +/- 4.7 degrees normal); backward elevation to 60 degrees (62 +/- 9.5 degrees normal); internal rotation to 65 degrees (69 +/- 4.6 degrees normal); external rotation to 95 degrees (104 +/- 8.5 degrees normal), abduction to 180 degrees (184 +/- 7 degrees normal); and adduction to 30 degrees (30 degrees normal). Dr. Cohen's examination of the Plaintiff's lumbar spine revealed the following: flexion to 70 degrees (66 +/- 15 degrees normal); extension to 30 degrees (33 +/- 5.5 degrees normal); right and left lateral bending to 30 degrees (29 +/- 6.6 degrees normal); and right and left rotation to 30 degrees (30 degrees normal).

On November 13, 2008, the Plaintiff's medical records were examined by Scott Coyne, M.D., a radiologist, at the request of the Defendants. Upon review of the Plaintiff's cervical spine MRI, Dr. Coyne found mild degenerative disc changes and minimal annular disc bulging on the Plaintiff's cervical spine, along with more focally advanced degenerative changes at the C5-6 level. Defendants assert in their motion for summary judgment that Dr. Coyne found the degenerative disc and facet joint changes of the cervical spine to be chronic, pre-existing and longstanding. Upon review of the Plaintiff's lumbosacral spine MRI, Dr. Coyne found no evidence of trauma, no evidence of disc herniations and the minimal annular disc bulging to be developmentally normal. In sum, Dr. Coyne concluded that there was no evidence of any osseous or soft tissue abnormality or other trauma causally related to the August 27, 2007 accident.

The Defendants allege that the Plaintiff cannot sustain a claim under the 90/180 category of the no fault “serious injury” threshold. The Defendants contend that since the Plaintiff only missed three (3) days of work and has provided no evidence that she was declared medically unfit or incapable to return to work at her full capacity for the three (3) months following the accident.

The Defendants also contend that the Plaintiff’s injuries relating to her neck and back pain, due to herniations and bulging discs alone, do not establish that the Plaintiff has met the serious injury threshold. The Defendants rely on *Descovich v. Blika*, 279 A.D.2d 499 (2d Dept. 2001) and *Pierre v. Nanton*, 279 A.D.2d 621 (2d Dept. 2001) for the proposition that the Plaintiff cannot solely rely on a treating physician’s affidavit indicating that she suffered from a herniated disc and bulging discs. Rather, the Plaintiff is still required to provide objective evidence of the extent or degree of physical limitations resulting from such injuries and their duration. *See* Defendants Affirmation in Support, ¶ 20.

In opposition to the Defendant’s motion, the Plaintiff states that Dr. Cohen’s findings as to the “normal” ranges of motion span, in some cases, thirty-five degrees, i.e. normal cervical flexion and extension 40-75 degrees. The Plaintiff’s treating Chiropractor, Dr. Plutno, noted in his report that the “normal” ranges of motion for cervical flexion and extension were 45 degrees. Further, the Plaintiff points out that Dr. Cohen opined that the “normal” lumbar flexion was 66 +/- 15 degrees while Dr. Plutno opined that “normal” lumbar flexion was 90 degrees. The Plaintiff contends that where experts disagree on a

normal range of motion, there is a question of fact that must be submitted to the trier of fact.

The Plaintiff further asserts that Dr. Coyne's report reveals additional questions of fact regarding the seriousness of the Plaintiff's injuries. In that regard, Dr. Coyne acknowledges that there is a disc protrusion at C5-6 and noted that the most probable cause is a degenerative disc process. In contrast, Dr. Plutno opined that these injuries were causally related to the accident of August 27, 2007 and were not degenerative. The Plaintiff asserts that a trier of fact could reasonably conclude that the protrusion is the result of the accident rather than degeneration.

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102 (d) *Gaddy v. Eyster*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence, in admissible form, to raise an issue of fact as to the existence of a "serious injury". *Licari v. Elliot*, 57 N.Y.2d 230 (1982). In order for the Plaintiff to satisfy the statutory serious injury threshold, the legislature requires objective proof of a Plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a Plaintiff's proof of injury must be supported by objective medical evidence...paired with the doctor's observations during the physical examination of the Plaintiff.

Here, although the Defendants have established a prima facie case that the Plaintiff did not sustain a “serious injury”, the Plaintiff has come forth with sufficient evidence, in admissible form, to raise an issue of fact as to the existence of a “serious injury”. The findings of Dr. Plutno are supported by objective medical evidence establishing the extent or degree of the Plaintiff’s physical limitations resulting from the injuries related to the accident of August 27, 2007. Dr. Plutno concluded that the Plaintiff’s injuries, including the herniations and bulges, were a result of the accident on August 27, 2007. As of Dr. Plutno’s re-evaluation of the Plaintiff on September 19, 2009, he found that the Plaintiff had a permanent disability in her neck/lower back.

In the Defendants’ Reply to the Plaintiff’s opposition, the Defendants’ did not contest the Plaintiff’s argument that a question of fact exists as to the causal relationship between the herniations and disc bulges and the accident of August 27, 2007. In light of the experts’ difference of opinion as to whether the Plaintiff’s injuries were causally related to the subject accident or are degenerative in nature, the Court finds that a question of fact exists. Additionally, the Court finds that the Plaintiff has raised material issues of fact with respect to the discrepancies in the parties’ respective expert reports regarding what the “normal” range of motion is for the cervical and lumbar spine.

The Defendants’ contention that the MRI reports submitted by the Plaintiff are not sworn to and should therefore not be considered by the Court is without merit. Attached to the Plaintiff’s Affirmation in Opposition as Exhibit “B” is a physician’s affirmation

attesting to the accuracy of the information inscribed on the MRI's including all the diagnosis, impressions and findings contained therein.

Based on the foregoing, the Court finds that questions of fact exist as to whether the Plaintiff sustained a "serious injury" within the categories of a permanent loss of use of a body organ, member, function or system, or a significant limitation of use of a body organ or member. *Gaddy v. Euler*, 79 N.Y.2d 955 (1992) *supra*.

Upon examining the medical evidence offered by the Plaintiff on this threshold motion, the Court is ensured that the evidence is objective in nature and that the Plaintiff's subjective claims as to pain or limitations of motion are sustained by verified objective medical findings. *Grossman v. Wright*, 268 A.D.2d 79 (2nd Dept 2000).

Further, in addition to providing medical proof contemporaneous with the subject accident, the Plaintiff also provided competent medical evidence containing verified objective findings based upon a recent examination wherein Dr. Plutno provided an opinion as to the significance of the injury. *Kauderer v. Penta*, 261 A.D.2d 365 (2nd Dept. 1999); *Constantinou v. Surinder*, 8 A.D.3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 323 (2nd Dept. 2005).

To prevail under the "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” category, a Plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102 [d]) “which would have caused the alleged limitations on the Plaintiff’s daily activities”. *Monk v. Dupius*, 287 A.D.2d 187, 191 (3rd Dept. 2001). A curtailment of the Plaintiff’s usual activities must be “to a great extent rather than some slight curtailment”. *Licari v. Elliot, supra* at 236.

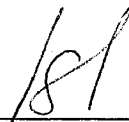
The Plaintiff contends that she was unable to return to work at United Cerebral Palsy for three (3) days and was on light duty for an additional three (3) months following the subject accident and is still unable to participate in leisure sports and activities and other household chores.

With regard to this category, the Plaintiff must present objective medical evidence of a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002). In this case, the Plaintiff submitted medical reports and an affidavit of Dr. Plutno, which confirm her allegations.

Accordingly, based on the foregoing, the motion by the Defendants seeking summary judgment, dismissing the claims against them, must be **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
July 22, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED

JUL 27 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**