

Fernandez v Duran

2011 NY Slip Op 32836(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 106167/2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice

PART 22

REINA FERNANDEZ

INDEX NO. 106167/2010

vs.

MOTION DATE _____

SALVADOR DURAN and MAGALY DURAN

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits— Exhibits

Papers Numbered
FILED

Answering Affidavits — Exhibits _____

2
OCT 12 2011
3

Replying Affidavits, Cross Motion _____

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Salvador and Magaly Duran (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiff Reina Fernandez's ("Plaintiff") complaint on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including right knee posteromedial meniscal tear with surgery, C6-C7 and L4-L5 disc bulges, right ankle ligament tears, partial tear of right wrist ligament, partial tear of right hand tendon, right shoulder partial rotator cuff tear and lumbar radiculopathy. Under New York Insurance Law §5102(d), a "serious injury" is defined 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

In support of this motion, Defendants submit Plaintiff's treating records from Dr. Brian Haftel. Dr. Haftel treated Plaintiff on or around October 24, 2007 for pain management regarding work-related injuries. He states that Plaintiff was involved in a work-related accident on June 6, 2005 and developed severe neck and lower back pain. Dr. Haftel reports that Plaintiff goes to physical therapy once a week. Radiologic evaluation and EMGs were performed on December 16, 2005 and found L5/S1 radiculopathy. An MRI of the lumbar spine found mild degenerative changes at L3-L4 and an x-ray of the lumbar spine revealed degenerative disc disease at L3-L4. An x-ray of the cervical spine revealed mild discogenic disease from C4 through C7 and an x-ray of the left shoulder showed mild degenerative changes of the acromioclavicular joint. Upon examination, Dr. Haftel found limitations in Plaintiff's lumbar and cervical spine range of motion and his impressions were lumbar and cervical spine sprains and lumbar radiculopathy. On December 5, 2007, Dr. Haftel gave the Plaintiff six trigger point injections.

Defendants also submit the expert report of Dr. Douglas Unis. Dr. Unis examined Plaintiff on November 23, 2010. He conducted range of motion using a goniometer and found no limitations in Plaintiff's motion for her cervical spine, right shoulder, right wrist, right knee, right ankle, lumbar spine and right hip. Dr. Unis concluded that Plaintiff sustained contusions of the right wrist, right knee, right ankle and right hip as well as cervical and lumbar sprains/strains. He notes that she is post-surgery for her right knee and has mild residuals related to the surgery, but no functional limitation. On February 15, 2011, Dr. Unis amends his report after reviewing additional records. He states that Plaintiff underwent arthroscopy of the left wrist with debridement of a partially torn scapholunate ligament and triangular fibrocartilage complex on April 14, 2008. Dr. Unis also notes that on April 6, 2009, Plaintiff underwent a release of the a-1 pulley for a trigger finger of her left middle finger. Dr. Unis concludes that his opinions in his November 23, 2010 report remain the same and that any evidence of right shoulder impingement that he found was unrelated to the accident and was degenerative in nature.

Additionally, Defendants submit Plaintiff's deposition testimony. Plaintiff stated that she was involved in a work-related accident on September 29, 2004, wherein she was injured while pushing a patient in a wheelchair. As a result of this accident, Plaintiff stated that she had problems with her right knee, right ankle, left hand, right hip and lower back. Due to this accident, Plaintiff filed for workers' compensation and disability. Plaintiff also testified that she was injured on June 6, 2005 while assisting a patient use the bathroom at work. She stated that as a result of this incident, she hurt her neck and back. Plaintiff's injuries were such that she was still treating when she was involved in November 23, 2009 motor vehicle accident that is the basis for this action. Plaintiff identified the areas of injury she was being treated for prior to this accident as her neck, back, left hand, left wrist and whole right side including her shoulder. Defendants further submit October 28, 2009 worker's compensation records from Dr. Orsuville Cabatu that indicate that Plaintiff was considered completely disabled (a month prior to the present accident) due to injuries sustained in a April 20, 2005 accident.

Defendants have met their *prima facie* burden and further have shown that Plaintiff's injuries as to her back, right knee, neck, right ankle and right shoulder may be the result of preexisting injuries (*see Arroyo v Morris*, 85 A.D.3d 679, 2011 WL 2567961 [1st Dept 2011]; *Style v Joseph*, 2006 NY Slip Op 6129).

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the

injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

In opposition to Defendant's motion, Plaintiff submits the expert reports of Dr. Eric Jacobson, Dr. Orsuville Cabatu and Dr. Thomas Kolb. Additionally, Plaintiff submits the certified medical records of Dr. Eric Jacobson and Dr. David Capiola, of Tri-State PMR, and the uncertified records from the emergency department at New York Presbyterian Hospital. It is well settled that a plaintiff may not rely upon unsworn medical evidence to defeat a defendant's summary judgment motion as such, the New York Presbyterian Hospital records will not be considered (*see Migliaccio v Miruku*, 56 AD3d 393, 394 [1st Dept 2008]; *DeJesus v Paulino*, 61 AD3d 605, 607 [1st Dept 2009] [unsworn emergency room records and other reports had no probative value]).

Dr. Jacobson first treated Plaintiff on November 25, 2009. At that time, he conducted range of motion using a goniometer and found limitations in motion for Plaintiff's right shoulder, right knee, lumbar spine and right ankle. He referred Plaintiff for physical therapy and MRIs of the right wrist and hand, right shoulder, right knee, cervical and lumbar spine and right ankle. Dr. Jacobson reports that the right ankle MRI revealed a tear of the anterior and posterior talo-fibular ligaments and the calcaneo-fibular ligament. The right wrist MRI film showed a partial tear of the scapho-lunate ligament and flexor tenosynovitis. Dr. Jacobson reported that the right hand MRI revealed a partial tear of the flexor tendon at the second metacarpophalangeal joint. He stated that the right shoulder MRI showed a partial rotator cuff tear and that the right knee MRI revealed a tear of the posterior horn of the medial meniscus, partial tear of anterior cruciate ligament, medial collateral ligament and lateral collateral ligament. Dr. Jacobson reported that the cervical spine MRI revealed a C6-C7 disc bulge and the lumbar spine MRI showed a L4-L5 disc bulge. Dr. Jacobson stated that Plaintiff underwent right knee surgery on March 23, 2010. He also noted that she was treated with trigger finger injections and was given an Achilles tendon sheath injection into her right ankle when she did not respond to physical therapy. Dr. Jacobson also conducted EMG/NCS studies on May 15, 2010 and found right C5, C6 and C7 radiculopathy. He also conducted EMG/NCV studies on June 10, 2010, which revealed lumbar radiculopathy. Dr. Jacobson most recently examined Plaintiff on May 11, 2011. At that time, he conducted range of motion testing and found limitations in Plaintiff's right shoulder, right knee, lumbar spine, cervical spine, and right ankle.

Dr. Jacobson addressed Plaintiff's prior work related accidents of April 20, 2005 and June 6, 2005. He reported that the April 2005 incident involved Plaintiff's left wrist and hand, while the June 2005 involved back and neck pain. Dr. Jacobson stated that Plaintiff's neck pain resolved after May 2006 and that lumbar MRIs taken in November 2005 revealed mild degenerative changes at the L3-L4 levels with no evidence of disc herniation. Further, the April 2006 cervical MRI films showed mild spondylosis. Dr. Jacobson stressed that these results were vastly different than the findings in the lumbar and cervical MRIs taken in February 2010. He

concluded that the November 2009 accident caused new injuries to Plaintiff's lumbar and cervical spine as well as injuries to her right shoulder, right wrist, right knee and right ankle.

Moreover, Dr. Jacobson directly responded to Dr. Unis's report and reported that photographs from Plaintiff's right knee surgery on March 23, 2010 showed traumatic injuries, not degenerative fraying. Dr. Jacobson also disagree with Dr. Unis's findings regarding Plaintiff's right shoulder, stating that these injuries were caused by the accident as opposed to being degenerative. Dr. Jacobson also states that Plaintiff's injuries to her right shoulder, right knee and right ankle were caused by the accident and are unrelated to any degeneration.

Dr. Cabatu examined Plaintiff after her April 2005 work related injury. He stated that based on his examination and x-rays, Plaintiff was diagnosed with a left wrist sprain/strain, left 1st carpometacarpal joint strain/sprain and left carpal tunnel syndrome. On February 2, 2007, Plaintiff underwent left wrist Carpal Tunnel release surgery. Dr. Cabatu further treated Plaintiff after her second work related injury in June 2005. His diagnosis was left sided back pain with no radiation and negative straight leg raising. Dr. Cabatu further reported that the June 2005 incident resulted in a back sprain with a period of left sided neck pain, which all resolved.

Dr. Kolb prepared Plaintiff's MRI reports of her right knee, cervical and lumbar spine, right wrist and right hand. He reported that Plaintiff had sustained a L4-L5 disc bulge, C6-C7 disc bulge, right knee tear of the posterior horn of the medial meniscus, partial tear of the anterior cruciate and lateral collateral ligaments, right shoulder partial rotator cuff tear, right hand partial tear of the flexor tendon at the second metacarpophalangeal joint and right wrist partial tear of the scapho-lunate ligament. Dr. Kolb further stated that these injuries were a result of the 2009 motor vehicle accident and were not degenerative or preexisting. Dr. Lichy prepared the medical report interpreting Plaintiff's right ankle MRI films. He stated that Plaintiff sustained a right ankle tear of the anterior and posterior talo-fibular ligaments and calcaneo-fibular ligaments as a result of the 2009 motor vehicle accident.

To qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyer*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). Evidence of range of motion limitations, especially when coupled with positive MRI and electromyogram test results, is sufficient to defeat summary judgment (*see Colon v Bernabe*, 65 AD3d 969, 886 NYS2d 376 [1st Dept 2009]; *Wadford v Gruz*, 35 AD3d 258, 826 NYS2d 57 [2006]; *Brown v Achy*, 9 AD3d 30, 776 NYS2d 56 [2004]). Given the medical reports based on physical examinations and Plaintiff's MRI results, Plaintiff has successfully raised a question of fact as to whether she has sustained a serious injury.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed for three days following the accident then for two weeks following right knee surgery on March 23, 2010. The Verified Bill of Particulars further states that Plaintiff has been confined to home from the date of the accident to the present. Defendants argue that Plaintiff's prior disability claims preclude her claims under the 90/180 category. However, Dr. Jacobson's report states that as a result of the 2009 motor vehicle accident, Plaintiff's activities were significantly restricted including the fact that she has a limp and has to use a cane to

ambulate, that she cannot lift anything greater than 15 pounds, that she cannot walk, rub, exercise, visit her family or take her son to school. This evidence is sufficient to raise a question of fact as to whether Plaintiff has sustained a serious injury under the 90/180 category.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation, significant limitation and 90/180 categories of Insurance Law §5102(d); and it is further

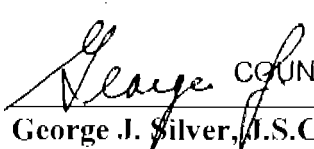
ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the Court.

FILED

OCT 12 2011

Dated: OCT 07 2011
New York, New York

 NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.

GEORGE J. SILVER