

Arenas v Guaman

2011 NY Slip Op 34051(U)

June 13, 2011

Sup Ct, Bronx County

Docket Number: 306550/09

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

JUN 16 2011

IA-6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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ALEJANDRA ARENAS,

Plaintiff(s),

INDEX No. : 306550/09

- against-

FELIX GUAMAN and JADE CAR CORP.

Defendant(s)

Present:

HON. STANLEY GREEN

J.S.C.

----- X
The following papers numbered 1 to 4 read on this motion
No. on the Calendar of February 22, 2011

	<u>PAPERS NUMBERED</u>
Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	3
Replying Affidavit and Exhibits.....	4
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	2

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: June 13, 2011


STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

-----X
ALEJANDRA ARENAS,

Plaintiff(s),

INDEX No. : 306550/09

- against-

FELIX GUAMAN and JADE CAR CORP.

Defendant(s).

DECISION

-----X
HON. STANLEY GREEN:

The motion by defendants for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is denied.

Plaintiff commenced this action to recover damages for personal injuries she sustained on December 11, 2008, when she was struck by defendants' motor vehicle as she was crossing at the intersection of Broadway and West 140th Street in New York City.

Plaintiff alleges that as a result of the accident she sustained a right shoulder partial thickness rotator cuff tear and a partial tear of the supraspinatus tendon of her right shoulder, which required arthroscopic surgery. She also alleges that she sustained a cervical sprain and strain, a central subligamentous disc herniation at L4-5 and a contusion to her right knee.

Defendants seek dismissal of the complaint on the ground that plaintiff's injuries are not serious injuries within the meaning of Insurance Law §5102(d). In support of the motion, defendants submit: (1) the affirmed report of Dr. Ross, a radiologist who reviewed the MRI's of plaintiff's right shoulder, cervical spine and lumbar spine and opines that they revealed only

degenerative and developmental changes that were not caused by the accident; (2) the affirmed report of Dr. Montalbano, who performed an orthopedic examination of plaintiff on July 16, 2010 and opines, based on his examination, his review of plaintiff's medical records and the radiology reviews of Dr. Ross, that plaintiff did not sustain any permanent injury or disability to her cervical spine, lumbar spine or right shoulder as a result of the December 11, 2008 accident; (3) copies of plaintiff's medical records, which show that she did not complain of pain in her right shoulder at the time she was treated in St. Luke's Hospital emergency room; and (4) a portion of plaintiff's deposition testimony in which she testified that she was confined to bed for a month or two after the accident.

Plaintiff contends that defendants have failed to establish that she did not sustain a medically determined injury of a non-permanent nature that prevented her from performing substantially all of her usual daily activities for not less than 90 days out of the 180 days immediately following the accident and that her affidavit and the affirmations of her treating physicians raise triable issues of fact not only as to whether she sustained a serious injury under the 90/180 days category, but also as to whether she sustained a permanent consequential limitation or a significant limitation of use of her right shoulder, cervical spine and lumbar spine as a result of the subject accident.

In her affidavit, plaintiff states that defendant's vehicle struck her on her right side with a very hard impact and caused her to lose consciousness, that she was taken by ambulance to St. Luke's Hospital emergency room and that she complained to the emergency room doctor about the severe pain she experienced in her right shoulder, right leg, neck and back. She was treated and discharged with pain medication and instructions to see her private physician.

Plaintiff states that after the accident she had severe pain in her right shoulder, back and neck on a daily basis. She claims that she was confined to bed for approximately one month after the accident and to her home for approximately eighteen months and that she was unable to perform her daily activities of cleaning, cooking and taking care of her child.

On December 19, 2008, plaintiff sought treatment at Urgent Medical Care, where she came under the care of Dr. Neuman. Dr. Neuman's affirmation and report show that at the time he examined plaintiff, she complained of decreased range of motion of her cervical spine, lumbar spine and right shoulder, which he quantified and compared to normal. He referred plaintiff for physical therapy and MRI testing of her right shoulder, cervical and lumbosacral spine.

Dr. Doshi's affirmation and reports show that the MRI of plaintiff's lumbar spine revealed a disc herniation at L4-5, the MRI of plaintiff's right shoulder revealed a possible small supraspinatus tendon tear and the MRI of plaintiff's cervical spine revealed straightening of the cervical spine lordosis suggesting muscle spasm, but no disc bulge or herniation.

Dr. Colden's affirmation indicates that he first examined plaintiff on March 26, 2009. He noted that plaintiff had restricted range of motion of the cervical spine, lumbar spine and right shoulder, which he quantified and compared to normal. His diagnosis was traumatic cervical syndrome, traumatic low back syndrome, traumatic right shoulder derangement, cervical spine radiculopathy, lumbar spine radiculopathy, muscle weakness and post concussion syndrome. His reports indicate that there is a causal relationship between these findings and the December 11, 2008 accident. He prescribed a continued course of physical therapy.

Dr. Colden's Functional Capacity Evaluation report dated March 26, 2009, indicates that

plaintiff was unable to perform various activities of daily living and that she had a "marked partial" to "total disability."

The affirmation and reports of Dr. Liebowitz show that he, Dr. Scilaris and Dr. Capiola maintain an office to practice at 39 East 69th Street in New York City.

On May 7, 2009, plaintiff sought treatment for her right shoulder injury at Dr. Liebowitz' office. At that time, plaintiff had restricted range of motion of her right shoulder, which Dr. Liebowitz quantified and compared to normal. Dr. Liebowitz administered a Cortisone injection and advised plaintiff to follow-up in one month.

On June 4, 2009, plaintiff returned to Dr. Liebowitz' office, complaining of persistent pain in her right shoulder. His examination revealed weakness with testing of the rotator cuff and positive findings on the Neer's and Job's tests. His impression was "partial rotator cuff tear of the right shoulder" and his recommendation was that plaintiff undergo right shoulder arthroscopy.

On July 14, 2009, Dr. Scilaris performed a surgical right shoulder arthroscopy. His diagnosis was right shoulder partial thickness rotator cuff tear, supraspinatus tendon and impingement and bursitis. In his affirmation, Dr. Scilaris opines, inter alia, that "the injuries sustained by Alejandra Arenas, together with the surgical procedures required, as outlined in operative reports, were traumatically induced, a direct result of the December 11, 2008 motor vehicle accident, and are permanent in nature."

The affirmation and report of Dr. Capiola show that he examined plaintiff on November 2, 2010. At that time, she complained of significant pain in her right shoulder. Dr. Capiola noted that plaintiff was undergoing physical therapy stretching strengthening exercises, but she

continued to have significant tenderness to palpation in the right AC joint and there was mildly positive Hawkins and Neer signed. He opined that plaintiff should undergo right shoulder revision arthroscopy with an AC joint resection. He also opined that the right shoulder injuries and surgery were traumatic in nature and a direct result of the December 11, 2008 accident.

On December 16, 2010, plaintiff was examined by Dr. Post. His report show that plaintiff complained of persistent pain in her right shoulder, low back and neck and his examination revealed restrictions in the range of motion of her cervical spine, lumbar spine and right shoulder, which he quantified and compared to normal.

Dr. Post opines are a result of the accident, plaintiff sustained: (1) cervical derangement with root irritation right with permanent restriction of motion; (2) partial tear and impingement right shoulder which necessitated operative intervention and has left her with permanent weakness and restriction of motion; and (3) lumbar and lumbosacral derangement with bilateral root irritation with permanent restriction of motion, all of which he opines are causally related to the December 11, 2008 accident.

Despite plaintiff's contention to the contrary, the evidence presented by defendants is sufficient to establish, prima facie, that plaintiff did not sustain a permanent consequential limitation of use or a significant limitation of use of her cervical spine, lumbar spine or right shoulder as a result of the accident (Franchini v. Palmieri, 1 NY3d 536). Defendants met their burden as to plaintiff's 90/180 day claim by offering the affirmed reports of Dr. Ross, who examined the MRI images of plaintiff's alleged injuries taken shortly after the accident and concluded that the injuries were only pre-existing developmental and degenerative changes not caused by the accident (Pommells v. Perez, 4 NY3d 566; Reyes v. Esquilin, 54 AD3d

615Townes v. Harlem Group, 82 AD3d 583). Thus, the burden shifted to plaintiff to submit competent evidence sufficient to raise a material issue of fact (Zuckerman v. City of New York,

Plaintiff has met this burden. The affirmations and reports of Dr. Neuman, Dr. Colden, Dr. Liebowitz, Dr. Capiola, and Dr. Post show that plaintiff had restrictions in the range of motion of her cervical spine, lumbar spine and right shoulder shortly after the accident, that she underwent physical therapy for all of these injuries and arthroscopic surgery to her right shoulder and at the time she was examined by Dr. Post, on December 16, 2010, she continued to have pain and restriction of motion of her right shoulder, cervical spine and lumbar spine, which these physicians opine are causally related to the accident of December 11, 2008. This evidence, coupled with Dr. Colden's Functional Capacity Evaluations indicating that plaintiff was unable to perform numerous activities of daily living (which is consistent with plaintiff's claims in her affidavit), is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury under the permanent consequential limitation, significant limitation and 90/180 days categories of Insurance Law §5102(d).

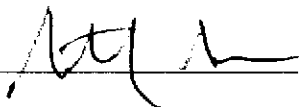
It is noted that defendants contend that plaintiff's evidence is insufficient because her doctors failed to address defendants' experts' opinion that plaintiff had pre-existing developmental and degenerative conditions and failed to causally relate her surgery to the subject accident. However, Dr. Colden's reports and the affirmations of Dr. Liebowitz, Dr. Scilaris and Dr. Capiola, which state that plaintiff's right shoulder injuries, including the surgical intervention of July 2009, are traumatic in nature and a direct result of the December 11, 2008 accident, are based upon treatment and surgery performed on plaintiff's right shoulder and are therefore sufficient to raise a material issue of fact as to whether plaintiff sustained a serious injury to her

right shoulder as a result of the December 11, 2008 accident (Linton v. Nawaz, 62 AD3d 434).

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: June 13, 2011

A handwritten signature in black ink, appearing to read 'Stanley Green', is written over a horizontal line.

STANLEY GREEN, J.S.C.