

Cartagena v Scarsdale Trip Serv.

2011 NY Slip Op 34134(U)

June 17, 2011

Sup Ct, Bronx County

Docket Number: 0300117/2009

Judge: Diane A. Lebedeff

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This opinion is uncorrected and not selected for official publication.

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PART 17

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

CARTAGENA, VENTURA

Index No. 0300117/2009

-against-

Hon. DIANE A. LEBEDEFF

SCARSDALE TRIP SERVICE

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **January 28 2011** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

In this case involving the claim that plaintiff was injured and sustained a "serious injury" following a motor vehicle accident on September 22, 2008, in which the car plaintiff was driving was hit in the rear, defendants move for summary judgment dismissing the complaint, asserting that plaintiffs failed to sustain a "serious injury" pursuant to the threshold requirements of Insurance Law § 5102 (d).

Pursuant to Insurance Law § 5102 (d), a "serious injury" is defined, in relevant part, as follows:

"a personal injury which results in ... 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

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: ____ / ____ / ____

Hon. _____
DIANE A. LEBEDEFF, J.S.C.

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.”

“Because summary judgment is a drastic measure that deprives a party of its day in court, it may be granted only if no genuine triable issue of fact is presented” (*F. Garofalo Elec. Co., Inc. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff's Cervical and Lumbar Spine

Defendants submit affirmations from examining physicians in support of their summary judgment requests as to orthopedic injuries. When such evidence is sufficient to sustain defendants' initial burden of establishing that the injured plaintiff had not suffered a serious injury, the burden shifts to plaintiff to demonstrate a triable issue of fact by coming forward with evidence in admissible form to overcome defendants' submissions (*see Gaddy v Eyler*, 79 NY2d 955 [1992]).

Starting with radiological reports, defendants submit an affirmation that relates only to the cervical spine. The affirmations of radiologist David A. Fisher, M.D., reports – based upon a review of the x-ray and MRI of the cervical spine, both done within several weeks of the accident – a finding of degeneration at 3 disc spaces, with the MRI reported to show no disc herniation (motion, exhibits E and F). However, the plaintiff's radiologist diagnosis of “posterior disc bulge impinging upon the anterior spinal canal at C3-4, C4-5, and C5-6” (opp., exhibit C, second aff.) is not refuted; further, defendant's expert identified only one of these three disc spaces cited by plaintiff as involving degeneration (C5-6) and there is no other material submitted indicating that all symptoms could be accounted for by reference to degeneration at this C5-6 disc space.

As to actual physical examinations, orthopedic surgeon Michael J. Katz, M.D., examined plaintiff on July 14, 2010 (motion, exhibit D). Essentially, he found normal ranges of motion in both areas of the spine, as well as that both right and left sides showed no atrophy and had equal power prince and grip strengths; after a review of plaintiff's medical records and his examination results, his affirmation opined that plaintiff had resolved cervical and lumbar strains with radiculitis. In addition, an affirmation from neurologist Michal J. Carciente, M.D., reported that his examination conducted on July 7, 2010, found plaintiff to be symptom free (motion, exhibit G).

Countering the two medical assessments tendered by defendants, treating physician Bozena Augustyniak, M.D., reports finding limitations on plaintiff's range of motion and related clinical findings both shortly after the accident and on February 1, 2011, as well as reporting intermediate treatment dates. Accordingly, on the general medicine and orthopedic issues, questions of fact are present.

Additionally, plaintiff submits an affidavit detailing the impact of the accident, her course of treatment, and that any cessation of treatment resulted from the exhaustion of no-fault benefits (opp., exhibit A). On the issue of plaintiff's termination of treatment, plaintiffs acknowledge she must offer some reasonable explanation for having done so in order to sustain the "serious injury" threshold requirements of Insurance law (*Pommells v Perez*, 4 NY3d 566 [2005]), and address that point both by her own affidavit and by the statements in the health care provider's affidavit.

In light of these voluminous medical material submitted and the clear conflicts between the material and opinions tendered by the opposition, it cannot be said, as a matter of law, that plaintiff failed to meet the threshold (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). As to any claim of a pre-existing condition, given that the motion papers do not present any specific argument in relation thereto nor even identify the document or present a substantive discussion in relation thereto, this argument is found wanting and insufficient to support relief.

Defendants, in reply, submit further medical reports and affirmations, in support of their argument that plaintiff suffered from a pre-existing condition. However, given defendants failure to submit this evidence in their original moving papers, it will not be considered because it is not properly before the Court (*see Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

90/180 Category

Defendant also submits a copy of plaintiff's deposition, in which he listed a number of activities he states he pursues in a more limited fashion after the accident – primarily activities outside the house, such as less walking, less grocery shopping, less driving, as well as a reduced ability to work on his car (exhibit H, pp. 95-102). Defendants argue that their submission of plaintiff's deposition testimony and the affirmed reports of their examining physicians demonstrate their entitlement to summary judgment on the grounds that plaintiff did not suffer a "serious injury" within the meaning of the category of 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" (Insurance Law § 5102 [d]).

In relation to this "serious injury" test, courts have held that a defendant can "establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period" (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]; *see also Picott v Lewis*, 26 AD3d

319, [2d Dept 2006], “defendants’ submissions of the deposition testimony of [plaintiff] and the affirmed medical report of their examining physician were sufficient to make a prima facie showing that [plaintiff] did not sustain a serious injury within the meaning of Insurance Law § 5102[d]”).

The material presented demonstrates that plaintiff was not precluded from performing substantially all his individual daily activities for 90 of the first 180 days post-accident (*Santiago v Bhuiyan*, 71 AD3d 485, 486 [1st Dept 2010], if a plaintiff does not “offer the requisite competent medical proof to substantiate [her] claims,” plaintiff “fail[s] to raise triable issues of fact as to whether [she was] incapacitated from performing substantially all of [her] usual and customary activities for at least 90 of the first 180 days after the accident”). Indeed, deposition testimony reveals that many such activities could be pursued, thereby refuted by this branch of a “serious injury” claim (*Whisenant v Farazi*, 67 AD3d 535, 535 [1st Dept 2009]).

Accordingly, the 90/180 day claim is severed and dismissed as to both plaintiffs.

* * *

Based upon the foregoing, the motion and is denied, except to the extent indicated above.

This decision constitutes the order of the court.

Dated: June 17, 2011


Hon. Diane A. Lebedeff, JSC