

Saadi v Echevarria
2012 NY Slip Op 31873(U)
July 10, 2012
Sup Ct, Suffolk County
Docket Number: 09-20365
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-30-11
ADJ. DATE 12-12-11
Mot. Seq. # 001 - MG;CASEDISP

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NAHEED SAADI,	A. ALI YUSAF, ESQ.
	114-08 101st Avenue
	Richmond Hill, New York 11419
Plaintiff,	
	BAKER, MCEVOY, MORRISSEY
- against -	& MOSKOVITS, P.C.
	Attorney for Defendants
RAFAEL ECHEVARRIA and TAXI EL	330 West 34th Street, 7th Floor
UNIVERSAL INC.,	New York, New York 10001
Defendants.	
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 17 ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on June 17, 2008 when the driver’s side of her vehicle was struck by the front of a vehicle owned by defendant Taxi El Universal, Inc. and operated by defendant Rafael Echevarria. The accident occurred on East 3rd Street at or near its intersection with Drayton Avenue in the Town of Islip, Suffolk County, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including cervical spine disc bulge at C3-4 creating impingement on the neural canal; cervical spine disc herniation at C4-5 creating impingement on the neural canal; C5-6 narrowing of the cervical spine; left shoulder rotator cuff tear, impingement syndrome of the left shoulder; and thoracic spine central herniation at T6-7 creating impingement on the neural canal. On the date of the accident, plaintiff was treated at and then released from the emergency room of Southside Hospital. Plaintiff is also seeking to recover damages for economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

In her bill of particulars, plaintiff alleges that as a result of said accident she sustained injuries under the following categories of serious injury pursuant to Insurance Law § 5102 (d): permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member;

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significant limitation of use of a body function or system; or a medically determined non-permanent injury or impairment that prevents the performance of substantially all of the material acts of plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendants submit, among other things, the pleadings, plaintiff's bill of particulars, plaintiff's certified deposition transcript, and the affirmed reports of defendants' examining orthopedic surgeon, examining neurologist, and examining radiologist.

Insurance Law § 5102 (d) defines "serious injury" 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" (see Insurance Law § 5102 [d]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Trans. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff's deposition reveals that following the subject accident, she complained to the police at the scene that her entire left side, her left arm, shoulder and leg, were numb. She began treatment with her treating physician a week-and-a-half after the accident. Her treating physician indicated that plaintiff had no problems with her left shoulder. Plaintiff stopped treatment of her neck and mid-back in December 2008 when her treating physician told her that she could continue therapy but that she was not going to get any better. Plaintiff

stated that she missed only one week of work as a telemarketer following the accident and that her work, hours and pay have not changed. Plaintiff explained that currently sitting for long periods causes her pain in her entire body.

In his affirmed report dated July 29, 2010, defendants' examining orthopedic surgeon, Salvatore Corso, M.D. (Dr. Corso), indicated that he performed range of motion testing of plaintiff's cervical spine and thoracolumbar spine using a goniometer. With respect to plaintiff's cervical spine, Dr. Corso's findings were flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right and left lateral bending to 45 degrees (45 normal), and right and left rotation to 80 degrees (80 degrees normal). He noted right paracervical tenderness and spasm¹. In addition, Dr. Corso indicated that Soto Hall, Valsalva's, Compression and Spurling tests were all negative. Regarding plaintiff's thoracolumbar spine, he noted maintenance of the normal lumbar lordosis and provided range of motion testing results of flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right and left lateral bending to 45 degrees (45 degrees normal), and right and left rotation to 30 degrees (30 degrees normal). He indicated that straight leg raising was negative and performed to 90 degrees bilaterally in the sitting position. Dr. Corso also noted right sided paralumbar tenderness and spasm, but no spasm on palpation. He further indicated that Romberg's, Laseque and Fabere tests were negative. Dr. Corso diagnosed cervical sprain and lumbar sprain, both resolved. He concluded that it was a normal orthopedic examination, that plaintiff had no orthopedic disability, and that plaintiff could continue her current occupation without restrictions and perform her normal activities of daily living without restrictions. Dr. Corso opined with a reasonable degree of medical certainty that there was no permanency with regard to the examination. In an affirmed addendum to said report, Dr. Corso added that due to an error in transcription, his impression and conclusion reflected the lumbar spine and that his impression should have read thoracolumbar strain, resolved. He also added range of motion testing results for plaintiff's left shoulder of forward flexion to 180 degrees (180 degrees normal), backward elevation to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), external rotation to 90 degrees (90 degrees normal), and internal rotation to 80 degrees (80 degrees normal). According to Dr. Corso, there was negative tenderness and the Sulcus test and apprehension tests were normal, and the Hawkin's test and Neer's test were negative.

Defendants' board certified neurologist, Uriel Davis, D.O. (Dr. Davis), indicated in his affirmed report dated July 26, 2010 that he examined plaintiff on said date. He provided the results of his neurological examination indicating, among other things, that plaintiff's motor system examination revealed 5/5 muscle strength in the deltoids, triceps, biceps, forearm muscles, hand muscles, quadriceps, hamstrings and calf muscles, and that plaintiff's deep tendon reflexes were 1-2+, equal and symmetric in the upper and lower extremities. He also performed range of motion testing of plaintiff's cervical spine and lumbar spine using a goniometer and found that the results were the same as the normal measurements provided. Dr. Davis diagnosed plaintiff as "status-post anti MVA," with resolved cervical sprain and strain and resolved lumbar sprain and strain. He concluded that plaintiff had a normal neurological examination and that there was no need for any further causally related neurological treatment, including physical therapy. In addition, Dr. Davis opined that there was no accident related disability or permanency and that plaintiff could continue to work and

¹ The existence of muscle spasms without any range of motion limitations is insufficient to raise an issue of fact concerning whether plaintiff sustained a "serious injury" under Insurance Law § 5102 (d) (*compare Mahmood v Vicks*, 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; *Letts v Bleichner*, 56 AD3d 619, 868 NYS2d 92 [2d Dept 2008]).

perform her regular activities of daily living without any restrictions.

The affirmed reports from July 2008 of defendants' examining radiologist, A. Robert Tantleff, M.D. (Dr. Tantleff), indicate that he reviewed the MRI of plaintiff's cervical spine as well as the MRI of plaintiff's thoracic spine. With respect to plaintiff's cervical spine MRI, Dr. Tantleff found diffuse regional discogenic changes of the cervical spine without evidence of any significant or dominant disc bulge, protrusion or herniation. He noted that there was no evidence of acute or recent injury and no evidence of any compressive change on the cervical cord, regional or traversing elements. Dr. Tantleff's impression in conclusion was regional discogenic changes not inconsistent with plaintiff's age, unrelated to the date of the accident and of no definitive significance as presented. Regarding plaintiff's thoracic spine MRI, Dr. Tantleff indicated that the examination was normal and unremarkable with no evidence of disc bulge, protrusion or herniation. His impression was a normal and unremarkable MRI of the thoracic spine.

Here, defendants established, *prima facie*, through the affirmed reports of their expert orthopedic surgeon, neurologist, and radiologist, as well as plaintiff's deposition testimony that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Barry v Future Cab Corp.*, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]; *Noh v Duffe*, 70 AD3d 1017, 894 NYS2d 765 [2d Dept 2010], *lv denied* 14 NY3d 714, 905 NYS2d 559 [2010]). Defendants also established *prima facie* that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) inasmuch as she missed one week of work as a result of the subject accident (*see Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see, Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d) inasmuch as she suffered post-traumatic spine pathology as a result of the subject accident. Her submissions in support of her motion include MRI reports of her cervical spine and her thoracic spine with the attached affirmations of her radiologist, the affirmed reports of her treating physician, Nizarali Visram, M.D., from June 17, 2008 to October 23, 2008, and her certified deposition transcript.

Here, although plaintiff submitted MRI reports of her cervical spine and of her thoracic spine affirmed by her treating radiologist indicating that plaintiff sustained, among other things, a disc bulge and herniations in the cervical and thoracic regions of her spine, the mere existence of bulging or herniated discs, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]). While plaintiff submitted medical evidence of contemporaneous examinations from June 2008 to October 2008 in which significant limitations in cervical and lumbar ranges of motion were noted by her treating physician, she failed to proffer any recent medical evidence regarding any range-of-motion limitations in her spine (*see Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). Thus, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102 (d) (*see Valera v Singh*, 89 AD3d 929, 932

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NYS2d 530 [2d Dept 2011]; *Lively v Fernandez*, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). Even though plaintiff testified at her deposition that she continues to have pain during periods of prolonged sitting, a plaintiff's complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury (see *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]).

Moreover, plaintiff failed to establish economic loss in excess of basic economic loss (see *Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (see *Siew Hwee Lim v Dan Dan Tr., Inc.*, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated:

July 10, 2012

W. Gerard Ashe
J.S.C.

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