

Lopez v Pogrebivskiy
2013 NY Slip Op 30253(U)
February 5, 2013
Supreme Court, Queens County
Docket Number: 30180/2010
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

INGRID LOPEZ,
Plaintiff,
- against -

Index No.: 30180/2010
Motion Date: 12/20/12
Motion No.: 5

OLEG POGREBIVSKIY, "JOHN DOE,"
and KJI LIMO CORP.,

Motion Seq.: 1

Defendants

- - - - - x

The following papers numbered 1 to 18 were read on this motion by defendant, KJI LIMO CORP, and the cross-motion of defendant OLEG POGREBIVSKIY, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 6
Cross-Motion-Affirmation.....	7 - 9
Affirmation in Opposition-Affidavits-Exhibits.....	10 - 15
Reply Affirmation.....	16 - 18

In this negligence action, plaintiff, Ingrid Lopez, seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on November 11, 2009, between the vehicle being operated by Oleg Pogrebivskiy and the taxi cab owned by KJI Limo Corp. The accident took place in front of 8300 Talbot Street, Queens County, New York. At the time of the accident the plaintiff was a passenger in the taxi cab owned by KJI Limo Corp. Plaintiff claims that as a result of the accident the right side of her body struck the door of the

taxi cab and she sustained injuries to her back, neck and left wrist.

The plaintiff commenced this action by filing a summons and complaint on December 3, 2010. Issue was joined by service of defendant's verified answer dated January 28, 2011. A note of issue was filed by the plaintiff on January 27, 2012. The matter is presently on the calendar in the trial scheduling part for February 28, 2013. Defendant, KJI Limo, and codefendant Oleg Pogrebivskiy, move respectively for an order pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Counsel for co-defendant Oleg Pogrebivskiy, Donald Munson, Esq. cross-moves for the same relief and states that in the interest of brevity, defendant Pogrebivskiy adopts the arguments and proof submitted by the co-defendant with respect to that portion of their motion that pertains to serious injury.

In her verified Bill of Particulars, the plaintiff, age 29, states that as a result of the accident she sustained, *inter alia*, lumbar discectomy of the L4-5 disc; tear of a tendon in the left wrist, disc herniation at C4-5, and disc bulges at L4-5 and L5-S1. The plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In support of the motion, defendant submits an affirmation from counsel, Laurent Chevalier, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; uncertified records from the emergency room at Jamaica Hospital; the affirmed medical report of orthopedist, Dr. Alan M. Crystal, radiologist, Dr. Jeffrey Lang, emergency medicine specialist, Dr. Ronald A. Paynter, and a copy of the transcript of the plaintiff's examination before trial.

Dr. Alan Crystal, an orthopedic surgeon, retained by the defendant to perform an independent orthopedic examination,

evaluated the plaintiff on November 11, 2009 and filed an addendum on January 30, 2012. Plaintiff told the doctor that due to her injuries she underwent a discectomy but that her pains in the back are now worse. She also had complaints of pain to her neck and left wrist. Upon examination, Dr. Crystal found that the plaintiff had no limitations of range of motion of the lumbar spine, cervical spine or left wrist. He states that although the plaintiff shows clinical signs of a left wrist DeQuevain's Tenosynovitis, her MRI of the left wrist does not show any trauma to the tendons of the wrist. He states that the plaintiff does not have any clinical findings consistent with a tear of the left wrist and also states that the DeQuevain's Tenosynovitis lacks medical evidence to causally link it to the accident. Based upon his examination, he states that there is no basis to casually relate the alleged injuries of the lumbar and cervical spine to the accident in question because the cervical and lumbar MRIs did not show any soft tissue trauma, there were no limitations of range of motion and bulging discs occur with aging.

Dr. Paynter, a physician board certified in Emergency Medicine, reviewed the plaintiff's medical records from the Emergency Department at Jamaica Hospital and found that the ER records are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident of November 11, 2009. It is his opinion that there were no acute traumatic findings to causally relate the plaintiff's subject accident to her claimed injuries other than muscle spasm.

Neuroradiologist, Dr. Lang, reviewed the MRI studies of the plaintiff's cervical spine, lumbar spine and left wrist and found that there were no posttraumatic findings and the MRI of the plaintiff's left wrist, cervical spine and lumbar spine were normal and there were no findings secondary to the accident of 11/11/2009. His review of an x-ray of the plaintiff's left wrist taken one week after the accident showed no evidence of fracture and the x-ray was normal.

In her examination before trial, taken on July 20, 2011, Ms. Lopez stated that at the time of the accident she was employed as a baby sitter but she left the job after the accident because she could not take care of the children anymore. However, she testified that she returned to baby-sitting approximately two months after the accident. She subsequently began employment as a salesperson of beauty products. She stated that at the time of the deposition she still had pain on a daily basis in her lower back, neck and left wrist. She stated that she was no longer

receiving treatment for her injuries because her no-fault insurance was terminated as of April 2010. She stated that she was involved in an accident ten years prior to this one for which she received treatment for neck pain. The day of the accident she was going to an MRI facility to get images for carpal tunnel syndrome of her right hand. She was picked up by taxi cab in front of her building. While proceeding down Talbot Street the taxi was hit on its side by the co-defendant's vehicle. As a result of the impact, she injured her left wrist. The taxi company sent a replacement vehicle to the scene and she was taken to her appointment. After she returned home that day her back and neck became painful and she felt as if she couldn't move. She then called another taxi to take her to Jamaica Hospital. At the hospital she told the doctor that her back felt paralyzed and her neck was in pain. She was treated in the ER and released the same day with instructions to see her own physician. The following day plaintiff went to Yellowstone Medical and complained of pain in her neck back and left wrist. She was treated at that facility by Dr. McGee with physical therapy 2 or 3 times per week for six months. She also consulted with a hand specialist, Dr. Salvatore who gave her injections for pain and a wrist brace. Dr Salvatore told her she had a tear on her wrist and he suggested surgery. Plaintiff testified that she rejected the wrist surgery but on November 5, 2010 she had a lumbar discectomy performed by Dr. Kaisman. She stated that she stopped treating at Yellowstone when the no fault benefits were terminated and she could not afford to pay the out-of-pocket costs for further visits. She also stated that after the discectomy the pain became worse.

Defendant's counsel contends that the medical reports of Drs. Crystal, Paynter and Lang, as well as the transcript of the plaintiff's examination before trial in which she testified that she returned to work two months immediately following the accident are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney, Mark J. Lindner, Esq., submits his own affirmation, as well as the affidavit of the plaintiff and the affirmed medical reports of radiologist, Dr. Leadon, orthopedic surgeon, Dr. Kaisman, Dr. Lerner and Dr. Goldman.

In her affidavit, dated April 20, 2012, the plaintiff states that following the accident she sought medical treatment and began a course of physical therapy at Yellowstone Medical Rehabilitation under the supervision of Dr. McGee. She states that despite all of the physical therapy and treatment she received since the accident she still feels pain to her neck and back. Ms. Lopez also states that once her no-fault benefits were terminated she had to stop treatments because she could no afford to pay for further care and treatment out of pocket. She states that she was involved in a prior accident in 2002, 10 years prior to the subject accident, but she made a full recovery prior to this accident and was not experiencing any pain in her neck and back.

Dr. Leadon, a board certified radiologist, states in an affirmed report that he personally reviewed the MRI films taken of the plaintiff's left wrist, cervical spine and lumbar spine. With respect to the left wrist, Dr. Leadon states that he observed a thin vertical tear in the triangular fibrocartilage complex. With respect to the MRI of the cervical and lumbar spines, he observed bulging discs at L4-L5 and L5-S1 and a herniated disc at C4-C5.

Dr. Arden Kaisman submits an affirmation stating that he conducted discectomy surgery on Ms Lopez's lumbar spine on November 5, 2010, one year post-accident. His post-operative diagnosis was a bulging disc at L4-L5. He states that he was aware of Ms. Lopez's prior accident in 2002 and in his opinion the injuries to her cervical and lumbar spines and left wrist and her need for back surgery are all related to her accident of November 11, 2009.

Dr. McGee submits an affirmed report stating that he treated Ms. Lopez for her injuries sustained in the subject accident. He states that directly after the accident on November 16, 2009 he examined the plaintiff, conducted range of motion testing and found that she had significant limitations of range of motion of the cervical and lumbar spines. He states that taking into consideration the prior accident of 2002, it is his opinion that the injuries to her cervical and lumbar spines as well as her left wrist are causally related to the accident of November 11, 2009.

Dr. Lerner, Assistant Clinical Professor of Neurology at Albert Einstein College of Medicine submits an affirmed report with respect to his examination of the plaintiff on April 25, 2012. At that time he found loss of range of motion

of the cervical spine and lumbar spine. He states that considering the duration that symptoms have persisted and lack of resolution with conservative treatment that the injuries and associated impairments are considered permanent and causally related to the motor vehicle accident of November 11, 2009. In rendering his opinion he states that he took into consideration the plaintiff's prior accident of 2002 wherein she was treated and made a full recovery.

Dr. Goldman reports that he measured the range of motion of the plaintiff's left wrist on June 21, 2012 and found that she still had significant limitations of range of motion of the left wrist at that time.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Crystal, Paynter and Lang as well as the transcript of the plaintiff's examination before trial are sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Lerner, McGee, Goldman, Leadon and Kaisman attesting to the fact that after qualitative, quantitative

and objective examinations the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident. As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. McGee adequately explained the gap in the plaintiff's treatment by stating that once the plaintiff's no fault benefits were terminated she could no longer afford to pay for treatments out of pocket (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion of defendant KJI Limo Corp. and the cross-motion of defendant Oleg Pogrebivskiy for an order granting summary judgment dismissing the plaintiff's complaint are denied.

Dated: February 5, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.