

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 308771/10
Motion Cal. No.: 17
Motion Date: 4/15/13

DAMARIS SOLANO,

Plaintiff,

-against-

QLR SIX, INC. and GERONIMO E. MARTINEZ,

Defendants,

DECISION/ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Notice of Motion, Affirmation in Support Exhibits in Support	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendants move for Summary Judgment pursuant to C.P.L.R. §3212 on the issue of liability upon the ground that the injuries claimed by Plaintiff do not satisfy the "serious injury" threshold requirement of section 5102(d) of the New York Insurance Law. Plaintiff submitted written opposition.

Plaintiff commenced this action seeking damages for injuries allegedly sustained on January 7, 2010.

It has long been held that summary judgment is a drastic remedy, the procedural equivalent of a trial which should only be granted when the evidence leaves no issue of material fact unresolved (Andre v. Pomeroy, 35 N.Y.2d 361 [1974] Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dep't. 1990]) or where an issue is even debatable. Stone v. Goodson, 8 N.Y.2d 8 (1960). In deciding a summary judgment motion, it is not the function of a court to make credibility determinations or findings of fact, but is rather to identify material triable issues of fact

or to point to the lack thereof. Vega v. Restani Constr. Corp. 18 N.Y.3d 499 (2012) *citing* Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).

The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Defendants argue that Plaintiff fails to meet the statutory threshold for serious injury as set forth by New York Insurance Law §5102(d). Defendants argue that Plaintiff's injuries allegedly stemming from the motor vehicle accident in 1992 as such her injuries herein are preexisting in nature. In support they offer, *inter alia*, the medical reports of Dr. Robert Israel, Dr. Stephen Lastig and Dr. Michael Carciente. Defendants also submit medical records and testimony evidencing Plaintiff's medical history prior to the subject motor vehicle accident.

Dr. Robert Israel conducted an orthopedic examination of plaintiff on May 23, 2012 and found normal ranges of motion in the plaintiff's cervical, thoracic and lumbar spine as well as the right knee and leg. Although Dr. Israel opined that plaintiff's sprains in the cervical, thoracic and lumbar spine as well as the right knee and leg had resolved and that plaintiff had no disability from the subject accident, he did find a cause and effect relationship between his diagnosis and the reported accident. Dr. Israel did review the plaintiff's 2010 and 2011 MRI's which were also reviewed by Dr. Stephen W. Lastig.. Although, Dr. Lastig opined that the plaintiff's lumbar spine and cervical spine MRI's injuries were degenerative, this Court notes that this opinion is in conflict with Dr. Israel's finding of causal relationship with the subject accident.

Dr. Carciente reviewed plaintiff's medical records from the subject accident and the 1994 accident and conducted a neurological examination on May 23, 2012. Dr. Carciente opined that plaintiff presented a normal neurological examination, there was no objective evidence of radiculopathy and no correlation between the findings of the spinal MRI and the examination. Plaintiff had no causally related neurological injury or disability.

Although Dr. Lastig opined that plaintiff's injuries were degenerative and Dr. Carciente opined that there was no causally related injury or disability , this opinion is in conflict with Dr. Israel who found a causal connection. This Court further notes that none of the defendants doctors attributed the plaintiff's injuries as pre-existing from the prior accident.

In opposition, the plaintiff has submitted sufficient proof to raise a triable issue of fact. Plaintiff submits the sworn reports of Dr. Gregory Lawler, who treated plaintiff for pain management beginning in May 21, 2010 after physical therapy proved unsuccessful. Straight leg raising indicated pain at 80degrees. After treating her for what he assessed as a lumbar disc bulge at L5-S1 and C4-C5 muscular spasms of the cervical spine and a C4-C5 disc herniation, which he found causally related to the subject accident and indicated that plaintiff was pain free since the prior accident and had not treated since 1999. Dr. Lawler recommended plaintiff for caudal epidural steroid injection since it had been five months since the accident and physical therapy and conservative medication treatment did not eliminate the pain. Plaintiff underwent other injections on two subsequent occasions and was recommended for provocative lumbar discography and noted that according to her MRI films taken on January 11, 2011, the plaintiff had a disc bulge at L5-S1. Dr. Lawler treated the plaintiff through her treatment with Dr. Quartararo's surgery and through June 2012, at which time plaintiff continued to present with pain due to the L5-S1 bulge and annual tear which he causally related to the subject accident. Although plaintiff slipped on a pencil during her course of treatment, she only exacerbated those injuries present as a result of the accident. Dr. Lawler opined that not only were the plaintiff's injuries to her lumbar spine of such a nature that she would require surgery for treatment.

Also, included in plaintiff's opposition was the sworn report of Dr. Louis Quartararo, the plaintiff's surgical consultant who first evaluated her on April 11, 2011. He reviewed her January 13, 2010 lumbar spine and cervical spine MRI's as well as th 2011 MRI's of the lumbar spine. Dr. Quatataro also noted that the plaintiff had not treated for the 1996 accident since 1999 and was asymptomatic. Dr. Quartararo discussed surgical options with the plaintiff and opines that based upon his review of the films and his physical examination, the plaintiff will need to have surgical intervention.

Defendants due to the conflicting opinions of their experts, did not submit sufficient proof to eliminate any triable issue of fact in all aspects of the motion except as to whether the plaintiff met

the burden for summary judgment on the issue of whether she sustained an injury that rendered her incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. *Assuming arguendo*, that the defendants had met the burden for summary judgment, plaintiff submitted sufficient proof to rebut the defendants motion for summary judgment, with the exception that plaintiff fails to submit sufficient medical proof that she was unable to perform their usual and customary activities for 90 out of the first 180 days following the accident. Uddin v. Cooper,, 32 A.D.3d 270 (1st Dept.2006).

Accordingly, it is

ORDERED, that defendants motion for summary judgment dismissing the plaintiff complaint for failure to sustain a serious injury is hereby granted to the extent that plaintiff has failed to raise a triable issue of fact as to whether she was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. All other portions of defendant's motion for summary judgment are hereby denied motion for summary judgment is hereby denied. It is further

ORDERED, that Defendants serve a copy of this Order with Notice of its Entry upon Plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision of the Court.

DATE JUN 1 4 2013

HON. WILMA GUZMAN, J.S.C.