

<b>Beckford v Arostegui</b>
2013 NY Slip Op 33994(U)
June 18, 2013
Supreme Court, Bronx County
Docket Number: 306137/2011
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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PATRICIA BECKFORD and ERROL BECKFORD,

Plaintiffs,

DECISION AND ORDER

Index No. 306137/2011

- against -

F.A. AROSTEGUI,

Defendant.

-----X  
PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated March 25, 2013 and the affirmation, affirmed reports, and exhibits submitted in support thereof; plaintiffs' notice of cross-motion dated April 29, 2013 and the affirmations and affidavit submitted in support thereof; defendant's unsigned affirmation in opposition and reply affirmation dated May 8, 2013 and the exhibits annexed thereto; defendants' amended affirmation in opposition and reply affirmation dated May 21, 2013 and the exhibits annexed thereto; plaintiff's reply affirmation dated May 29, 2013; and due deliberation; the court finds:

Plaintiff and her husband, derivatively, commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred on April 1, 2011. Defendant now moves pursuant to CPLR 3212 for summary judgment on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff opposes defendant's motion and cross-moves for summary judgment on the issue of serious injury. Although made more than one hundred twenty days after plaintiff filed her note of issue, *see* CPLR 3212(a), the court will consider the cross-motion since it seeks nearly identical relief as that sought in defendant's timely motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep't 2006), *appeal dismissed*, 9 N.Y.3d 862, 872 N.E.2d 878, 840 N.Y.S.2d 765 (2007).

Plaintiff alleges in her verified bill of particulars to have suffered a partial tear of the right

glenoid labrum; a partial tear of the right rotator cuff; hypertrophic synovium; impingement syndrome; aggravation of a right shoulder injury; and spine strains. Plaintiff claims her injuries fall within the categories of 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; and 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 ("90/180").

In support of the motion, defendant submits the pleadings; the deposition transcripts; affirmed reports from orthopedic surgeon Thomas Nipper, M.D., neurologist Marianna Golden, M.D., and radiologist Stephen W. Lastig, M.D.; and plaintiff's medical records from Distinguished Diagnostic Imaging, P.C., Louis C. Rose, M.D., and New York Westchester Square Medical Center.

Dr. Lastig opined the imaging studies of the cervical and lumbar spine and right shoulder revealed degenerative changes, including supraspinatus tendinopathy, subacromial-subdeltoid bursitis and mild AC joint osteoarthritis, but no findings which were causally related to the accident.

Dr. Golden reported performing a normal neurological evaluation of plaintiff on October 16, 2012, finding normal ranges of motion of the cervical and lumbar spine and resolved sprains/strains with no evidence of a neurological disability.

Dr. Nipper conducted an orthopedic evaluation of plaintiff on October 16, 2012. Range of motion of the thoracic spine was normal. He attributed the limitations of the cervical and lumbar spine to plaintiff's "suboptimal effort," and range of motion of the right shoulder was diminished. Passive ranges of motion for those areas, though, were normal. Additional tests such as straight leg raising, cervical compression and impingement sign, were negative. After reviewing the medical records, Dr. Nipper opined there was no causal relationship between the motor vehicle accident and plaintiff's

reported symptomatology. Plaintiff had sustained injuries to her lower back, right shoulder, and left knee in a work-related incident on October 30, 2010 for which she received extensive treatment. The right shoulder MRI report indicated degenerative changes and a post-operative report dated May 26, 2011 showed a diagnosis of hypertrophic synovium, conditions which Dr. Nipper opined preexisted the motor vehicle accident. He concluded that the sprains to the cervical and lumbar spine and internal derangement of the right shoulder had resolved.

At her deposition, plaintiff testified she filed a claim with the Workers' Compensation Board for lower back and right shoulder injuries sustained in a work-related mishap on October 30, 2010. She had been declared disabled and had not returned to work at the time of the motor vehicle accident. She was confined to her bed for two days and to her home after the accident, although she attended medical appointments, visited the bank and paid her bills. She treated with Dr. Rose following both accidents.

Plaintiff in opposition to defendant's motion and in support of her cross-motion submits an affirmation from Dr. Rose and two affirmed reports from orthopedic surgeon, Michael J. Katz, M.D. Dr. Rose stated plaintiff's shoulder injury had improved with conservative care but the motor vehicle accident caused her symptoms to worsen. He performed right shoulder arthroscopic surgery on May 26, 2011, and his operative report indicated a diagnosis of a partial tear of the right glenoid labrum, a partial tear of the right rotator cuff, and hypertrophic synovium. He found a limited range of motion of the right shoulder in an examination performed shortly after the motor vehicle accident and again during a more recent examination. He opined that the severity of the shoulder injury was the direct result of the second accident. He also observed diminished ranges of motion, muscle spasms, positive straight leg raising tests, and persisting range of motion limitations of the cervical and lumbar spine. Dr. Rose opined plaintiff's injuries were caused or aggravated by the motor vehicle accident.

Dr. Katz examined plaintiff on February 17, 2011 in connection with her Workers' Compensation claim and reported finding normal ranges of motion of the right shoulder and negative

results for several objective tests. He examined plaintiff again on July 14, 2011, seven weeks after surgery, and observed a limitation on active abduction but normal movement on flexion and internal and external rotation of the right shoulder. He opined the shoulder injury was related to the work-related accident and the motor vehicle accident.

Here, the conflicting expert opinions preclude granting either party summary judgment. *See Seck v. Balla*, 92 A.D.3d 543, 938 N.Y.S.2d 549 (1st Dep't 2012). While defendant met his *prima facie* burden, *see Luetto v. Abreu*, 105 A.D.3d 558, 963 N.Y.S.2d 112 (1st Dep't 2013), plaintiff raised an issue of fact that she sustained a serious injury to her right shoulder. *See Jean-Louis v. Gueye*, 94 A.D.3d 504, 942 N.Y.S.2d 52 (1st Dep't 2012). Since plaintiff has raised a triable issue concerning her right shoulder, she is entitled to recover damages for all injuries causally related to the accident, including those injuries which do not meet the serious injury threshold. *See Linton v. Nawaz*, 14 N.Y.3d 821, 926 N.E.2d 593, 900 N.Y.S.2d 239 (2010). Summary judgment on plaintiff's cross-motion is also denied since defendant's experts refuted both the cause and the extent of plaintiff's injuries, including whether the shoulder surgery was related to the motor vehicle accident. *See Baez v. Rahamatali*, 6 N.Y.3d 868, 850 N.E.2d 19, 817 N.Y.S.2d 204 (2008). Defendant also raised an issue as to whether the motor vehicle accident exacerbated plaintiff's preexisting shoulder injury since Dr. Rose's post-accident diagnosis was identical to his pre-accident diagnosis dated March 9, 2011. The parties' proof, though, demonstrates that plaintiff did not suffer a "permanent loss of use" of any body part. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001).

Accordingly, it is

ORDERED, that the motion of defendant F.A. Arostegui seeking summary judgment dismissing plaintiffs' complaint is granted to the extent of dismissing plaintiff's claim of serious injury in the category of "permanent loss of use of a body organ, member, function or system"; and it is further

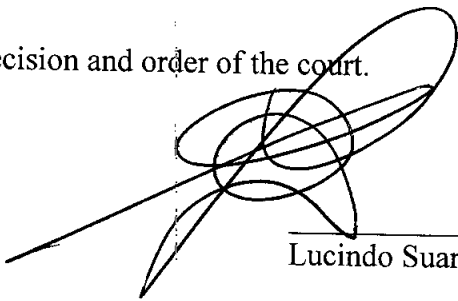
ORDERED, that the cross-motion of plaintiffs Patricia Beckford and Errol Beckford seeking

summary judgment on the issue of serious injury is denied; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant F.A. Arostegui dismissing plaintiff's claim of serious injury in the category "permanent loss of use of a body organ, member, function or system."

This constitutes the decision and order of the court.

Dated: June 18, 2013



Lucindo Suarez, J.S.C.