

Torres v Sagar
2014 NY Slip Op 32654(U)
September 22, 2014
Supreme Court, Bronx County
Docket Number: 308346/2011
Judge: Julia I. Rodriguez
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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27**

HAYDEE TORRES and ANIVA MANGUEL,
Plaintiff,

-against-

VICTOR SAGAR,

Defendants.

Index No. 308346/2011

DECISION and ORDER

Present:

Hon. Julia I. Rodriguez

Recitation as required by CPLR 2219 (a), of the papers considered in review of motion by Defendant Victor Sagar pursuant to CPLR 3212 on the ground that Plaintiff Haydee Torres did not sustain a "serious injury" pursuant to Insurance Law 5102 (d) and other relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2

This action arises from a motor vehicle accident which occurred on May 20, 2011. Both Plaintiff and Defendant were the operators of their respective vehicles; Plaintiff alleges that she was stopped in traffic when her vehicle was suddenly rear ended, causing her to sustain injury to her neck, right shoulder and back.

After discovery Defendant Victor Sagar ("Sagar") moves for summary judgment dismissing the complaint on the ground that Plaintiff Haydee Torres ("Torres") did not sustain a "serious injury" as defined in §5102 (d) of the Insurance Law, and therefore has no cause of action pursuant to §5104(a).

In support of summary judgment Sagar submitted, *inter alia*, the sworn medical report of Isaac Cohen, a Board Certified Orthopedic Surgeon, who examined Torres on November 19, 2013. Dr. Cohen lists that he reviewed, *inter alia*, the ambulance report dated 5/20/2011, the MRIs dated 6/22/2011 of the cervical/ lumbar spines, and right shoulder; nerve conduction and EMG studies dated 7/1/2011, and the operative report dated 7/25/2011 of the right shoulder arthroscopy. Dr. Cohen conducted range of motion testing and found that plaintiff had normal ranges of motion in her cervical and lumbar spines, as well as in her right shoulder. Dr. Cohen diagnosed plaintiff with cervical and lumbosacral spine strains that had resolved, and post right shoulder arthroscopy. Dr. Cohen concluded that plaintiff had "an overall satisfactory functional capacity of the

musculoskeletal system, with no evidence of a functional disability, sequelae or permanency related to the accident of record.” Dr. Cohen opined that the “soft tissue complaints to the neck and back” resulting from the accident “resolved uneventfully” with the physical therapy “work-up”. Dr. Cohen referenced the right shoulder MRI as demonstrating “AC joint arthropathy. . . associated with chronic, degenerative changes” and “a degenerative tear of the labrum,” indicating a “condition that was longstanding, pre-existent and certainly not related to the subject accident of record.” According to Dr. Cohen, there was no correlation between the accident and the right shoulder arthroscopy, because the pathology documented “took many years to develop and reflect a progressive degenerative condition” and was not caused by a “single post-traumatic event.”

The issue of whether a claimed injury falls within the statutory definition of a “serious injury” is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendant Sagar met his initial burden of proof that Plaintiff Torres did not sustain a “serious injury.” Once defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubenscastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep’t 2006).

In opposition to summary judgment, Plaintiff Torres submitted a sworn medical affidavit dated April 10, 2014 by **Imelda M. Cruz-Banting**, M.D., a specialist in physical medicine and rehabilitation. Torres also submitted a medical affirmation dated April 1, 2014 by Dr. Howard I. Baum, the orthopedic surgeon who performed the arthroscopic surgery of the right shoulder on July 25, 2011.

In her medical affirmation Dr. Cruz-Banting recites that she first examined Torres on May 25, 2011, at which time she determined, based upon specified objective tests, that Torres had limitations in the range of motion of her cervical and lumbar spines, in addition to her right shoulder. On May 25, 2011 Dr. Cruz-Banting noted that testing of the cervical spine was

“indicative of cervical radiculopathy” and that Torres “had a positive impingement sign of the right shoulder.” Torres began a course of physical therapy and acupuncture which went through December 2011; Cruz-Banting further evaluated Torres on June 20, July 18, August 17, September 14, October 26 and November 29, 2011.

In July 2011 Dr. Cruz-Banting performed EMG and nerve conduction studies of Torres’ upper and lower extremities and found that the test results “were consistent with a left cervical radiculopathy and a bilateral lumbar radiculopathy.” Dr. Cruz-Banting cited MRI studies of the right shoulder, cervical and lumbar spines indicating bulging discs of the cervical (C4-5 and C5-6) and lumbar (L3-4, L4-5, L5-S1) spines. Dr. Cruz-Banting also referred to Dr. Howard Baum for an orthopedic consult; upon Dr. Baum’s recommendation for surgery of the right shoulder, said surgery was performed on July 25, 2011.

Torres’ last examination took place on March 31, 2014; Dr. Cruz-Banting concluded that based upon additional objective testing and clinical observation, it is her medical opinion that, as a result of the injuries sustained in the subject accident, Torres suffered physical limitations to her cervical spine, right shoulder and lumbar spine; these limitations are “permanent, significant, functional” and permanent, and are “not due to any type of pre-existing or degenerative condition.”

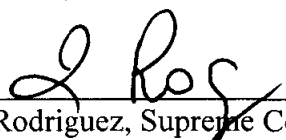
Torres’ submission also included the medical affidavit by Dr. Howard I. Baum, who performed arthroscopic surgery of Torres’ right shoulder on July 25, 2011. Dr. Baum states that during surgery he observed that Torres had “sustained a radial tear of the glenoid labrum, a partial thickness rotator cuff tear, impingement and post-traumatic bursitis.” He states that the motor vehicle accident of May 20, 2011 was the proximate cause of these conditions, and that the bursitis he observed “was the result of trauma and was not chronic, degenerative or pre-existing.” Dr. Baum last examined Torres on April 1, 2014 at which time he opined that Torres’ “injuries and limitations are permanent, significant and consequential disabilities of a body function and body system, which will continue to effect every facet of her life.”

After consideration of Plaintiff Torres’ submission, the Court finds that the differing and/or contradictory medical opinions expressed by Drs. Cohen and Cruz-Banting/Baum raise issues of

fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although Defendant met his initial burden, Plaintiff Torres' submission raised material issues of fact and credibility as to whether she sustained a "significant limitation of use of a body function or system," "permanent loss of use of a body organ, member, function or system" and "permanent consequential limitation of use of a body organ or member" [§5102(d)]. At this juncture the court declines to dismiss these Insurance Law claims as matter of law. *See Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005). Inasmuch as Defendants argue that Torres failed to explain the gap in her medical treatment, the length of treatment or lack thereof goes to the weight of plaintiff's evidence, to be determined by the trier of fact, rather than to be decided as a matter of law.

For the foregoing reasons, Defendant's motion for summary judgment dismissing the complaint for failure of Plaintiff Torres to meet the "serious injury" threshold of Insurance Law § 5102(d) is **granted** solely to the extent that plaintiff's 90/180 claim, i.e., that she suffered "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," *in addition* to the claims that she suffered a fracture and significant disfigurement are **dismissed**, as these claims were not medically substantiated. Defendant's motion is otherwise **denied**, as hereinabove described.

Dated: Bronx, New York
September 22, 2014


Julia I. Rodriguez, Supreme Court Justice