

O'Neill v Arnold

2014 NY Slip Op 33206(U)

January 6, 2014

Sup Ct, Bronx County

Docket Number: 310197/2011

Judge: Mary Ann Brigantti-Hughes

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This opinion is uncorrected and not selected for official publication.

[* 1]

PART 15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
-----X

| | |
|---------------------|--------------------------|
| Case Disposed | <input type="checkbox"/> |
| Settle Order | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

GREY O'NEILL,

Index No. 310197/2011

-against-

Hon. MARY ANN BRIGANTTI-
HUGHES.

AARON ARNOLD
-----X

The following papers numbered 1 to 5 Read on this motion, SUMMARY JUDGMENT
Noticed on and duly submitted on the Motion Calendar of September 18, 2013

| | PAPERS NUMBERED | |
|---|-----------------|---|
| Notice of Motion- Exhibits and Affidavits Annexed | 1 | 2 |
| Answering Affidavit and Exhibits | 3 | 4 |
| Replying Affidavit and Exhibits | 5 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers, the defendant Aaron Arnold ("Defendant"), moves for summary judgment, dismissing the complaint of the plaintiff Grey O'Neill ("Plaintiff") for failure to meet the "serious injury" threshold requirement of New York Insurance Law §5102.

Background and Party Arguments

This action arises out of an alleged motor vehicle accident that occurred on June 9, 2011. As a result of the accident, Plaintiff allegedly suffered the following injuries, among others: (1) bulging disc at C5-6 and C6-7 as well as L3-4 and 4-5, with left forminal herniation at L5-S1 impinging upon the existing L5 root; (2) mild lateral subluxation and small joint diffusion of the right knee, and (3) cervical radiculopathy and lumbar radiculitis.

At her examination before trial, Plaintiff testified that she was taken to the hospital after the accident with complaints of neck, lower back, and right side pain. X-rays were taken. Thereafter, Plaintiff received physical therapy, accupuncture, and chiropractic treatment from "Best Care" medical facility. She

Respectfully Referred to: _____
Dated: _____

testified that she missed one day of work as a result of the accident, and her salary increased in the time following the accident.

Defendant submits the affirmed report of orthopedist Lisa Nason, M.D., who examined Plaintiff on October 15, 2012. At the exam, Plaintiff presented with complaints of pain in the cervical spine, right shoulder, right elbow, lumbar spine, right hip, and right knee. Upon physical examination, Plaintiff exhibited full range of motion in the cervical spine, right shoulder, right elbow/forearm, right wrist/hand, lumbar spine, right hip, and right knee, in all directions. Measurements were recorded using a goniometer and the degrees noted were in accordance with AMA Guidelines, 5th Edition. All other muscle testing, reflex testing, and objective range of motion testing was either normal or negative. Ultimately, Dr. Nason diagnosed Plaintiff with “resolved” sprains and strains and a “resolved” right knee sprain/contusion. She opined that there is no objective evidence of a disability.

Defendant argues that, in light of the foregoing, there is no evidence that Plaintiff sustained a “permanent” or “significant” injury within the meaning of the sixth, seventh, or eighth categories of “serious injury” as described in §5102 of No-Fault law. Moreover, there is no evidence that Plaintiff sustained a non-permanent injury or impairment that would fall under the ninth category of “serious injury,” since Plaintiff testified at deposition that she only missed one day of work as a result of this accident.

Plaintiff opposes the motion. Plaintiff initially argues that Dr. Nason’s report itself raises an issue of fact since she used “normal” ranges of motion that differed from those of Plaintiff’s treating physician, Dr. Max Tyorkin. Plaintiff also notes that Defendant has not challenged the MRIs or EMGs that were performed by Plaintiff’s treating physicians.

Plaintiff also submits an affirmation from Dr. Tyorkin, her treating orthopedic surgeon. Dr. Tyorkin affirms that he first examined Plaintiff on June 30, 2011. Plaintiff related that she had some previous lower back pain in 2009, but she had taken medication for this issue and at the time of this accident, she was pain-free. At the initial exam, Plaintiff exhibited restricted range of motion in the cervical spine upon flexion (40 degrees, 60 normal), extension at 45 degrees (60 normal), left and right rotation (55 degrees, 80 normal) with pain and tenderness. Dr. Tyorkin also found restricted movement in Plaintiff’s right shoulder and lumbar spine. An MRI of Plaintiff’s lumbar spine taken on June 25, 2011, revealed a bulging disc and left foraminal herniation. An MRI of the cervical spine taken the same date revealed a bulging disc. Based on this history, Dr. Tyorkin opines that these findings were causally related to this accident. Later EMG and nerve conduction studies revealed right lower lumbosacral posterior root dysfunction and right middle cervical posterior root dysfunction and right Carpel Tunnel Syndrome. Dr. Tyorkin states that Plaintiff received physical therapy and chiropractic care, but that provided only temporary relief and Plaintiff eventually “reached a plateau.” Plaintiff annexes certified records of physical therapy treatment from June 27, 2011 through July 2012. Dr. Tyorkin recently examined Plaintiff on July 29, 2013. At that examination, Plaintiff continued to exhibit range of motion restrictions in the cervical spine upon flexion

and extension (50 degrees, 60 normal), left and right rotation (70 degrees, 80 normal), and left and right lateral flexion (30 degrees, 40 normal) with pain. Plaintiff also had restrictions in the lumbar spine upon flexion (75 degrees, 95 normal), extension (25 degrees, 35 normal), and right and left lateral flexion (30 degrees, 40 normal). Straight-leg raising was positive on the right side, and other objective testing was positive. Dr. Tyorkin ultimately opined that Plaintiff had sustained a significant permanent loss of range of motion in the cervical spine as much as 25%, and in the lumbar spine as much as 30%. He disagrees with the report of Dr. Nason, and contends that the defendant's expert used incorrect "normal" ranges of motion when performing her examination. He also notes that Dr. Nason failed to review Plaintiff's diagnostic exam results, including her MRIs and EMGs.

Also annexed to the opposition papers are Plaintiff's affirmed MRI reports and certified chiropractic treatment records.

Discussion

While Defendant may have satisfactorily carried his burden of proving entitlement to judgment as a matter of law, in light of the above admissible evidence, Plaintiff has demonstrated an issue of fact as to whether she suffered a permanent serious injury in accordance with New York Insurance Law §5102(d). "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept. 1998), *LaMasa v. Bachman*, 56 A.D.3d 340 (1st Dept. 2008). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment. *Bradley v. Soundview Healthcenter*, 4 A.D.3d 194 (1st Dept. 2004); *Lewis v. Capalbo*, 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 455 [2001]).

Plaintiff has submitted sufficient evidence in admissible form to raise a triable issue of fact as to whether her cervical and lumbar spine injuries were "serious" by providing objective medical evidence that she had pain and restrictions approximately soon after the accident, and recently upon a July 2013 examination (*See Winters v Cruz*, 90 A.D.3d 412 [1st Dept. 2011]). Dr. Tyorkin's affirmation, stating that he reviewed the Plaintiff's hospital records, examined her approximately three weeks after the accident, and reported diminished range of motion of plaintiff's cervical and lumbar spine, as well as shoulder, constitutes qualitative medical evidence of a serious injury contemporaneous with the accident. (*see Perl v. Mehr*, 18 N.Y.3d [2011]; *Prestol v. McKissock*, 50 A.D.3d 600 [1st Dept. 2008]). MRI examinations taken soon after the accident confirmed the existence of disc bulges and a herniation in cervical and lumbar spine. Taken together, this evidence constitutes sufficient proof of causation (*see Rosa v. Mejia*, 95 A.D.3d 402 [1st Dept. 2012], *citing Perl v. Meher*, 18 N.Y.3d 208 [2011]). The slight discrepancies in what Dr. Tyorkin considered a "normal" range of motion do not render his opinion invalid, Dr. Tyorkin identified other orthopedic tests performed at the examinations that revealed positive findings, and otherwise

sufficiently described the qualitative nature of the plaintiff's limitations "based on the normal function, purpose, and use of the body part." (*Vasquez v. Reluzco*, 28 A.D.3d 365 [1st Dept. 2006]). Defendant's arguments that there is an unexplained gap or cessation of treatment were improperly raised for the first time in reply papers (*Tadesse v. Degnich*, 81 A.D.3d 570 [1st Dept. 2011]). Since there is an issue of fact as to whether Plaintiff has sustained a serious injury to the cervical or lumbar spine, she is entitled to recover for all injuries causally related to the accident, even those not meeting the threshold (*Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489 [1st Dept. 2013]).

As to plaintiff's 90/180 day claim, however, Plaintiff has failed to meet ~~the~~ burden that ~~she~~ was prevented from performing ~~her~~ usual and customary activities for 90 of the 180 days following the incident (*Nelson v. Distant*, 308 A.D.2d 338, 340 [1st Dept. 2003]). Plaintiff testified that she only missed one day of work following the accident (*Idemudia v. Fields*, 105 A.D.3d 589 [1st Dept. 2013]). Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's "90/180" claim is granted.

Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendant's motion seeking summary judgment on Plaintiff's "90/180" claim is granted, and it is further,

ORDERED, that the remaining branches of Defendant's motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 1/6, 2014



Hon. Mary Ann Brigantti-Hughes, J.S.C.