

Laidley v Collins

2014 NY Slip Op 33312(U)

August 15, 2014

Supreme Court, Bronx County

Docket Number: 308549/2012

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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CYNTHIA LAIDLEY,

Plaintiff,

DECISION AND ORDER

Index No. 308549/2012

- against -

EBENEZER B. COLLINS,

Defendant.
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PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated March 3, 2014 and the affirmation, affirmed report, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated July 22, 2012 [*sic*] and the affirmed report and exhibits annexed thereto; defendant's reply affirmation dated August 12, 2014; and due deliberation; the court finds:

In this action arising out of a November 18, 2011 motor vehicle accident, defendant moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff alleges in her verified bill of particulars to have suffered disc bulges at C4-C5, C5-C6, T1-T2; disc herniations at C3-C4 and C6-C7; a partial tear of the rotator cuff, hypertrophic changes associated with impingement syndrome, and subcoracoid bursa effusion in her shoulder; neck and lower back pain; right hand fatigue; and chest pain. She was confined to her bed and home for intermittent periods. She claims her injuries fall within the categories of significant disfigurement; fracture; 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").

Defendant relies upon the pleadings, plaintiff's deposition transcript and an affirmed report from orthopedic surgeon Alvin Bregman, M.D. in support of the motion. Dr. Bregman examined plaintiff on November 14, 2013 and reported finding normal ranges of motion for all areas tested and normal or negative results for all objective tests administered. He concluded that plaintiff's spine, right shoulder and bilateral hand sprains had resolved. Plaintiff testified she had been laid off from her full-time job as a registered nurse three months before the accident. At the time of the accident, she was not actively seeking employment. With regard to her post-accident activities, she could no longer run a hospital or nursing home unit, sit or stand for long periods, walk up stairs, or lift heavy objects. She worked for a nursing agency for two weeks in 2012 and she began working regularly with another agency in March 2013. She denied suffering an injury to her chest.

The existence of a ligament tear in the shoulder and bulging and herniated discs is not evidence of serious injury absent objective proof of the extent of the alleged physical limitations and their duration. *See Williams v. Horman*, 95 A.D.3d 650, 944 N.Y.S.2d 135 (1st Dep't 2012). Defendant has demonstrated that plaintiff did not sustain a serious injury within the meaning of the Insurance Law. *See Levinson v. Mollah*, 105 A.D.3d 644, 963 N.Y.S.2d 653 (1st Dep't 2013); *Haniff v. Khan*, 101 A.D.3d 643, 958 N.Y.S.2d 89 (1st Dep't 2012). Plaintiff did not suffer a permanent loss of use of any body part or identify a fracture or permanent scar in her verified bill of particulars. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001); *Perez v. Vasquez*, 71 A.D.3d 531, 897 N.Y.S.2d 412 (1st Dep't 2010). An inability to sit or stand for long periods and lift heavy objects does not show that substantially all her daily activities were curtailed. *See Gibbs v. Hee Hong*, 63 A.D.3d 559, 881 N.Y.S.2d 415 (1st Dep't 2009). Plaintiff, who was unemployed, did not

assert a claim for lost wages. *See Vasquez v. Almanzar*, 107 A.D.3d 538, 967 N.Y.S.2d 361 (1st Dep't 2013).

Plaintiff in opposition offers an undated report from treating physician Sireen M. Gopal, M.D. and his records which include two reports from Harold M. Tice, M.D. regarding plaintiff's cervical spine and right shoulder MRI studies. She also submits the emergency room records from Montefiore Medical Center. The submissions fail to raise a triable issue of fact. The uncertified and unaffirmed reports and records from Dr. Tice and Montefiore were not in admissible form, *see DeJesus v. Paulino*, 61 A.D.3d 605, 878 N.Y.S.2d 29 (1st Dep't 2009), and Dr. Bregman did not rely on them in forming in his opinion. *See Luetto v. Abreu*, 105 A.D.3d 558, 963 N.Y.S.2d 112 (1st Dep't 2013); *Malupa v. Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 (1st Dep't 2013). Dr. Gopal found current motion deficits for the neck and low back but failed to compare his findings to the normal standards for those areas or set forth the objective tests used to measure the limitations.¹ *See Rickert v. Diaz*, 112 A.D.3d 451, 976 N.Y.S.2d 80 (1st Dep't 2013); *Gibbs v. Hee Hong, supra*. He found a positive painful arc and positive Neers and Hawkins impingement tests for the left shoulder but did not describe any qualitative limitations. *See Kamara v. Ajlan*, 107 A.D.3d 575, 968 N.Y.S.2d 45 (1st Dep't 2013). He performed no tests on the right shoulder or right hand, *see Rickert v. Diaz, supra*, or give a qualitative assessment of injuries to those areas. His opinion that plaintiff's return to work remained "guarded" conflicts with plaintiff's testimony that she had resumed working in 2013. He failed to rule out the degenerative changes he found in the cervical and lumbar spine x-rays as a cause of her limitations. *See Batista v. Porro*, 110 A.D.3d 609, 973 N.Y.S.2d 213 (1st Dep't 2013). Dr. Gopal referenced the findings from a lumbar spine MRI report but the report was not attached to his affirmation or reviewed and relied

¹ Dr. Gopal did not state the date on which he performed the physical examination, although plaintiff's counsel affirms that the examination took place on April 25, 2014. If the examination did not take place on April 25, then plaintiff has not offered any objective evidence of current limitations. *See Vega v. MTA Bus Co.*, 96 A.D.3d 506, 946 N.Y.S.2d 162 (1st Dep't 2012).

upon by defendant's expert. *See Malupa v. Oppong, supra.* In a May 10, 2012 examination, Dr. Gopal reported that plaintiff's neck and low back pain had resolved and range of motion in the left shoulder was full. He found a minor limitation in the right shoulder but recommended that plaintiff discontinue treatment. He offered no explanation for his recent findings of limitations, *see Rivera v. Gonzalez*, 107 A.D.3d 500, 967 N.Y.S.2d 60 (1st Dep't 2013), and a mild, minor or slight limitation is not considered significant. *See Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 570 (1982). Dr. Gopal further stated that plaintiff recently complained of a low back and right shoulder pain, but subjective complaints of pain are insufficient to raise a triable issue. *See Levinson v. Mollah, supra.*

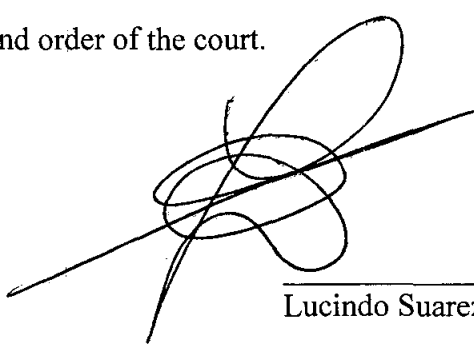
Accordingly, it is

ORDERED, that defendant's motion for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of Ebenezer B. Collins dismissing plaintiff's complaint against him.

This constitutes the decision and order of the court.

Dated: August 15, 2014



Lucindo Suarez, J.S.C.