

Ramirez v Montero

2015 NY Slip Op 30278(U)

February 4, 2015

Supreme Court, Suffolk County

Docket Number: 27335/2012

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Lissette Gonzalez Ramirez,

Plaintiff,

-against-

Laneide Montero,

Defendant.

Motion Sequence No.: 001; MDMotion Date: 8/28/14Submitted: 10/2/14Index No.: 27335/2012Attorney for Plaintiff:

Cannon & Acosta, LLP
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 Huntington Station, NY 11746

Attorney for Defendant:

Dodge & Monroy, P.C.
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Clerk of the Court

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; Answering Affidavits and supporting papers, 16 - 21; Replying Affidavits and supporting papers, 22 - 24; it is

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 17, 2011 in an accident that occurred at or near the intersection of West 13th Street and 4th Avenue in Huntington, New York. By her bill of particulars, plaintiff alleges that as a result of the subject

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accident she sustained serious injuries including, T4-5 disc herniation impressing the ventral thecal sac; C3-4, C4-5, C5-6 disc bulges; T1-2, T3-4 and T11-12 disc bulges; L4-5 disc bulge flattening the thecal sac; L5-S1 disc bulge; and cervical radiculopathy.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). His submissions in support include the pleadings, plaintiff’s deposition transcript and the affirmed reports of defendant’s examining orthopedic surgeon and examining radiologist.

It is well settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; or 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 order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of plaintiff’s limitation or loss of range of motion must be provided or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). The mere existence of a herniated or bulging disc or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). In order to qualify under the 90/180-days category,

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an injury must be “medically determined” meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

At her deposition, plaintiff testified that prior to the subject accident she was not experiencing any neck or back symptoms nor any knee pain; that at the scene of the accident she complained of neck and back pain and right knee pain; and that she went to Huntington Hospital’s emergency room the next day, underwent x-rays, was told to follow-up with her physician, and was released. Thereafter, plaintiff began treatment at Superior Medical Rehabilitation in which she received therapy as well as multiple injections to her lower back. Plaintiff explained that she received therapy for four days during the first week then two times a week for six months and underwent MRIs of her neck and back. She stated that her treatment ended after six months because she got tired traveling to the facility and that she went to see her treating physician Dr. Zespedes who prescribed medication and referred her to a chiropractor, Dr. Corso. In addition, plaintiff testified that she saw Dr. Corso only once, that he described exercises for her to decrease her pain, but that she did not return to him because the medication from her treating physician made her feel better. She informed that she never underwent an MRI of her right knee. Plaintiff further explained that as a result of the subject accident she missed two weeks from her work as a hair stylist, and that when she returned she could only work 26 or 24 hours per week rather than in excess of 40 hours per week as she used to prior to the accident. Her current complaints consist of neck and back pain all day long as well as numbness in her left leg. Plaintiff also stated that she can no longer exercise, play basketball with her son, and volunteer at her church and that she has difficulty walking long distances and sitting for long periods of time. She further testified that following the accident she was confined to bed for two days and to her home for two weeks.

Defendant’s examining orthopedic surgeon, Edward A. Toriello, M.D., indicated in his affirmed report dated December 16, 2013 that he performed an examination and range of motion testing of plaintiff’s cervical spine, right and left shoulder, right and left elbow, right and left wrist and hand, lumbosacral spine and right and left knee using a goniometer. Dr. Toriello reported that all of plaintiff’s range of motion testing results when compared to normal findings were all normal except for flexion of the lumbosacral spine, which was 45 degrees (normal 60 degrees) and limited by pain. He noted that there was no paralumbar muscle spasm or CVA tenderness or loss of the normal lumbar lordosis but that straight leg raising was positive for pain on the right at 70 degrees. Dr. Toriello diagnosed resolved cervical strain, resolved low back strain, and a normal right knee

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exam and concluded that plaintiff's decreased lumbar spine motion was subjective. Defendant's examining radiologist, David A. Fisher, M.D., indicated in his affirmed report dated July 15, 2014 that he reviewed plaintiff's MRI of the lumbar spine and found "mild degenerative changes at the L4/5 and L5/S1 levels in this 37 year old. There are no disc herniations. The mild disc bulges noted are compatible with the amount of degenerative change present. There is no radiographic evidence of traumatic or causally related injury." With respect to his review of plaintiff's MRI of the cervical spine, Dr. Fisher concluded in his report dated July 15, 2014 that it was a normal study with no disc herniations or fractures and that radiographic evidence of traumatic or causally related injury was absent.

Here, defendant submitted competent medical evidence establishing, *prima facie*, that the alleged injuries to plaintiff's cervical and lumbar regions of the spine did not constitute a serious injury within the meaning of Insurance Law § 5102 (d) and, in any event, were not caused by the subject accident but, instead, were degenerative in nature (*see John v Linden*, 2015 NY Slip Op 00336 [2d Dept 2015]). As plaintiff did not allege in her bill of particulars that she injured her knees and did not move for leave to amend her bill of particulars, any claims concerning her knees were not considered by this Court (*see Marte v New York City Transit Auth.*, 59 AD3d 398, 871 NYS2d 921 [2d Dept 2009]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]; *see also Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Defendant also submitted evidence establishing, *prima facie*, that plaintiff did not sustain a "serious injury" under the 90/180-day category of Insurance Law § 5102 (d) (*see Kaminski v Kawamoto*, 49 AD3d 501, 853 NYS2d 588 [2d Dept 2008]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

Plaintiff opposes the motion arguing that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d). She contends that her examining radiologist noted a T4/5 left side posterior disc herniation, which defendant's examining radiologist did not find upon review of the same MRI film, thereby raising an issue of fact and that plaintiff's treating physician's affirmation corroborates through objective testing that plaintiff continues to have significant symptoms.

Plaintiff's examining radiologist, Robert Diamond, M.D., affirms that plaintiff's MRI of the lumbar spine and MRI of the cervical spine were performed on July 12, 2011 and affirms the contents of his reports dated July 13, 2011. Dr. Diamond's reports contain his findings including, T4/5 left sided posterior disc herniation; C3/4, C4/5, and C5/6 posterior subligamentous disc bulges; and L5/S1 posterior disc bulge. In addition, plaintiff's treating physician, Sima Anand, M.D., provides range of motion testing results for plaintiff's cervical spine and lumbar spine upon initial examination on May 23, 2011 and on October 3, 2011. Dr. Anand also reported that an examination conducted on August 27, 2014 revealed cervical paravertebral muscle spasm as well as lumbar paravertebral muscle spasm upon palpation. Computerized range of motion testing conducted on September 17, 2014 revealed cervical extension was 30/60 degrees and left rotation was 34/80 degrees. Right lateral flexion of the lumbar spine was 17/25 degrees, lumbar flexion was 27/60

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degrees and lumbar extension was 8/25 degrees. Noting that plaintiff was asymptomatic prior to the motor vehicle accident on May 17, 2011, Dr. Anand concludes that plaintiff's injuries "are the direct result of the trauma she received."

Here, plaintiff's submissions are sufficient to raise a triable issue of fact. The findings in the MRI study conducted on July 12, 2011, including the finding that plaintiff sustained a left sided posterior disc herniation which impressed the ventral thecal sac and extended into the anteroinferior foramina, and the findings that plaintiff exhibited both cervical and lumbar paravertebral muscle spasm at an examination conducted three years after the motor vehicle accident raise issues of fact to be determined at trial (*see Ogle v Higgins*, 122 AD3d 696, 996 NYS2d 181 [2d Dept 2104]).

Dated:

2/4/2015


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION