

Pittman v Espaillat

2015 NY Slip Op 30775(U)

May 7, 2015

Supreme Court, Suffolk County

Docket Number: 13618/2011

Judge: James C. Hudson

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**Supreme Court of the County of Suffolk
State of New York - Part XL**

MEMORANDUM DECISION

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

x-----x

MELANIE PITTMAN,

Plaintiff,

-against-

MARISA ESPAILLAT, SILVIO M. CARLOS,
CARL S. FRANCIS and CARL TYRONE PERCY,

Defendants.

x-----x

x-----x

MELANIE PITTMAN,

Plaintiff,

-against-

LEONARD S. GALEHOFF,

Defendant.

x-----x

INDEX NO.: 13618/2011
SEQ. NO.: 002-MG, CASEDISP

INDEX NO.: 11695/2011
SEQ. NO.: 003-MG, CASEDISP

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ORDERED, that the motion of Marisa Espaillat, and Silvio Carlos and the cross-motion of Carl S. Francis, and Carl Tyrone Percy for Summary Judgment in their favor and against Plaintiff are both granted under the circumstances presented (CPLR § 3212). It is further

ORDERED, that the motion of Defendant Leonard Galehoff for summary judgment in his favor and against Plaintiff is granted under the circumstances presented (CPLR § 3212). It is further

ORDERED, that Plaintiff's complaint is dismissed as against movants and cross-movants under Index numbers 13618-2011, and 11695-2011.

The cases at bar are actions for personal injuries which arise from two separate automobile accidents. Under Index number 11695-2011, Plaintiff contends that on October 26, 2009, she was involved in a motor vehicle accident with Defendant Leonard Galehoff. Plaintiff also contends that on November 23, 2009 she was involved in another motor vehicle accident with automobiles driven by Defendants Silvio Carlos (owned by Marisa Espaillat) and Carl Tyrone Percy (owned by Francis S. Carl). This matter is under Index number 13618-2011.

On Aug 2, 2013 the Court (Spinner J.) issued an order joining these matters for trial.

Defendants Marisa Espaillat, Silvio Carlos, Francis S. Carl (s/h/a Carl S. Francis), Percy Tyrone Carl's (s/h/a Carl Tyrone Percy) and Leonard Galehoff move for summary judgment on the basis of Plaintiff's failure to sustain a serious injury (CPLR § 3212, Insurance Law Sec. 5102). Although these are separate matters under separate Index numbers, the dispositive issue in these applications warrant that the Court discuss them in a single decision.

The proponent of a Summary Judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980)). Only when the movant has satisfied the Court in this respect, will the burden shift to the respondent. The party opposing summary judgment is then obliged "...to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Id. at 562). It is beyond cavil that the court's role is "issue-finding, rather than issue-determination." at this juncture (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, [1957]; *In re Brandie B.* 109 A.D.3d 987, 971 N.Y.S.2d 701 [2nd Dept.2013]).

Defendants offer certain proof in support of the applications. Initially, the movants and cross-movants refer the Court to the deposition of the Plaintiff (March 10, 2014). This indicates that Plaintiff was involved in an accident on July 6, 2006, as a pedestrian. Her injuries from that incident involved her left elbow, left arm, lower back and neck.

After the October 26, 2009 accident, Ms. Pittman was taken to Southside Hospital where she made complaints of pain to her left knee, neck hand and head. After seeing her pediatrician, Plaintiff began treatment at All Island Chiropractic and Physical therapy. This commenced approximately one month after the accident (deposition transcript p.38). She also received treatment from a Dr. Kaulter.

Regarding the October 26, 2009 accident, Defendant Mr. Galehoff has presented the record of an orthopedic physical examination on August 19, 2014 by Dr. Lee Kupersmith. His affirmed report (Defendant- Galehoff Exhibit "G") gives a diagnosis of "Cervical sprain/strain, resolved...Lumbosacral sprain/strain, resolved." As to disability the Doctor wrote "The claimant exhibits no orthopedic disability at this time. The patient has no objective findings to substantiate her subjective complaints." As to prognosis Dr. Kupersmith reports "The claimants slight restriction in range of motion of her lumbar spine was subjective in nature." Defendant also submits a sworn report by Dr. Mark Zuckerman in which he reports a goniometer test reading which indicated all results were on the normal numeric scale with certain slight deviations (e.g., "Lumbar flexion to 55 degrees of forward flexion (normal 60-90 degrees)."

The Defendants from the November 23, 2009 car accident tender the report of Dr. Jay Nathan (Defendants Espaillat and Carlos Exhibit "E"). In Dr. Nathan's report (dated April 28, 2014) he affirms that, using a hand held goniometer, he administered a range of motion test to the Plaintiff. The "[r]ange of motion of the shoulder revealed forward elevation to be 100(claimant)/180 (normal) degrees..." All other tests produced a numerical figure on the part of Plaintiff that matched the normal specification for each test.

The question is whether the aforementioned sworn medical proof submitted by the Defendants rises to the level of showing the Plaintiff did not suffer a serious injury on either October 26th or November 23rd of 2006.

Plaintiff argues that movants and cross-movants have failed to sustain their initial burden. Specifically, counsel asks the Court to focus on the reports of two examining physicians, Dr. Jay Nathan and Dr. Mathew Chacko (Plaintiff's Exhibit "B"). Regarding Dr. Nathan's report, counsel states, *inter alia*, "...that a review of the upper extremities reveal range of elevation motion of right shoulder to be 100 out of 180 and abduction is 100 out of 180. These are significant limitations of motion." Counsel points out that the two Doctors both agreed that Plaintiff's cervical flexion was normal but used different numerals (45 vs. 60) to indicate same. The same difference between the Doctors reports is noted concerning lumbar flexion (90 as "normal" vs. 60 as "normal"). Plaintiff's counsel also notes that the

report of Dr. Zuckerman states that the Plaintiff's "lumbar flexion is 55 degrees of forward flexion (normal 60-90 degrees)."

Although Plaintiff's counsel has woven his prose into an impressive argument, we are unpersuaded as to its utility. A "...minor limitation in range of motion in a single plane of [the Plaintiff's] cervical spine and lumbar spine, is not fatal to Defendants' prima facie showing, where the neurologist found a full range of motion in every other plane, indicated that the deficits were subjective, and in light of the orthopedic surgeon's opinion that the strains/sprains were resolved"; *Canelo v. Genolg Tr.*, 82 AD3d 584,919 N.Y.S.2d 27 [1st Dept 2011]; see, *Arrowood v. Lowinger*, 294 A.D.2d 315, 742 N.Y.S.2d 294 [1 Dept.,2002.]. Although the examining physicians in the case before us differ in small detail, their unanimous consensus remains and indicates that the Plaintiff's diminished physical condition does not qualify as a "significant" limitation of use (*Bandoian v. Bernstein*, 254 A.D.2d 205, 679 N.Y.S.2d 123 [1 Dept.,1998].

Prior to determining the ultimate question before us, however, the Court will examine recent case law to determine if summary judgment is appropriate. In *McDonough v. Mulligan* 125 A.D.3d 616, 3 N.Y.S.3d 92 [2nd Dept.,2015] and *Zwibel v. Midway Automotive Group*, --- N.Y.S.3d ---, 2015 WL 1651459 [2nd Dept., April 15, 2015], the Court opined that summary judgment was not called for because the movants in both cases had "failed to adequately address the [Plaintiffs] claims, set forth in the bill of particulars, that [they] sustained a serious injury" of a specific nature to particular parts of their bodies. This is in contrast to the instant controversy where the affirmed reports of the various Doctors are quite detailed in refuting, item by item, Plaintiff's claims of injuries.

The Court is also mindful of the necessity to closely scrutinize the numeric values used by the examining physicians relied upon by the movants. In *McLaughlin v. Rizzo*, 38 A.D.3d 856, 832 N.Y.S.2d 666 [2nd Dept.2007], the Court had scant regard for the numerical ratings of the Plaintiff's injuries on the basis that "...he failed to compare any of those numeric findings to what is deemed normal ranges of motion for those regions of the Plaintiff's body" (Id. citing, *Harman v. Busch*, 37 A.D.3d 537, 829 N.Y.S.2d 680; *Iles v. Jonat*, 35 A.D.3d 537, 538, 825 N.Y.S.2d 540; *Mirochnik v. Ostrovskiy*, 35 A.D.3d 413, 825 N.Y.S.2d 721; *Kavanagh v. Singh*, 34 A.D.3d 744, 745–746, 826 N.Y.S.2d 97).

In *Ramirez v. C.A. Castaneda-Valle* 2012 WL 5288050 (Trial Order) Supreme Court, Suffolk Co. October 15, 2012, the Court (LaSalle J.), found the numeric scores of the examining doctor "...deficient, since the normal range of motion measurements that he set forth for Plaintiff consists of variable ranges of motion, thereby, leaving the court to speculate as to the normal values and under what circumstances those variable ranges occur" (Id. citing, *McLaughlin v. Rizzo*, *supra*; *Powell v. Alade*, 31 A.D.3d 523, 818 N.Y.S.2d 600 [2d Dept 2006]; *Manceri v. Bowe*, 19 A.D.3d 462, 798 N.Y.S.2d 441 [2d Dept 2005])." Using the aforementioned caselaw as our guide, we find the medical reports submitted by the movants and cross-movants is sufficient. The use of a varied scale on one test in Dr.

Zuckerman's report namely "lumbar flexion is 55 degrees of forward flexion (normal 60-90 degrees)," does not discredit the remainder of his comprehensive analysis, nor does it affect the reports of the other physicians.

Applying the aforementioned case law, the Court finds that "...Defendants have met their prima facie burden of showing that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident" (*Campbell v. Morgan*, 126 A.D.3d 660, 2 N.Y.S.3d 363 [2nd Dept. 2015] citing, *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 [2002]; *Gaddy v. Eyler*, 79 N.Y.2d 955, 956-957, 582 N.Y.S.2d 990 [1992]). In light of this finding, the Court now looks to Plaintiff to submit objective proof in admissible form to raise triable issues of fact as to the threshold issue (*Licari v. Elliott* 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982]).

In her counsel's affirmation in opposition to the applications for summary judgment, Plaintiff asserts "Since Defendants have not met their initial burden, it is unnecessary to decide whether the papers submitted by the Plaintiff in opposition are sufficient to raise a triable issue of fact" citing, *Spanos v. Harrison*, 67 A.D.3d 893 [2nd Dept.2009]. Since the Court has found against Plaintiff on the initial question, however, it is incumbent on the Court to review the proof submitted by Plaintiff. It consists of the sworn reports of Dr. Chacko and Dr. Zuckerman (Plaintiff's exhibits "B" and "C") which as we have noted, argue in favor of Defendants' motions and cross-motion. Additionally, Plaintiff has submitted certified medical records of the Plaintiff concerning her treatment by Dr. Matthew Kalter. We find these exhibits to be insufficient to rebut the proof laid before the Court by the Defendants (*Lively v. Fernandez* 85 A.D.3d 981, 925 N.Y.S.2d 650 [2nd Dept.2011; see, *O'Gorman v. Prus*--- N.Y.S.3d ----, 2015 WL 1442643 N.Y.Sup. Westchester Co. March 15, 2015.)

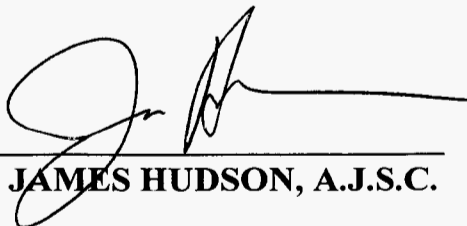
Accordingly, the Court finds that Plaintiff failed to sustain a serious injury under Insurance Law § 5102(d) for either the accident of October 26th, 2009 or November 23, 2009. Summary Judgment is granted in favor of the Defendants and against the Plaintiff under Index numbers 11695-2011 and 13618-2011. The Plaintiff's complaints are dismissed.

This order also constitutes the judgment of the Court.

Serve a copy of this order on Ms. Linette Gordon, the Calendar Clerk for this part.

This Memorandum constitutes the order of the Court.

DATED: MAY 7, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.