

Gonzalez v Guerrero
2015 NY Slip Op 30842(U)
April 6, 2015
Supreme Court, Bronx County
Docket Number: 307048/10
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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MADELINE GONZALEZ and ADALISSES GENAO,

Index No.: 307048/10

Plaintiffs,

-against-

DECISION/ORDER

RUBEN GUERRERO, MANUEL A. GUERRERO and
RAMON E. MEJIA,

Defendants

Howard H. Sherman
J.S.C.

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Facts and Procedural Background

Plaintiffs seek damages for injuries allegedly sustained on January 4, 2008 in a motor vehicle accident that occurred on at or near the intersection of Boston and Fordham Roads, Bronx, New York.

The action was commenced in August 2010, and issue was joined with the service of the answers of Manuel Guerrero in October.

The Note of Issue was filed on October 28, 2013.

Plaintiff **Madeline Gonzalez** alleges that she sustained the following injuries as a result of the motor vehicle accident: left knee medial and lateral meniscal tears and partial ACL tear requiring surgery that was performed on 4/2/10; cervical spine herniations at C3-4 and C5-6; lumbar spine herniations at L3-4 and L5-S1, and L4-L5 radiculopathy with range of motion restrictions [Verified Bill of Particulars ¶10].

It is further alleged that plaintiff was confined to bed for a period of two months after the accident, and to home to date [Id. ¶ 11(b,c)].¹

¹ 1/5/11.

All injuries are alleged to be permanent and to qualify as serious in each and every category of serious injury enumerated in the statute [Id. ¶24].²

Motion

Defendant Manuel Guerrero moves for an award of summary judgment dismissing the complaint of plaintiff Madeline Gonzalez on the grounds that she did not sustain a serious injury in the underlying motor vehicle accident. In support defendant submits copies of the pleadings and the verified Bill of Particulars, and the affirmed reports of the independent medical evaluations, as well as a copy of the transcript of plaintiff's 11/15/11 examination before trial.

Defendant Ramon Mejia cross-moves for the same relief on the same grounds tendering copies of the reports of the same medical experts, as well as the report of a biomechanical engineer. The engineer's report is not tendered in admissible form and is not considered for purposes of the motion.

Independent Medical Evaluations

1) Dr. John H. Buckner conducted an orthopedic evaluation of plaintiff after a physical examination on November 12, 2012.

For purposes of the evaluation, Dr. Buckner reviewed inter alia, the emergency treatment records as well as reports of the contemporaneous diagnostic studies and treatment records, and the operative report of 4/2/10.

Plaintiff presented with complaints of dizziness; nervousness; pain in the head, neck, back and left shoulder, and right and left leg, and occasional numbness in the left leg³ as well as

² Plaintiff did not succumb to any accident-related injury, nor was she dismembered in the accident, or caused to lose a fetus, nor was she significantly disfigured, nor did she sustain a fracture, nor are the injuries alleged equivalent to a "total" loss of use as contemplated with respect to the permanent loss of use category.

³ It is noted that neither shoulder, nor head, nor leg accident-related injuries are asserted here.

difficulty in walking, bending, and lifting.

Upon an examination , which incorporated a series of objective orthopedic and neurologic tests, and on evaluation of the contemporaneous records, Dr. Buckner concluded that there was no evidence of causally-related musculoskeletal injury, the arthroscopic left knee surgery concluded to be unrelated to the motor vehicle accident.

With respect to the cervical and lumbar spine, Dr. Buckner concluded that plaintiff had no musculoskeletal disability. Concerning the left knee injury alleged, he opined that in light of the biomechanics of the accident, and the lack of any evidence of diagnosis or treatment for this condition for fifteen months post-accident, and the indicia of degenerative changes evidenced on the 12/21/09 MRI, and at surgery, that the condition was not causally related to the accident. In addition, the musculoskeletal examination of the knee was concluded to be entirely normal, without permanency.

Dr. Buckner found plaintiff's cervical and lumbar spine examinations to be normal, and upon review of the reports of the MRI studies, he concluded that plaintiff did not sustain any accident-related cervical or lumbar spine injury.

With respect to the left shoulder injury asserted, Dr. Buckner opines that his examination was consistent with non-traumatic chronic impingement evidenced in the MRI report and found upon arthroscopic surgery, and concludes that plaintiff did not sustain a serious left shoulder injury in the motor vehicle accident.

Dr. Buckner concluded that plaintiff could perform all activities of daily living without restriction.

2) Dr. A. Robert Tantleff conducted a radiological review of the contemporaneous diagnostic films of plaintiff's cervical and lumbar spine.

With respect to the former study of 6/12/08, Dr. Tantleff opines within a reasonable degree of medical certainty that the films revealed regional discogenic changes with evidence of longstanding degenerative disc disease especially with loss of disc space, desiccation and spondylitic spurring at C4-5 and C5-6, and no evidence of acute or recent injury.

The 7/22/08 study of the lumbar spine was found to reveal advanced longstanding degenerative discogenic changes at L4 - 5 without correlation to the date of the accident.

Deposition

Plaintiff testified that she was the rear-seated middle passenger in a cab when the impact of the rear-end collision caused her body to thrust forward [Gonzalez EBT: 11-22]. She was taken by ambulance to Jacobi Hospital with complaints of pain in the left leg, neck and back [Id. 37-38]. She was given a neck brace and prescription for pain medication before being discharged [Id. 39]. She was given a card for a medical clinic at the hospital, and two or three days later, she presented there for the treatment [Id. 44-45]. She treated for a couple of months before being referred to another clinic [Id. 51-53]. She treated at the second clinic for four months [Id. 54]. She was referred to a specialist for her leg in 2009 or 2010 [Id. 58], and had knee surgery about a year after the accident [Id. 59-60], and then underwent a course of post-surgery physical therapy. Plaintiff testified that she was confined to bed for a month after the accident [Id. 103].

DISCUSSION AND CONCLUSIONS

Upon review of the findings by objective testing upon recent examination, and the evaluation of the contemporaneous records including the diagnostic reports, it is the finding of this court that

defendants have met their initial burden to prove as a matter of law that plaintiff did not sustain either an accident-related permanent consequential limitation of use of a body organ ,member of function, and/or a significant limitation of use of a body function or system .

In addition, in light of plaintiff's testimony concerning the minimal accident-related confinement, it is submitted that defendants have met their prima facie burden to establish that plaintiff did not sustain a serious injury as defined by the 90/180 category asserted.

Upon this showing, it is incumbent upon the plaintiff to come forward with an objective basis supporting the conclusion that she sustained a serious injury.

Plaintiff has done so.

Upon consideration of the contemporaneous records of medical treatment proffered by the cross-moving defendants as annexed to Dr. Buckner's report ⁴ and the affirmed reports of treating physicians Dr. Hostin, and Dr. Khakhar tendered in opposition, it is submitted that plaintiff has come forward with probative medical evidence of an accident-related serious injury in the significant and permanent consequential loss of use categories. Conflicts in experts' assessment of findings upon recent examination, as well as the etiology of the left knee injury are issues more properly reserved for the triers of fact.

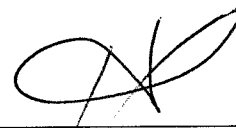
Finally, no medical proof is offered to support a 90/180 claim, even were the extent of plaintiff's post-accident confinement sufficient to qualify for purposes of such a claim.

⁴ See, Exhibit C.

Accordingly, the motion and cross motion are granted to the extent of awarding summary judgment dismissal of the claims of serious injury in all categories with the exception of “significant” and “permanent consequential” limitations of use.

This constitutes the decision and order of this court.

Dated: April 6, 2015
Bronx , New York



Howard H. Sherman
J.S.C.