Buelto v Mariam Et Alassane Car Serv., Inc.
2015 NY Slip Op 30992(U)
May 13, 2015
Supreme Court, Bronx County
Docket Number: 317957/11
Judge: Mark Friedlander
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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

SANDRA BUELTO,

Plaintiff,

-against-

MARIAM ET ALASSANE CAR SERVICE, INC., YAYA DOUMBIA and DAVID BURNS,

Defendants.

MEMORANDUM DECISION/ORDER
Index No.: 317957/11

HON. MARK FRIEDLANDER

Defendants, Mariam Et Alassane Car Service, Inc. ("Alassane") and Yaya Doumbia ("Doumbia"), move for an order, pursuant to CPLR§3212, granting them summary judgment dismissing plaintiff's complaint on the ground that the injuries claimed do not meet the "serious injury" threshold requirements of the Insurance Law. Defendant, David Burns ("Burns"), moves for an order, pursuant to CPLR§3212, granting summary judgment on the ground that plaintiff fails to meet the serious injury threshold requirement under Insurance Law §§5104(a) and 5102(d). Plaintiff moves for an order, pursuant to CPLR§3212, granting summary judgment on the issue of liability in favor of Sandra Buelto against all defendants; or in the alternative, granting plaintiff summary judgment to the extent that plaintiff was free of negligence in the causation of the accident. Burns' motion incorporates and adopts the facts, legal arguments and procedural history set forth in the motion of co-defendants. The motions are consolidated for disposition and decided as hereinafter indicated.

This action arises out of a three car accident which occurred on June 6, 2011, on Central Park West, near its intersection with 103rd Street, New York, New York.

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In support of the motions, defendants Alassane and Doumbia, submit a copy of the pleadings, plaintiff's bill of particulars, dated April 12, 2012, a transcript of plaintiff's deposition testimony, the affirmed reports of Dr. A. Robert Tantleff, M.D., a radiologist, of Comprehensive Radiology Review, PLLC, and Dr. John H. Buckner, M.D., an orthopedist, plaintiff's medical records from Ram Nair Medical, P.C., and the MRI report of Dr. Jacob Lichy, M.D., of plaintiff's lumbar spine.

In opposition to defendants' motions, plaintiff submits the affirmation of Dr. William B. Jones, M.D., affirmation and certification of medical records by doctors Jones and Huseyin E. Tuncel, M.D., of United Medical Offices of Long Island, PC., and submissions by S. Ramachandran Nair, M.D., and Jacob Lichy, M.D. (MRI report), as well as plaintiff's affidavit and excerpts of her deposition transcript.

Plaintiff claims that, as a result of her accident, she sustained a herniation of the L4-5 intervertebral disc with central as well as lateral encroachment, with trigger point injections and percutaneous discectomy surgical procedure.

The burden rests on defendant to establish by evidentiary proof, in admissible form, that plaintiff has not suffered a serious injury (*Lowe v. Bennet*, 122 AD2d 728 [1st Dept. 1986], aff'd 69 NY2d 701 [701]). When defendant's evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see *Licari v. Elliot*, 57 NY2d 230 [1982]).

Dr. Buckner, after examining plaintiff, found she had normal ranges of motion of the lumbar spine. His impression was that his orthopedic examination was entirely within normal

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limits with no positive findings. No residuals or permanency was found. He opined that plaintiff is capable of work activities and activities of daily living without restrictions.

Dr. Tantleff's examination of the MRI film of plaintiff's lumbar spine found significant regional changes of the lumbar spine, most pronounced at L4-5, which he attributed to advanced discogenic changes and longstanding degenerative disc disease, all unrelated to plaintiff's accident. He found no markers of acute or recent injury.

Based upon the above, defendants have made out a *prima facie* case that plaintiff's injuries did not meet the threshold requirements for serious injury as regards a permanent loss of use, a permanent consequential limitation or a significant limitation.

As to plaintiff's 90/180 claim as well, defendants have made out a *prima facie* case. Pursuant to plaintiff's deposition testimony, she did not miss any work as a result of the accident. *Perez v. Coor,* 84 A.D.3d 646 (1st Dept. 2011).

Since defendants have made out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury.

Plaintiff's opposition papers do not raise a triable issue of fact. Although Dr. Jones in his recent examination of plaintiff found significant restriction of range of motion of plaintiff's lumbar spine, no medical treatment records were produced subsequent to August 23, 2011, which was one week after plaintiff's lumbar discectomy of August 16, 2011,and less then three months subsequent to plaintiff's accident. Even crediting plaintiff's deposition testimony that she continued treatment for a period of approximately six months after the accident, ending sometime in December, 2011, cessation of treatment within six months after her accident

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demonstrates that her injuries were minor in nature and requires an explanation for her gap in treatment, which is unexplained here. *Frias v. Liu,* 107 A.D.3d 589 (1st Dept. 2013).

Defendants' motions for summary judgment on the ground that plaintiff's injuries do not meet the threshold requirement of the Insurance Law is granted, and plaintiff's complaint is dismissed in its entirety.

Having dismissed plaintiff's complaint on the ground of lack of serious injury, the Court need not address the issue of fault for the accident. Accordingly, plaintiff's motion for summary judgment on the issue of liability is denied as moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: 5/13/15

MARK FRIEDLANDER, J.S.C.