

<b>Manilla-Chalas v Familia</b>
2015 NY Slip Op 31648(U)
January 5, 2015
Supreme Court, Bronx County
Docket Number: 301512/2012
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

LUIGI MANILLA-CHALAS,

INDEX NUMBER: 301512/2012

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

ENDRIS FAMILIA and ANNETTE PAULINO,

Defendants.

The following papers numbered 1 to 3

Read on this Defendants' Motion for Summary Judgment

On Calendar of 6/9/14

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within action arises from a motor vehicle accident on April 21, 2010 in which plaintiff alleges to have sustained serious injuries to her neck, back and left shoulder. Defendants move for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1<sup>st</sup> Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

Toure, supra.<sup>1</sup>

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. Plaintiff alleges to have sustained, in relevant part, central herniations at C3-4, C5-6 and C6-7 creating impingement on the neural canal in her cervical spine; C5-6 radiculopathy on the left side; left foraminal herniations at L3-4 and L4-5, creating impingement in her lumbar spine; tendinosis/tendinopathy, characterized by heterogeneous signal in the supraspinatus tendon and joint effusion in her left shoulder, traumatic synovitis, impingement syndrome resulting in arthroscopy surgery on August 10, 2010 which revealed hypertrophic synovitis; bursitis, peripheral tear of the anterior superior glenoid labrum.

In support of their motion, defendants submit the affirmed report of Dr. Alan M. Crystal, an orthopedist, who examined plaintiff on July 11, 2013, and states that on physical examination, plaintiff exhibited normal range of motion in her cervical spine and left shoulder, and some minor restrictions in his lumbar spine. Dr. Crystal states that plaintiff had absolutely no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement. Regarding plaintiff's left shoulder, Dr. Crystal states that the medical records have contradictory information in that the emergency room record of April 21, 2010 does not have any shoulder complaints, and on April 26, 2010, Dr. Sanni-Thomas notes left shoulder pain and decreased range of motion. On May 19, 2010, Dr. Mao, another treating physician notes pain radiating to the left shoulder, but his examination reveals full range of motion and he does not record that the shoulder was injured.

Defendants also submit the affirmed report of Dr. Michael Setton who performed a review of plaintiff's cervical and lumbar spine MRIs, as well as a review of the left shoulder MRI. Dr. Setton states that with respect to the cervical spine, the MRI reveals no evidence of osseous or soft tissue injury definitely resulting from the accident eight days prior. He further states that there is a diffuse desiccation of the intervertebral discs, reflecting a degenerative loss of disc hydration occurring over a period of several months,

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<sup>1</sup>The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

predating and in no way causally related to the accident. Dr. Setton notes that there is mild to moderate bulging of the C4-5 and C5-6 intervertebral disc which relates to degeneration and weakening of the outer layer of the intervertebral disc and ligamentous laxity, findings unrelated to recent trauma. There is a small, broad-based central disc herniation at C3-4, which is most likely degenerative in nature as there is clear evidence of underlying disc degeneration at this level. Dr. Setton further states that there is asymmetric narrowing of the left neural foramen at C5-6 secondary to uncovertebral joint hypertrophy, a common form of osteoarthritis involving bony proliferation, occurring over a period of several months to years.

With respect to plaintiff's lumbar spine, Dr. Setton states that the MRI reveals no evidence of osseous or soft tissue injury definitely resulting from the accident one month prior. There is dessication of the L3-4 and L4-5 intervertebral discs, referring to degenerative loss of disc hydration occurring over a period of several months, a finding that predates and is in no way causally related to the accident one month prior. He further notes that there is a right foraminal disc herniation at L3-4 along with a broad-based central disc herniation at L4-5, both likely degenerative in etiology, as there is clear evidence of underlying degeneration at these levels. The described annular tears associated with these herniations refer to fissuring of the outer layer of the intervertebral disc, most commonly of degenerative etiology secondary to a chronic overuse type injury. Dr. Setton states that this finding can be present on an MRI for more than one year following the onset. He also found mild hypertrophic degeneration of the lower lumbar facet joints, a common form of osteoarthritis involving bony proliferation, occurring over a period of several months to years. Dr. Setton states that this is another indicator of chronic degenerative changes of the lumbar spine. Regarding plaintiff's left shoulder, Dr. Setton states that the MRI reveals no evidence of osseous or soft tissue injury definitely resulting from the accident one month prior. He states that there is no rotator cuff or labral pathology identified, and there is no evidence of abnormal bone marrow or para-articular soft tissue signal to indicate recent injury.

In opposition to the motion, plaintiff submits a plethora of medical records in admissible form setting forth her emergency room visit immediately following the accident, her extensive treatments, physical therapy, physical examinations, objective diagnostic testing and the results and the operative report for her left shoulder. These extensive records clearly raise an issue of fact as to whether plaintiff sustained a serious injury with respect to her left shoulder, and her 90/180 claim. The Court again notes the extensive treatment plaintiff received for her claimed injuries to her neck, back and left shoulder. However, with respect to the neck and

back, there can be no finding that plaintiff raised an issue of fact. Dr. Setton sets forth in a very detailed manner his findings of degenerative conditions in plaintiff's cervical and lumbar spine. Notwithstanding the voluminous medical submissions, plaintiff's doctors completely fail to address plaintiff's purported preexisting conditions as found by defendants' reviewing doctor.

Thus, the failure of plaintiff's treating doctors to not address or contest the detailed findings of preexisting degenerative conditions by defendants' physician is fatal to plaintiff's claims of injuries. Defendants correctly argue that plaintiff submissions fail to address the degenerative findings of Dr. Setton. Dr. Setton provides very detailed findings of pre-existing degenerative conditions. In the First Department, it has been consistently held that the failure of plaintiff's expert to address a pre-existing condition or degenerative condition warrants dismissal of the action. See, Boone v. Elizabeth Taxi, Inc., 993 N.Y.S.2d 302 (1<sup>st</sup> Dept. 2014)(Summary judgment proper where plaintiff's submissions failed to address defendants' showing that his cervical spine injuries were degenerative and preexisting); Nicholas v. Cablevision Systems Corp., 984 N.Y.S.2d 332 (1<sup>st</sup> Dept. 2014)(Plaintiff's physicians failed to address the degeneration that defendants' neurologist found in the MRIs taken of the cervical and lumbar spine); Kendig v. Kendig, 981 N.Y.S.2d 411 (1<sup>st</sup> Dept. 2014)(Plaintiff's treating neurologist's report failed to address defendant's prima facie showing that her cervical and lumbar spine conditions were degenerative, preexisting and arthritic); Rickert v. Diaz, 976 N.Y.S.2d 80 (1<sup>st</sup> Dept. 2013)(Plaintiff failed to raise an issue of fact where her doctors failed to explain why degeneration could not be ruled out as the cause of plaintiff's injuries); Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1<sup>st</sup> Dept. 2011)(Plaintiff expert must address causation where defendants expert indicates that plaintiff's injury was caused by pre-existing condition); McCree v. Sam Trans Corp., 920 N.Y.S.2d 35 (1<sup>st</sup> Dept., 2011)(While its medical expert attributed the range of motion restrictions he found in plaintiff's right shoulder and cervical spine to degenerative changes or a pre-existing condition, his opinion lacked a factual basis and was conclusory); Frias v. James, 895 N.Y.S.2d 335 (1<sup>st</sup> Dept. 2010) (Expert's opinion that plaintiff's restrictions were attributed to degenerative causes was conclusory as it was advanced without any elaboration and without any reference to degeneration in the MRI reports reviewed); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1<sup>st</sup> Dept. 2009) (Plaintiff failed to raise an inference that his injury was caused by the accident by not refuting defendants' evidence of a pre-existing degenerative condition of the spine. Missing from all of plaintiff's submissions is any mention of the congenital defect and degenerative condition. The doctor's failure even to

mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's injuries rendered his opinion that they were caused by the accident speculative); Reyes v. Brito, 869 N.Y.S.2d 495 (1<sup>st</sup> Dept. 2008) (Plaintiff failed to raise a triable issue of fact where the affirmation of her treating doctor made no effort to address, much less rebut, the finding by defendant's radiologist that the condition of plaintiff's lumbar and cervical spine was attributable to pre-existing degeneration rather than to this accident).

Nevertheless, since plaintiff has raised an issue of fact regarding her left shoulder injury which resulted in surgery, defendants' motion must be denied. "If a 'jury determines that plaintiff has met the threshold for serious injury [based on her shoulder injury], the jury may award damages for all of plaintiff's injuries causally related to the accident, even those not meeting the serious injury threshold'". Kang v. Almanzar, 984 N.Y.S.2d 42 (1<sup>st</sup> Dept. 2014) quoting Rubin v. SMS Taxi Corp., 898 N.Y.S.2d 110 (1<sup>st</sup> Dept. 2010). "Once a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident". Rubin, quoting Obdulio v. Fabian, 822 N.Y.S.2d 276 (1<sup>st</sup> Dept. 2006). See also, Prince v. Lovelace, 981 N.Y.S.2d 410 (1<sup>st</sup> Dept. 2014)(Plaintiff having met his threshold burden based on evidence that he suffered serious injury to his right knee, we need not address whether the claimed cervical and lumbar injuries are also sufficient to meet the no fault threshold).

Regarding the left shoulder, plaintiff produced objective, contemporaneous and qualitative medical evidence regarding the injury. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1<sup>st</sup> Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1<sup>st</sup> Dept. 2006). Plaintiff did complain about the shoulder within days of the accident. The medical records of Dr. Sanni-Thomas, who examined plaintiff five days after the accident, reveal significant restrictions in the range of motion of her left shoulder. Thus, plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1<sup>st</sup> Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Plaintiff's treating physicians set forth the nature of plaintiff's limited ranges of motion in her shoulder by assigning percentages to the limitations and identifying the objective tests performed in deriving those measurements. Rivera v. Benaroti, 815 N.Y.S.2d 44 (1<sup>st</sup> Dept. 2006); Taylor v. Terrigno, 812 N.Y.S.2d 50 (1<sup>st</sup> Dept. 2006). In addition, objective medical evidence such as the MRI sufficiently establish the existence of a serious injury. Toure, supra; Brown v.

Achy, 776 N.Y.S.2d 56 (1<sup>st</sup> Dept. 2004). Plaintiff's MRI revealed objective findings of injury "tendinosis/tendinopathy, characterized by heterogeneous signal in the supraspinatus tendon" and joint effusion in her left shoulder. Plaintiff's surgeon, Dr. Jeffrey Cohen, who performed the surgery on August 10, 2010, was able to personally confirm the injury to plaintiff's left shoulder when he performed the surgery. Dr. Cohen's provides in his operative report that his preoperative diagnosis was traumatic synovitis and impingement syndrome. His postoperative diagnosis was hypertrophic synovitis, capsulitis, subacromial bursitis and peripheral tear of the anterior superior glenoid labrum. Thus, notwithstanding Dr. Setton's claims that there was no rotator cuff or labral pathology identified, the surgeon who performed the surgery found otherwise. The affirmation of plaintiff's treating physician and surgeon which is based on his personal examinations and observations of the plaintiff is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1<sup>st</sup> Dept. 1998). Therefore, plaintiff has raised an issue of fact with respect to her shoulder injury under the significant limitation of use of a body function or system category.

Plaintiff also raised an issue of fact in the permanent consequential limitation of use of a body organ or member category based on her most recent examination on April 24, 2014. Dr. Jerry Lubliner noted that plaintiff continues to complain of pain in her left shoulder and on physical examination she had significant limited range of motion with one-grade of external rotation, weakness and positive Neer and Hawkins' sign on the left. Based on his medical examination of plaintiff, the qualitative tests performed, review of the relevant medical records, and assessment of plaintiff's continue pain and symptoms, Dr. Lubliner opines that plaintiff had and will continue to have permanent deformities/conditions.

In Venegas v. Singh, 962 N.Y.S.2d 67 (1<sup>st</sup> Dept. 2013), the Court held that plaintiff raised an issue of fact as to his shoulder injury by submitting the affirmation of his treating orthopedic surgeon, who opined that the MRI films showed evidence of a tear, diagnosed a rotator cuff tear and impingement after surgery, and measured significant limitations in range of motion at a recent examination. Based upon his examinations, observations made during arthroscopic surgery, and review of the MRI films, he opined that plaintiff's left shoulder injuries were caused by the accident. The First Department held that contrary to defendants' contention, plaintiff's orthopedist sufficiently addressed causation by proffering a "different, yet equally plausible" opinion from that of defendants' experts. See also Vaughan v. Leon, 943 N.Y.S.2d 63 (1<sup>st</sup>

Dept. 2012); Yuen v. Arka Memory Cab Corp., 915 N.Y.S.2d 529 (1<sup>st</sup> Dept. 2011).

Similarly, in Paulino v. Rodriguez, 937 N.Y.S.2d 198 (1<sup>st</sup> Dept. 2012), the First Department held that plaintiff raised an issue of fact regarding the injury to her left shoulder where her subjective complaints of persistent pain were substantiated by objective medical evidence, including an MRI of her left shoulder, taken approximately two weeks after the accident, which showed the presence of fluid in her subscapular bursa, consistent with the diagnosis of bursitis. The Court noted that plaintiff also submitted medical evidence that she tested positive for a painful arc test and an impingement sign test, suffered persistent pain despite conservative treatment, and continued to exhibit range of motion deficits in her left shoulder even after undergoing arthroscopic surgery. The Court further held that since injuries may worsen over time, evidence of contemporaneous range of motion limitations was not a prerequisite to plaintiff's claim.

Defendants failed to make a prima facie showing that plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented her from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident. See, Delgado v. Papert Tr., Inc., 939 N.Y.S.2d 457 (1<sup>st</sup> Dept. 2012). Defendants' physicians' examinations took place well after the relevant 180-day period and defendants submitted no other evidence disproving plaintiff's claim that she was disabled for 90 out of the 180 days following the accident. See, Jeffers v. Style Tr. Inc., 952 N.Y.S.2d 541 (1<sup>st</sup> Dept. 2012); Quinones v. Ksieniewicz, 915 N.Y.S.2d 70 (1<sup>st</sup> Dept. 2011). In light of defendants' failure to meet their initial burden on the 90/180-day claim, plaintiff's proof need not be reviewed, and defendants submitted no other evidence disproving plaintiff's claim that she was disabled and unable to perform any household chores.

Accordingly, defendants' motion for summary judgment is denied.

Dated: 1/5/15



Hon. Alison Y. Tuitt