

Gutierrez v Garcia

2015 NY Slip Op 31649(U)

January 5, 2015

Supreme Court, Bronx County

Docket Number: 301637/11

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 04

JAN 20 2015

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CARMEN DELIA GUTIERRES,

Plaintiff,

Index No. 301637/11

-against-

DECISION/ORDER

EDUARDO GARCIA, FRANKLIN GARCIA,
HASSAN EISIDDIG and EL BOGHDEDY EXPRESS

Howard H. Sherman
J.S.C.

Defendants.
-----x

The following papers numbered 1 to 4 read on this motion for summary judgment defendant noticed on November 18, 2013 and duly submitted on the Motion Calendar of February 21, 2014.

	<u>PAPERS NUMBERED</u>	
Notice of Motion-Notice of Cross Motion Exhs and Affidavit Annexed	1, 2	
Answering Affidavit and Exhibits	4	
Memoranda of Law	3	

Upon the foregoing papers this motion by defendants Eisiddig and Boghdedy and cross-motion by defendants Eduardo Garcia and Franklin Garcia for an order awarding summary judgment in favor of defendants dismissing the complaint on the grounds of lack of serious injury is granted for the reasons set forth below.

Plaintiff alleges that she sustained serious injuries as the result of a 4/25/10 motor vehicle accident that occurred on April 25, 2010 at or near the intersection of Fordham Road

and Jerome Avenue, Bronx, New York.

The accident-related injuries alleged include pain to the right shoulder; TMJ syndrome; post-traumatic cervical, thoracic, and lumbar sprain/strain and multilevel bulging cervical disks and a herniation at L4-5 with impingement; left shoulder impingement syndrome; internal derangement of right/left shoulder impingement syndrome and derangement [Verified Bill of Particulars ¶ 11]. It is further alleged that plaintiff was confined to bed and home for one week post- accident [Id. ¶¶ 11,13,14].

Plaintiff asserts a claim of serious injury in four categories 1) permanent loss of use of a bodily organ, member, or system; 2) permanent consequential limitation of use of a bodily organ or member; 3) significant limitation of use of a bodily system or function, and 4) a medically non-permanent injury which prevented plaintiff from performing all the material acts which constitutes her usual and customary daily activities for 90/180 days during the first 180 days immediately following the injury.

Motion/Cross-Motion

Defendants El Boghdedy Express and Hassan Eisiddig move for an order awarding summary judgment in their favor dismissing as asserted against them the complaint and all cross-claims on the grounds that plaintiff failed to sustain a serious injury as defined by Insurance Law 5102(d).

Defendant Eduardo Garcia and Franklin Garcia cross-move for the same relief adopting and incorporating the arguments and exhibits of the moving defendants.

The motion is supported by the affirmed reports of independent medical evaluations conducted by defendants' neurologic, orthopedic, and radiological experts.

In pertinent part, Dr. Kuldip K. Sachdev, M.D., a Board Certified Neurologist, opines that plaintiff has no neurological disability and is capable of working and carrying out activities of daily living without restriction. The "normal" examination he conducted 10/24/12 encompassed negative findings upon a series of objective tests of the head, and cranial nerves, and of the cervical, thoracic and lumbar spine, and as measured with the use of goniometer full ranges of motion in all levels of the spinal areas as quantified and compared to normal readings based upon AMA guidelines for evaluation. The findings indicate the absence of spasm upon palpation of the spinal regions and negative results on Spurling, Soto Hall, Laseque's and Patrick's testing.

In her affirmed report, of her 9/17/12 examination, Dr. Lisa Nason, a Board Certified Orthopedist, concludes that there was no evidence of residuals or permanency of the alleged resolved injuries to the cervical thoracic and lumbar spine and bilateral shoulders. Dr. Nason's examination incorporates negative findings upon a series of objective tests, including, *inter alia*, foraminal compression; shoulder depression; Spurling; Impingement; Hawkins; Apprehension; straight leg raising and Laseque's.

The finding included full ranges of motion,¹ in both shoulders in all planes and in all planes of the cervical, thoracic and lumbar spine as quantified and compared to normal

¹ A goniometer was used to measure readings.

readings with those readings being based upon the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition.

A. Robert Tantleff, M.D., a Board Certified Radiologist conducted a review of the contemporaneous diagnostic studies of the cervical and lumbar spine.

With respect to the former MRI dated 05/01/10, Dr. Tantleff opines that it reveals age related ² regional discogenic changes of the cervical spine of "no definable clinical significance and unrelated to the current date of incident of 4/25/10." These changes include minimal central disc protrusion "of no significance" at C3-4 and C4-5. Disc desiccation and spondylitic spurring was observed and "no evidence of acute or recent injury."

The 6/25/10 MRI of the lumbar spine was found to reveal no evidence of any definable or significant disc bulge, protrusions or herniation and regional discogenic changes of the lower thoracic and lumbar spine most pronounced at L3-4 and L4-5 with degeneration, desiccation, real loss of height and spondylitic spurring indicative of and consistent with longstanding chronic degenerative disc desiccation. He also found a congenital transitional lumbosacral junction that may cause pain and concluded that there was "exacerbation of degenerative discogenic disease." Dr. Tantleff found no evidence of acute or recent injury or post-traumatic abnormality.

² Plaintiff was born on 03/30/75.

Deposition Testimony

In pertinent part, plaintiff testified that she returned to her full time job as a teaching assistant a week after the accident [Della-Gutierrez EBT: 99; 120]. She also testified that she has received no treatment for her accident injuries since August 2010 [EBT: 96].

Upon consideration of the moving papers including the testimony of plaintiff with respect to her minimal accident-related confinement as well as the findings of defendants' experts upon objective testing upon recent examination and those of the radiologist with respect to pre-existing degenerative discogenic changes and a congenital condition exacerbating this process, it is the finding of this court that defendants have sustained their prima facie showing of the lack of a serious injury.

In opposition, plaintiff fails to come forward with any probative medical proof to raise a triable issue of fact that she sustained a serious injury in the motor vehicle accident of April 25, 2010.

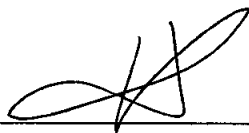
With the exception of the MRI studies , which though neither affirmed nor sworn, are properly before the court as having been relied upon by defendants' expert, plaintiff submits no medical reports in admissible form [Exhibits 2, 3, 4].

Moreover, with respect to any claim of a permanent injury, plaintiff's papers are deficient for the absence of any findings of continuing accident-related limitations upon recent medical examination (see, Vasquez v Almanzar, 107 AD 3d 538, 539-540, 967 NYS 2d 361 [1st Dept. 2013]).

Accordingly, the motion and cross-motion are granted and it is
ORDERED that summary judgment be entered in favor of defendants dismissing
the complaint and any and all cross-claims.

This constitutes the decision and order of this court.

Dated: January 5, 2015
Bronx, New York



Howard H. Sherman
J.S.C.