| **Rodriguez v Krasdale Foods, Inc.** |
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| 2015 NY Slip Op 32159(U) |
| November 9, 2015 |
| Supreme Court, Queens County |
| Docket Number: 701716/2013 |
| Judge: David Elliot |
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

JENNY RODRIGUEZ,
Plaintiff(s),

- against -

KRASDALE FOODS, INC., et al.,
Defendant(s).

Index
No. 701716 2013

Motion
Date October 27, 2015

Motion
Cal No. 138

Motion
Seq. No. 1

The following papers read on this motion by defendants for an order granting them summary judgment dismissing the amended complaint on the ground that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law § 5102 (d).

| | Papers Numbered |
|---|---|
| Notice of Motion - Affirmation - Exhibits..... | EF17-42 |
| Answering Affirmation - Exhibits..... | EF43 |
| Reply..... | EF44-54 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident which occurred on January 10, 2013, on 1st Avenue approximately 15 feet south of East 54th Street, in the County, City, and State of New York. Per her verified bill of particulars, plaintiff claims injury to the right shoulder – resulting in surgery which was performed on May 17, 2013 – as well as injury to the cervical spine. Defendants aver that plaintiff's amended complaint must be dismissed

since plaintiff's alleged injuries are either not serious, not caused by the accident, or preexisting in nature.

On this motion, it is defendants' initial burden to establish, *prima facie*, that plaintiff did not, as a matter of law, suffer a "serious injury" as defined in section 5102 (d) of the Insurance Law (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Wong v Innocent*, 54 AD3d 384 [2008]; *Perdomo v Scott*, 50 AD3d 1115 [2008]). Defendants may establish that plaintiff did not sustain a "serious injury" by submitting to the court affidavits or affirmations by medical experts who conclude that, after having examined plaintiff, no objective medical findings can support the claim (*see Shamsoodeen v Kibong*, 41 AD3d 577 [2007]; *Schacker v County of Orange*, 33 AD3d 903 [2006]; *Krat v D'Amico*, 18 AD3d 505 [2005]).

Defendants have met their *prima facie* burden of establishing their entitlement to judgment as a matter of law in several respects with regard to permanency and significance. First, defendants have submitted evidence indicating that plaintiff was involved in two serious prior motor vehicle accidents in 2004 and 2006, such that plaintiff's claimed injuries are preexisting and not causally related to the subject accident (*see e.g. Pryce v Nelson*, 124 AD3d 859 [2015]; *Iovino v Scholl*, 69 AD3d 799 [2010]; *Alexander v Felago*, 297 AD2d 762 [2002]). The medical records regarding the 2004 accident reveal, notably, that plaintiff was diagnosed with a neck sprain, for which she received treatment. Further, on March 7, 2012, less than one year prior to the subject accident, plaintiff returned to the doctor complaining of, *inter alia*, neck pain as a result of said accident. The medical records regarding the 2006 accident reveal that plaintiff was diagnosed with neck and bilateral shoulder sprains/strains, as well as a disc bulge at C5-6, for which she received treatment.

Second, defendants have submitted the affirmed reports of their own medical experts. Dr. Elton Strauss, orthopaedic surgeon, per his September 24, 2014 affirmed report, performed objective testing to the cervical spine and right shoulder on that date, and found full range of motion with respect to the former and limited range of motion with respect to the latter. However, Dr. Strauss opined that plaintiff has recovered fully from any orthopaedic effects of the subject accident, and that: (1) the shoulder surgery performed was "questionable but proved there was no injury that resulted in tearing of the rotator cuff, cartilage or bone"; (2) prior trauma is a cause of the disc herniation of the cervical spine; (3) considering the low velocity of the accident, it should not have been implicated in her symptoms of injury; and (4) plaintiff is "deconditioned and overweight" thereby playing a role in her symptoms. Dr. Strauss supplemented his report after reviewing additional medical records, adding that plaintiff underwent treatment to the cervical spine after her prior accident and that she complained of pain in the shoulders. The doctor commented on the congenital conditions present in plaintiff's shoulder and that the surgery was not indicated

based on the examinations and MRI. He also noted that, during her initial consultation with her own doctor in connection with the subject accident, she made no complaints to the right shoulder.

The affirmed report of Dr. Daniel J. Feuer, neurologist, noted a normal neurological examination on September 24, 2014. Finally, the radiological report of Dr. John T. Rigney, dated June 28, 2015, indicates that he reviewed all pertinent radiographic examinations (historical and from the subject accident). Dr. Rigney disagrees with the MRI report of plaintiff's cervical spine – said MRI having been taken after the subject accident – which indicated a central disc herniation at C5-C6. Dr. Rigney states that it was instead a disc bulge, which was seen following plaintiff's 2006 accident, thereby confirming that the injury was, in fact, preexisting and not caused by the subject accident. Dr. Rigney also stated that the findings with respect to the right shoulder MRI reveal a chronic condition unrelated to the subject accident.

Third, defendants submit the affidavit of their biomechanical engineer, wherein which he opined that plaintiff's description of the movement of her body at the time of the accident is "not consistent with the laws of physics and the occupant kinematics of a person sustaining a sideswipe impact." He further states that the minor damage to plaintiff's vehicle is indicative of the low-speed/low-impact nature of the accident, and that, at most, the accident may have caused a transient sprain or strain with no more potential for exacerbation of any existing cervical pathology than vigorous activities or chiropractic manipulation.[1]

Fourth, defendants submit plaintiff's own medical records generated in connection with the subject accident. Defendants point out that – with the exception of taking note of a prior knee surgery – none of plaintiff's treating doctors indicate that they reviewed any of plaintiff's prior medical records, which would have noted the aforementioned car accidents. In addition, defendants submit the report generated in conjunction with her No-Fault benefits. Per the physician's examination, taken on September 9, 2013, plaintiff had normal range of motion in her cervical spine. Though there was a limitation observed in the right shoulder

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1. It is noted that plaintiff, in opposition to the motion, states that the engineer, who is not a physician, is not qualified to render an opinion as to causation for purposes of this motion. While the Second Department has held that a biomechanical engineer may, in fact, be qualified to make such assessments (*see Plate v Palisade Film Delivery Corp.*, 39 AD3d 835 [2007]), the court, at this juncture, makes no determination as to whether his testimony would be admissible at trial absent a Frye hearing, to which plaintiff ostensibly refers (*see e.g. Valentine v Grossman*, 283 AD2d 571[2001]). It is further noted that, assuming, *argendo*, the testimony of this witness was found to be admissible, same would not change the determination of the court on this motion for summary judgment, discussed *infra*.

and the doctor diagnosed her with status post arthroscopic surgery, he deemed the surgery to be unrelated and medically unnecessary in relation to the subject accident. He concluded, overall, that there was a "probable causal relationship" between the accident and the reported injuries. This doctor did not review medical records from prior accidents.

Finally, and particularly, with respect to plaintiff's 90/180 claim, defendants submit plaintiff's employment records which show that plaintiff took one day off from work approximately 15 days after the subject accident. Her deposition testimony reveals that she was able to take care of her children, do chores, and go to the store (only needing help lifting heavy items), and was working 40 hours per week within the first two months following the accident. Further, though plaintiff indicates that she missed two months of work following the surgery, defendants' proof submitted on the motion establishes, *prima facie*, that the surgery had no connection to the subject accident.

In opposition to the motion, plaintiff initially contends that defendants have failed to meet their prima facie burden since plaintiff's own treatment records, submitted on the motion, "confirm plaintiff's injuries" (*see Balram v CJ Transp., LLC*, 127ADd3d 796 [2015]; *Abdalla v Mazl Taxi, Inc.*, 75 AD3d 517 [2010]). However, the failure by plaintiff's physicians to review any of plaintiff's prior medical records render their conclusions regarding causation speculative (*see Cornelius v Cintas Corp.*, 50 Ad3d 1085 [2008]; *Penaloza v Chavez*, 48 AD3d 654 [2008]; *Moore v Sarwar*, 29 AD3d 752 [2006]). Second, to the extent she avers that defendants' doctors found limitations in range of motion, those doctors opined that there was no causal relationship between those findings and the subject accident. Finally, to the extent plaintiff argues that none of defendants' doctors specifically addressed the 90/180 category of serious injury, defendants may properly meet their burden on their motion by relying simply on plaintiff's own deposition testimony (*see John v Linden*, 124 AD3d 598 [2015]).

That being said however, plaintiff adequately raised a triable issue of fact by virtue of the affirmed reports of Drs. Ketan D. Vora, Mark Bursztyn, and Narayan Paruchuri (*see e.g. Fraser-Baptiste v New York City Tr. Auth.*, 81 AD3d 878 [2011]). Dr. Vora provides, *inter alia*: evidence of both recent and contemporaneous objective testing to the affected areas, showing limitations therein; evidence that the doctor reviewed prior medical records pertaining to plaintiff's two prior motor vehicle accidents; and an opinion that plaintiff's injuries are permanent and caused by the subject accident, specifically taking into account the prior accidents. Dr. Vora also specifically rebuts the opinions of defendants' doctors with respect to the cervical spine MRI, opining that same indeed showed a herniated disc, which is consistent with the doctor's own clinical findings.

Further, Dr. Bursztyn, the physician who performed the shoulder surgery, reviewed records from plaintiff's 2006 accident. He states that the injuries sustained, including the post-operative diagnosis, were causally related to the subject accident. Finally, Dr. Paruchuri reiterates the findings made in the MRI report, which contradict the opinions of defendants' experts regarding the type of injury and the causal relationship to the accident.

The fact that these doctors did not review a "complete" set of plaintiff's prior records, specifically, treatment records from two chiropractic facilities, does not render the opinions entirely speculative, and defendants point to no case law in reply that imposes such a burden. It should be noted that "[a] preexisting condition does not foreclose a finding that the injuries were causally related to the accident"; rather, an issue of fact has been created whereby it cannot conclusively be determined that the injuries are "entirely preexisting" (*Rodgers v Duffy*, 95 AD3d 864 [2012]).

Finally, it is noted that plaintiff adequately explained any gap in treatment by virtue of her testimony wherein which she stated that her No-Fault insurance was "cut off" and she could not afford to keep up with her private health insurance co-payments (*see Francovig v Senekis Cab Corp.*, 41 AD3d 643 [2007]).

Accordingly, defendants' motion for an order granting them summary judgment dismissing the amended complaint is denied.

Dated: November 9, 2015

J.S.C.