Santacruz v Johnson

2016 NY Slip Op 30482(U)

March 21, 2016

Supreme Court, New York County

Docket Number: 155333/13

Judge: Leticia M. Ramirez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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SHADEY SANTACRUZ and LUIS CORNIEL,

Plaintiff(s),

-against-

ANTHONY JOHNSON, FRANMAR LEASING, LLC. and ACADEMY EXPRESS, LLC,

Defendant(s).

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Index #: 155333/13
Mot. Seq: 01 & 02

DECISION/ORDER

HON. LETICIA M. RAMIREZ

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff Shadey Santacruz ("plaintiff") did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) and plaintiffs' motion, pursuant to CPLR §3212, for summary judgment on the issue of liability. The motions are consolidated for disposition and decided as follows:

Summary judgment is appropriate where there is no genuine triable issue of fact and where the papers submitted warrant that the court directs judgment in favor of the moving party as a matter of law. *Andre v Pomeroy, 35 N.Y.2d 361 (1974)*. While plaintiff has the burden of proof, at trial, of establishing a prima facie case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Licari v. Elliot, 57 N.Y.2d 230 (1982); Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. Only if defendants have met their burden, must plaintiff then present admissible evidence to establish the existence of a triable issue of fact. *Licari v. Elliot, supra.*; *Zuckerman v City of New York, supra.*

It is well settled that a sprain, strain or contusion do not constitute a "serious injury" under the Insurance Law. *Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Casimar v Bailey, 70 A.D.3d 994 (2nd Dept. 2010); Hernandez v Stepney, 2015 NY Slip Op. 30802U (Sup. Ct. Bronx 2015).*

Furthermore, proof of a herniated or bulging disc or radiculopathy, alone, is insufficient to establish a "serious injury." Such proof must be supported by additional objective medical evidence demonstrating resulting significant physical limitation, and its duration. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008)* and *Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008)*. In addition, subject complaints of pain, tenderness, weakenss or transitory headaches, without more, will not satisfy plaintiff's burden of establishing a "serious injury." *Scheer v Koubek, 70 N.Y.2d 678 (1987); Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007); Casimar v Bailey, supra*. The Court has also held that, where "the evidence proffered by a plaintiff is limited to conclusory assertions tailored to meet the statutory requirements or where a doctor's submission is based only on the plaintiff's subjective complaints," summary judgment is warranted. *DiLeo v Blumberg, 250 A.D.2d 364, 365 (1st Dept. 1998)*. In addition, an affirmation for an attorney with no personal knowledge of the facts is hearsay, and therefore, has no probative value. *Zuckerman v City of New York, supra.*

To satisfy the "significant disfigurement" category of Insurance Law §5102(d), of the Insurance Law §5102(d), a scar must be one that "a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn." *Sidibe v Cordero, 79 A.D.3d 536 (1st Dept. 2010); Hutchinson v Beth Cab Corp., 207 A.D.2d 283 (1st Dept. 1994)*; *Zuckerman v City of New York, supra.*

According to plaintiff's Bill of Particulars, plaintiff alleges, inter alia, the following injuries as a result of the subject accident: a C5-6 disc herniation; C4-5, C6-7 and L2-3-L4-5 disc bulges; cervical radiculopathy; right elbow derangement; headaches; and laceration to the right temporoparietal area, resulting in significant scarring.

In support of their motion, defendants submitted, inter alia, the affirmed reports of orthopedist, Dr. J. Serge Parisien, and neurologist, Dr. Jean-Robert Desrouleaux, who both examined plaintiff on June 16, 2014. Both doctors quantitatively measured the ranges of motion of plaintiff's cervical and lumbar spine, identifying how the measurements were made and the specific measurements as compared to normal ranges, and found normal ranges of motion. Dr. Parisien also quantitatively measured plaintiff's right elbow range of motion and found full range of motion. Dr. Parisien diagnosed plaintiff with resolved cervical and lumbar sprains/strains and a resolved right elbow contusion and opined that plaintiff had no orthopedic disability or

permanency as a result of the subject accident. Dr. Desrouleaux diagnosed plaintiff with post traumatic headaches and resolved cervical and lumbar myofascitis and opined that she had no neurological disability or permanency as a result of the subject accident.

Defendants also submitted the transcript of plaintiff's deposition conducted on April 29, 2014. During her deposition, plaintiff testified, inter alia, that she never received any treatment for the headaches that she experienced after the accident and that the last time that she experienced headaches was in 2013.

Finally, defendants submitted color photographs of plaintiff's scar, which reveal that the scar is obscured by plaintiff's hair and is barely visible.

In light of the foregoing, defendants met their burden of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. *Sidibe v Cordero, supra.; Hutchinson v Beth Cab Corp., supra.*; *Licari v Elliot, supra.* The burden then shifted to plaintiff to present admissible evidence to establish the existence of a triable issue of fact. *Licari v Elliot, supra.*; *Zuckerman v City of New York, supra.*

Plaintiff failed to meet this burden. To demonstrate a "significant" or "permanent consequential" limitation, a plaintiff must come forth with competent objective medical evidence of an injury caused by the subject accident and of the extent of any physical limitation resulting from the injury and its duration. *Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002); Lopez v Senatore, 65 N.Y.2d 1017 (1985); Broderick v Spaeth, 241 A.D.2d 898, lv denied 91 N.Y.2d 805 (1998); Gaddy v Eyler, 167 A.D.2d 67, aff'd 79 N.Y.2d 955 (1992).* With regard to plaintiff's "significant disfigurement" claim, it is incumbent upon a plaintiff to submit objective medical evidence from a plastic surgeon to address the severity of plaintiff's scar. *Aguilar v Hicks, 9 A.D.3d 318 (1st Dept. 2004)*; *Sidibe v Cordero, supra.*

Here, plaintiff did not submit any competent objective medical evidence in opposition to defendants' motion. Plaintiff merely submitted photographs of plaintiffs' scar in an attempt to create a triable issue of fact as to whether the plaintiff sustained a "serious injury." However, as with the photographs of plaintiff's scar submitted by defendants, the photographs submitted by plaintiff, show that the scar does not constitute a "significant disfigurement" within the meaning of Insurance Law §5102(d). *Sidibe v Cordero, supra.; Hutchinson v Beth Cab Corp., supra.*; *Christopher V. v James A. Leasing, Inc. 115 A.D.3d 462 (1st Dept. 2014).*

Plaintiff also failed to raise any triable issues of fact as to the 90/180 category of the Insurance Law. In her Supplemental Bill of Particulars, plaintiff only claims bed confinement for 2 weeks and home confinement for approximately 1 month. Furthermore, plaintiff testified, during her deposition, that she only missed 2 months from work as a result of the accident and, upon her return, resumed her regular duties. *Insurance Law §5102(d)*; *Scheer v Koubek, supra.*; *Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007)*; *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009)*; *Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005)*; *Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999)*.

Accordingly, defendants' summary judgment motion is granted and plaintiffs' Complaint is dismissed.

In light of the above, plaintiffs' summary judgment motion on the issue of liability is denied, as moot.

This constitutes the Decision/Order of the Court.

Dated: March 21, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.