

Jules v Katz
2016 NY Slip Op 30531(U)
March 30, 2016
Supreme Court, New York County
Docket Number: 156060/13
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

Index #: 156060/13
Mot. Seq: 03

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MARJORIE JULES,
Plaintiff(s),

-against-

DECISION/ORDER

HON. LETICIA M. RAMIREZ

MONICA KATZ,
Defendant(s).
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Defendant’s motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v Pomeroy*, 35 N.Y.2d 361 (1974). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v. Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). Furthermore, in deciding motions for summary judgment, the Court must accept, as true, the non-moving party’s recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *Menzel v Plotnick*, *supra*.

A bulging or herniated disc may constitute evidence of a serious injury within the meaning of Section 5102 of the New York State Insurance Law. *Newman-Bachhuber v Hu*, 744 N.Y.S.2d 48 (2nd Dept. 2002); *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Lewis v White*, 274 A.D.2d 455 (2nd Dept. 2000).

In *Lewis v White*, the Court, in holding that there was an issue of material fact as to whether the plaintiff suffered a serious injury, stated that

“[t]he Supreme Court properly denied the defendants’ separate motions. In

support of their respective motions the appellants relied on a Magnetic Resonance Image of the plaintiff's lumbar spine which revealed a herniated disc at level L5-S1. A disc herniation may constitute a serious injury within the meaning of the Insurance Law. The appellants submitted reports of two doctors who both failed to establish that the disc herniation was not causally related to the subject accident. Moreover, after performing straight left raising tests on the plaintiff, one of the defendants' doctors found a 20 degree limitation in range of motion. This same doctor causally related these injuries to the subject accident." *Lewis v White*, 713 N.Y.S.2d at 121, 122.

In this action, there remain triable issues of fact as to whether plaintiff sustained L4-5 and L5-S1 disc herniations as a result of the subject accident and as to whether plaintiff a "significant" or "permanent consequential" limitation of her cervical and/or lumbar spine as a result of the subject accident.

In her Bill of Particulars, plaintiff alleges, inter alia, the following injuries as a result of the subject accident of December 15, 2011: L4-5 and L5-S1 posterior midline disc herniations into the epidural fat with bilateral facet arthropathy causing bilateral lateral recess stenosis; and bulging discs at C3-4, C4-5 and C5-6.

In support of her summary judgment motion, defendant submitted the affirmed report of radiologist, Dr. Stephen Lastig dated May 8, 2014. Dr. Lastig reviewed the films of the plaintiff's lumbar spine MRI conducted on January 26, 2012. He opined that the MRI revealed multilevel degenerative disc disease, most pronounced at L4-5; smooth annular bulging at L4-5; a focal left paracentral disc protrusion at L5-S1; and degenerative lower lumbar facet arthropathy with no evidence of spinal stenosis. Dr. Lastig concluded that the disc pathology at L4-5 and L5-S1 is most likely degenerative in nature and, thus, unrelated to the subject accident.

Additionally, defendant submitted the affirmed report of orthopedist, Dr. Lisa Nason, who examined the plaintiff on April 23, 2015. Upon her examination, Dr. Nason found that plaintiff had full ranges of motion of the cervical and lumbar spine. Dr. Nason diagnosed plaintiff with, inter alia, resolved cervical and lumbar spine sprains/strains and concluded that the plaintiff had no objective evidence of a disability.

In opposition, plaintiff submitted the affirmation of radiologist, Dr. John Rigney dated September 2, 2015. In his affirmation, Dr. Rigney affirmed his findings as stated within the reports of plaintiff's lumbar and cervical spine MRIs conducted on January 26, 2012, to wit:

posterior herniations at both L4-5 and L5-S1; proximal straightening with curvature resumed more distally in the lumbar spine; a large left adnexal fluid collection most likely representing a large cyst in the lumbar spine; and straightening of the cervical curvature with posterior bulges at C3-4 through C5-6.

Plaintiff also submitted the affidavit of chiropractor, Ronald Mazza dated January 5, 2016. Chiropractor Mazza stated that plaintiff was first seen in his office on December 30, 2011 as a result of the subject accident and continued treatment through October 26, 2012. He stated that plaintiff's treatment was discontinued because she had reached maximum medical improvement. He further stated that she was instructed to perform home exercises to maintain her improvement. Chiropractor Mazza noted that the plaintiff underwent cervical and lumbar spine MRIs on January 26, 2012 and concluded that the findings of lumbar spine disc herniations and cervical spine disc bulges were causally related to the subject accident.

Upon his most recent examination of plaintiff on September 16, 2015, chiropractor Mazza found restricted ranges of motion of plaintiff's cervical and lumbar spine. Plaintiff's cervical spine revealed that flexion was to 30 degrees (normal is 50 degrees), extension was to 40 degrees (normal is 60 degrees), left rotation was to 35 degrees (normal is 80 degrees); right rotation was to 35 degrees (normal is 80 degrees); left lateral flexion was to 35 degrees (normal is 45 degrees) and right lateral flexion was to 35 degrees (normal is 45 degrees). Plaintiff's lumbar spine revealed that pelvic sacral angle was to 30 degrees (normal is to 45 degrees), flexion was to 40 degrees (normal is 60 degrees), extension was to 15 degrees (normal is 25 degrees), left lateral flexion was to 15 degrees (normal is 25 degrees) and right lateral flexion was to 15 degrees (normal is 25 degrees).

Chiropractor Mazza diagnosed plaintiff with, inter alia, posterior herniations at both L4-5 and L5-S1 and straightening of the cervical curvature with posterior bulges at C3-4 through C5-6 as a result of the subject accident and opined that the plaintiff's cervical and lumbar spine restrictions were permanent.

When viewing the evidence in the light most favorable to plaintiff, this Court finds that there remain triable issues of fact as to whether plaintiff sustained L4-5 and L5-S1 disc herniations as a result of the subject accident and as to whether plaintiff suffered a "significant" or "permanent consequential" limitation of her cervical and/or lumbar spine as a result of the

subject accident. *Assaf v Ropog Cab Corp.*, *supra.*; *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).

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Moreno v Chemtob*, 706 N.Y.S.2d 150 (2nd Dept. 2000).

Defendant's contention that summary judgment is warranted because plaintiff failed to explain her gap in treatment from October 26, 2012 to September 16, 2015 is unavailing, as plaintiff sufficiently explained her gap in treatment with the affidavit of chiropractor Mazza, who stated that plaintiff's treatment was discontinued because she had reached maximum medical improvement. *Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002), where the Court held that an extended period without treatment was sufficiently explained by expert testimony that continued treatment would not produce any benefit.

Accordingly, defendant's summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: March 30, 2016
New York, New York


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