

Dabbraccio v Agosta
2016 NY Slip Op 30678(U)
March 25, 2016
Supreme Court, Bronx County
Docket Number: 307226/13
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2

SALVATORE DABBRACCIO and HILDA PEREZ,
Plaintiffs,

Index No. 307226/13

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

MARIAN AGOSTA and ANDREW AGOSTA,
Defendants.

The following papers numbered 1 to _____ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1-2</u>
	Answering Affidavit and Exhibits-----	<u>3-4</u>
	Replying Affidavit and Exhibits-----	<u>5</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

The branch of the motion pursuant to CPLR 3212 for an order dismissing plaintiff Salvatore Dabbraccio's claim, on the ground that he did not suffer a serious injury as defined by Insurance Law § 5102(d), is permitted to be withdrawn as per the annexed stipulation dated September 10, 2015.

The branch of the motion pursuant to CPLR 3212 for an order dismissing plaintiff Hilda Perez' claim, on the ground that she did not suffer a serious injury as defined by Insurance Law § 5102(d), is denied.

Plaintiff commenced this personal injury action to recover for injuries allegedly sustained as a result of a motor vehicle accident that occurred on February 21, 2012. In her bill of particulars, plaintiff alleges to have suffered "serious injuries" in the categories of: 1) "permanent consequential limitation of use of a body organ or member;" 2) "significant limitation of use of a body function or system;" and 3) "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." With respect to categories 1 and 2, plaintiff claims, in opposition, injury to her cervical and lumbar spine.

To prevail on a motion for summary judgment, defendants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In support of their argument to dismiss Ms. Perez' claim that she was unable to perform her usual and customary daily activities for 90 days out of the first 180 days following the date of the accident, defendants submit the verified bill of particulars and the deposition testimony of Ms. Perez. In her verified bill of particulars, Ms. Perez alleges that she "was incapacitated from work for approximately two weeks, and on light duty for three months and intermittently thereafter." Ms. Perez' testimony does not mention or contradict that she was on light duty at work for three months. It is noted that defendants' doctor did not examine Ms. Perez within the relevant time period. Accordingly, movants failed to meet their prima facie burden that Ms. Perez did not suffer a serious injury that incapacitated her for 90 out of the 180 days immediately following the accident.

In support of their argument that Ms. Perez did not suffer a serious injury in the remaining two categories, defendants submit the affirmed report of Dr. Martin Barschi. On April 8, 2015, Dr. Barschi conducted an orthopaedic examination of Ms. Perez, which included range of motion testing of her cervical and lumbar spine. Based upon

his examination, Dr. Barschi concluded that the soft tissue injuries to Ms. Perez' cervical and lumbar spine were resolved. Dr. Barschi further found that she did not require any further orthopaedic treatment.

Based upon the foregoing, this court finds that defendants have met their prima facie burden of demonstrating that Ms. Perez did not suffer a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

To defeat summary judgment, plaintiff must create an issue of fact as to whether Ms. Perez suffered a "permanent consequential limitation of use of a body organ, member, function or system" or "significant limitation of use of a body function or system." To establish that an injury is permanent consequential or significant, plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, or system (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002]).

In the instant matter, plaintiff submits the affirmations of Dr. Thomas Kolb and Dr. Aric Hausknecht. Dr. Kolb affirms that he read and interpreted the MRI films of Ms. Perez' spine dated March 15, 2012 and found "a posterior disc bulge at L4-5 impinging upon the thecal sac." Dr. Hausknecht examined Ms. Perez on February 28, 2012, about a week after the accident. Dr. Hausknecht concluded that Ms. Perez suffered from limited range of motion as well as pain in her cervical and lumbar spine. Dr. Hausknecht affirms that Ms. Perez "was followed periodically in [his] office and was seen again on 3/27/12, 5/1/12, 6/6/12 and 8/1/12. She did show some clinical improvement with the chiropractic treatments and physical therapy and for the most part

her neck pain resolved." On July 23, 2015, approximately three and a half years after the accident, Dr. Hausknecht examined Ms. Perez and conducted range of motion testing and found limited range of motion in her lumbar spine. Dr. Hausknecht concluded that Ms. Perez' injuries are permanent and casually related to the accident.


Dr. Hausknecht's affirmation correlates Ms. Perez' back pain approximately three and a half years after the accident to quantified range of motion limitations found on physical exam and a bulging disc described in Dr. Kolb's affirmed MRI report, and Dr. Hausknecht opines that Ms. Perez' symptoms are permanent. This suffices to raise an issue of fact precluding the grant of summary judgment (*see Rosario v Universal Truck & Trailer Service*, 7 AD3d 306 [1st Dept 2004] [court held two year gap between examinations went to the weight of the evidence where plaintiff's physician conducted range of motion test and found a permanent injury casually related to the accident during last examination]). The appropriate weight to be accorded Dr. Hausknecht's affirmation is a matter of credibility for the jury to assess, as is the lapse in three and a half years before the July 23, 2015 exam.

Based upon the affirmation of plaintiff's experts, this court finds that plaintiff raises an issue of fact as to whether Ms. Perez suffered a permanent consequential limitation or a significant limitation of use of a body function or system (*see Grant v United Pavers Co. Inc.*, 91 Ad3d 499 [1st Dept 2012]).

Upon receipt of the stipulation of discontinuance as to defendant Salvatore Dabbraccio, the Clerk is directed to dismiss the action against defendant Salvatore Dabbraccio and amend the caption accordingly.

The foregoing shall constitute the decision and order of this court.

Dated: MAR 25 2016



Elizabeth A. Taylor A.J.S.C.