

Paulema v Alam

2016 NY Slip Op 30834(U)

May 4, 2016

Supreme Court, New York County

Docket Number: 157041/14

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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LISEDA PAULEMA and KATI VIASSY,

Index #: 157041/14
Mot. Seq: 03

Plaintiff(s),

-against-

DECISION/ORDER

HON. LETICIA M. RAMIREZ

MOHAMMED S. ALAM and PANAMA YELLOW
TAXI, INC.,

Defendant(s).

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Defendants’ motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiffs Liseda Paulema and Kati Viassy 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 a triable issue 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 the 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). 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).

Proof of a bulging or herniated disc may constitute evidence of a serious injury within the meaning of §5102(d) of the New York State Insurance Law. *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Shvartsman v Vildman*, 47 A.D.3d 700 (2nd Dept. 2008); *Tobias v Chupenko*, 41 A.D.3d 583 (2nd Dept. 2007); *Lewis v White*, 274 A.D.2d 455 (2nd Dept. 2000).

However, such proof must be supported by additional objective medical evidence demonstrating a significant physical limitation therefrom. *Pommells v Perez*, 4 N.Y.3d 566 (2005).

In this action, plaintiffs have sufficiently raised triable issues of fact as to whether they sustained a “serious injury” within the meaning of Insurance Law §5102(d) as a result of the subject accident on February 18, 2014.

In her Verified Bill of Particulars, plaintiff Liseda Paulema alleges, *inter alia*, disc herniations at C3-4, C4-5, C5-6 and C7-T1; bulging discs at C6-7, L3-4, L4-5 and L5-S1; left C5 radiculopathy; and C5-6 spondylosis.

In support of their motion, defendants submitted, *inter alia*, the affirmed report of Dr. Audrey Eisenstadt dated August 28, 2015, who reviewed, *inter alia*, the films of plaintiff Paulema’s cervical and lumbar spine MRIs conducted on May 13, 2014. Dr. Eisenstadt opined that the cervical spine MRI films revealed straightening of the cervical lordosis; desiccation of all cervical intervertebral discs from C2-3 through C7-T1; and bulging discs at C4-5, C5-6 and C6-7 with a small broad-based left paracentral C5-6 disc herniation. Dr. Eisenstadt opined that plaintiff Paulema’s lumbar spine MRI films revealed minimal disc bulging at L3-4 through L5-S1. Dr. Eisenstadt concluded that the cervical and lumbar spine MRI findings were degenerative in nature and did not result from the subject accident.

Next, defendants submitted the affirmed report of Dr. Naunihal Sachdev Singh, who examined said plaintiff on May 4, 2015. Upon his examination, Dr. Singh noted that said plaintiff had normal ranges of motion of her cervical, thoracic and lumbar spines. Dr. Singh diagnosed plaintiff Paulema with resolved alleged injuries to the cervical, thoracic and lumbar spine without any neurologic disability.

In opposition to defendants’ motion, plaintiff Paulema submitted, *inter alia*, the affirmation of Dr. David Payne, who interpreted the films of said plaintiff’s cervical and lumbar MRIs conducted on May 13, 2014. Dr. Payne opined that said plaintiff’s cervical spine MRI findings were disc herniations at C3-4 and C4-5 with thecal sac indentation; left paracentral herniation at C5-6 with hemicord compression; bulging disc at C6-7 with thecal sac indentation; and right lateral herniation at C7-T1 with impingement at the C8 root. He further opined that said plaintiff’s lumbar spine MRI findings were a bulging disc at L3-4 without stenosis; a bulging

disc at L4-5 extending into each foramen without nerve root encroachment; and a bulging disc at L5-S1 with thecal sac impingement.

Plaintiffs also submitted the affirmed report dated January 26, 2016 of Dr. Gautam Khakhar of Physical Medicine and Rehabilitation of New York, who first saw said plaintiff on February 21, 2014. Dr. Khakhar noted that, his most recent examination of said plaintiff on January 13, 2016, revealed restrictions in her cervical spine ranging from 20% to 33% and lumbar spine ranging from 20 % to 40%. Dr. Khakhar diagnosed plaintiff Paulema with, *inter alia*, disc herniations at C3-4 and C4-5 with thecal sac indentation; a disc herniation at C5-6 with hemicord compression; a disc herniation at C7-T1 with impingement on the C8 nerve root; a bulging disc at C6-7 with thecal sac indentation; bulging discs at L3-4 and L4-5; and a bulging disc at L5-S1 with thecal sac impingement. He causally related his diagnoses to the subject accident and opined that plaintiff Paulema has a partial permanent disability as a result of the subject accident.

When viewing the evidence in the light most favorable to plaintiffs, this Court finds that plaintiff Paulema sufficiently raised triable issues of fact as to whether she sustained disc herniations at C3-4, C4-5, C5-6 and C7-T1 and/or bulging discs at C6-7, L3-4, L4-5 and L5-S1 as a result of the subject accident and whether she sustained a “significant” or “permanent consequential” limitation of her cervical spine 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*, *supra.*; *Moreno v Chemtob*, 706 N.Y.S.2d 150 (2nd Dept. 2000).

Similarly, this Court finds that plaintiff Viassy raised triable issues of fact as to whether she sustained disc herniations at C2-3, C3-4 and C5-6 and/or a disc bulge at C4-5 as a result of the subject accident and whether she sustained a “significant” or “permanent consequential” limitation of her cervical 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).

According to plaintiff Kati Viassy's Verified Bill of Particulars, she alleges, *inter alia*, disc herniations at C2-3, C3-4 and C5-6 and a disc bulge at C4-5.

In support of their motion, defendants submitted, *inter alia*, the affirmed report of Dr. Audrey Eisenstadt dated August 28, 2015, who reviewed, *inter alia*, the films of plaintiff Viassy's cervical MRI conducted on March 3, 2014. Dr. Eisenstadt opined that the films revealed straightening of the cervical lordosis; desiccation of the C3-4 through C5-6 disc levels with minimal disc bulging at C3-4. Dr. Eisenstadt concluded that the cervical spine MRI findings were degenerative in nature and did not result from the subject accident.

Next, defendants submitted the affirmed report of Dr. Naunihal Sachdev Singh, who examined said plaintiff on May 4, 2015. Upon his examination, Dr. Singh noted that said plaintiff had normal ranges of motion of her cervical spine. Dr. Singh diagnosed plaintiff Viassy with, *inter alia*, a resolved alleged injury to the cervical spine without any neurologic disability.

In opposition to defendants' motion, plaintiff Viassy submitted, *inter alia*, the affirmation of Dr. David Payne, who interpreted the films of said plaintiff's cervical spine MRI conducted on March 3, 2014. Dr. Payne opined that said plaintiff's cervical spine MRI findings were left paracentral herniations at C2-3 with thecal sac impingement; central herniations at C3-4 with thecal sac indentation; a bulging disc at C4-5 without stenosis; and right foraminal herniations at C5-6 impinging upon the exiting C6 root.

Plaintiffs also submitted the affirmed report dated April 4, 2016 of Dr. Diara Gross of DHD Medical, P.C., who first saw said plaintiff on February 27, 2014. Dr. Gross noted that, her most recent examination of said plaintiff on March 3, 2016, revealed, *inter alia*, restrictions in her cervical spine ranging from 6% to 33%. Dr. Gross diagnosed plaintiff Viassy with, *inter alia*, disc herniations at C2-3 and C3-4 with thecal sac indentation; a disc herniation and at C5-6 impinging on the C6 nerve root; a bulging disc at C4-5 and causally related her diagnoses to the subject accident. She concluded that plaintiff Viassy has a partial permanent disability as a result of the subject accident.

Lastly, with defendants' submission of the affirmed reports dated July 31, 2015, relative to each plaintiff, from Dr. Nicholas Caputo, further material issues of fact were raised that

preclude summary judgment to defendants. Dr. Caputo, a trauma expert who reviewed the police accident report, plaintiffs' Bill of Particulars and plaintiffs' emergency room records and opined that plaintiffs' alleged injuries could not have arisen from the subject accident. However, Dr. Caputo's opinions serve to create triable issues of fact for jury determination, given the affirmations of Dr. Payne and the affirmed reports of Dr. Khakhar and Dr. Gross. *Assaf v Ropog Cab Corp.*, *supra.*; *Zuckerman v City of New York*, *supra.*; *Winegrad v New York Univ. Med. Ctr.*, *supra.*; *Alvarez v Prospect Hosp.*, *supra.*; *Ugarriza v Schmider*, *supra.*; *Andre v Pomeroy*, *supra.*; *Moreno v Chemtob*, *supra.*

Based upon the foregoing, defendants' summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: May 4, 2016
New York, New York


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