

Beras v Vigorito

2016 NY Slip Op 31024(U)

May 31, 2016

Supreme Court, New York County

Docket Number: 154787/14

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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DORIS BERAS and CARMEN BERAS,

Index #: 154787/14
Mot. Seq: 01

Plaintiff(s),

-against-

DECISION/ORDER

HON. LETICIA M. RAMIREZ

KYLE S. VIGORITO, STEVEN F. VIGORITO and
WOODY D. SMITH,

Defendant(s).

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Defendant Woody D. Smith’s motion and defendants Kyle S. Vigorito and Steven F. Vigorito’s cross-motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiffs Doris Beras and Carmen Beras 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 that 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).

In this action, plaintiff Doris Beras sufficiently raised triable issues of fact as to whether she sustained a right shoulder tendon tear necessitating surgery, disc bulges at C3-4 through C6-7, L3-4 and L4-5 and a disc herniation at L5-S1 as a result of the subject accident of March 22, 2014 and whether she sustained a “significant” or “permanent consequential” limitation of her right shoulder and cervical and 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).

In support of their motion, defendants submitted the affirmed report of radiologist Dr. Audrey Eisenstadt dated November 11, 2015, who reviewed the MRI films of said plaintiff's cervical and lumbar spine and right shoulder conducted on April 27, 2014. Dr. Eisenstadt opined that the MRIs indicated degenerative changes, without traumatic injury. Dr. Eisenstadt also opined that the right shoulder MRI did not reveal any tears, the lumbar spine MRI did not reveal a bulging disc at L3-4, and the cervical spine MRI did not reveal disc bulging at C3-4, C4-5 and C6-7. Dr. Eisenstadt found only minimal disc bulging at C5-6 and disc bulging at L4-5 and L5-S1 with a small superimposed central L5-S1 disc herniation without neural displacement. These findings conflict with the findings of plaintiff's radiologist Dr. Robert Diamond, to wit: *inter alia*, C3-4 through C5-6 posterior disc bulges impressing on the ventral cervical spine; C6-7 subligamentous disc bulging; L3-4 posterior broad-based disc bulge; L4-5 posterior broad-based disc bulge with extension into the anteroinferior foramina; L5-S1 posterior disc herniation with extension to narrow the right and left foramina and abutting the anteroinferior exiting right L5 root; and thinning of the supraspinatus at the level of the acromioclavicular joint indicating a partial tear.

In addition, the findings and opinions of defendant's expert, Dr. Jeffrey Passick, conflicts with that of plaintiff's expert, Dr. Joyce Goldenberg. Upon his examination on April 8, 2015, Dr. Passick indicated that plaintiff had subjective tenderness to palpation of the cervical and lumbar spine and found that plaintiff had limited ranges of motion of her cervical spine, lumbar spine and right shoulder. He diagnosed plaintiff with resolved cervical, thoracic spine and lumbar spine strains with pre-existing degenerative changes; a resolved right shoulder contusion/strain with pre-existing degenerative changes, status post right shoulder arthroscopy; and a right wrist sprain/strain. Dr. Passick opined that plaintiff's right shoulder surgery was not causally related to the subject accident and that plaintiff did not have an orthopedic disability as a result of the subject accident. In contrast, Dr. Goldenberg found greater limitations of motion of plaintiff's cervical and lumbar spine and right shoulder upon her examination on April 9, 2015 and diagnosed plaintiff with, *inter alia*, disc bulges at C3-4 through C6-7, L3-4 and L4-5; disc herniations at L5-S1 and a right shoulder partial tear of the supraspinatus tendon with right

shoulder arthroscopic surgery on July 15, 2014. Dr. Goldenberg causally related her diagnoses to the subject accident and opined that plaintiff has a permanent disability as a result of the subject accident. Furthermore, in his affirmation, Dr. David Neuman, who performed said plaintiff's right shoulder surgery also causally related the surgery to the subject accident.

Given the conflicting findings and opinions of the parties' experts, defendants' request for summary judgment as against plaintiff Doris Beras is denied. 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).

Similarly, plaintiff Carmen Beras sufficiently raised triable issues of fact as to whether she sustained disc herniations at C2-3 through C6-7, L1-2, L2-3 and L5-S1; bulging discs at C7-T1, L3-4 and L4-5; a right shoulder tendon tear; and a left shoulder tendon tear as a result of the subject accident of March 22, 2014 and whether she sustained a "significant" or "permanent consequential" limitation of both shoulders and the cervical and lumbar spine as a result of the subject accident. *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.*

In support of their motion, defendants submitted the affirmed report of radiologist Dr. Audrey Eisenstadt dated November 11, 2015, who reviewed the MRI films of said plaintiff's cervical and lumbar spine conducted on April 26, 2014 and shoulders conducted on April 27, 2014. Dr. Eisenstadt opined that the MRIs indicated degenerative changes, without traumatic injury. Dr. Eisenstadt further opined that the lumbar spine MRI did not reveal any herniations, that the cervical spine MRI revealed disc bulging at C3-4 and C6-7, but no herniations at C2-3, C3-4, C5-6 or C6-7; and that the cervical spine MRI did not reveal disc bulging at C7-T1. With regard to plaintiff's left shoulder MRI, the only tear noted by Dr. Eisenstadt was a partial distal tear of the supraspinatus tendon with tendinopathy. These findings conflict with the findings of plaintiff's radiologists Dr. David Payne and Dr. Robert Diamond. Dr. Payne noted findings of, *inter alia*, right paracentral herniation at C2-3 with thecal sac indentation; broad-based central herniations at C3-4, C4-5, C5-6 and L1-2 with thecal sac indentation; left foraminal herniation at C6-7; bulging disc at C7-T1; right foraminal herniation at L2-3 with impingement upon exiting L2 root; bulging disc at L3-4; bulging disc at L4-5 with moderate bilateral foraminal stenosis and

central herniation component impinging upon the thecal sac and originating L5 roots; and right foraminal herniation at L5-S1 with impingement upon exiting L5 root. Dr. Diamond noted findings of, *inter alia*, full thickness anterolateral communicating tear of the supraspinatus with adjacent medial and posterior tendinosis/tendinopathy of the left shoulder with marginal surface irregularity in the humerus in the region of the communicating tear.

In addition, the findings and opinions of defendant's orthopedic expert, Dr. Jeffrey Passick, conflicts with that of plaintiff's expert, Dr. Joyce Goldenberg. Upon his examination on April 8, 2015, Dr. Passick found that plaintiff had limited ranges of motion of her cervical spine lumbar spine and right shoulder, but no limitations of the left shoulder. He noted that plaintiff had subjective tenderness to palpation of the cervical and lumbar spine and right shoulder. He diagnosed plaintiff with, *inter alia*, resolved cervical and lumbar spine strains with pre-existing degenerative changes and resolved left and right shoulder strains. Dr. Passick opined that plaintiff did not have an orthopedic disability as a result of the subject accident. In contrast, Dr. Goldenberg, upon her examination on April 9, 2015, found limitations of motion of plaintiff's cervical spine, lumbar spine and both shoulders and diagnosed plaintiff with, *inter alia*, disc bulges at L3-4 and L4-5; disc herniations at L1-2, L2-3 and L5-S1; a left shoulder full thickness tear of the supraspinatus tendon; and a right shoulder full thickness tear of the supraspinatus tendon with proximal retraction/superior humeral subluxation. Dr. Goldenberg causally related her diagnoses to the subject accident and opined that plaintiff had a permanent disability as a result of the subject accident. (Both Dr. Eisenstadt and Dr. Diamond found a complete spinaspinatus tendon tear of said plaintiff's right shoulder. However, unlike Dr. Goldenberg, Dr. Eisenstadt attributes the tear to degeneration).

In light of the conflicting expert findings and opinions, defendants' request for summary judgment as against plaintiff Carmen Beras is also denied. *Ugarriza v Schmider, supra.*; *Andre v Pomeroy, supra.*; *Moreno v Chemtob, supra.*

Next, although defendants submitted the affirmed reports of neurologist Dr. Adam Bender relative to both plaintiffs, the Court did not consider the reports, since Dr. Bender failed to objectively measure the plaintiffs' ranges of motion. Instead, Dr. Bender visually measured plaintiffs' ranges of motion, which is a subjective test. An expert must utilize an objective test to

measure range of motion. *Mompremier v N.Y.C.T.A.*, 43 Misc.3d 1206A (Sup. Ct. N.Y. 2014). Therefore, Dr. Bender's reports have no probative value.

Lastly, contrary to defendants' contention, plaintiffs' explanations, in their affidavits, for their gap in treatment, to wit: that their no-fault benefits were terminated were sufficient to raise a triable issue of fact as to whether they sustained a "serious injury," in light of the affirmations of Dr. Payne and Dr. Diamond and Dr. Goldenberg's affirmed reports. *Ramkumar v Grand Style Tansp. Enters. Inc.*, 22 N.Y.3d 905 (2013); *Wadford v Gruz* 35 A.D.3d 258 (1st Dept. 2006); *Francovig v Senekis Cab Corp.*, 41 A.D.3d 643 (2nd Dept. 2007).

Given the material issues of fact that remain, summary judgment is inappropriate in this action. *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.*

Accordingly, defendants' summary judgment motions are denied, in their entirety.

This constitutes the Decision/Order of the Court.

Dated: May 31, 2016
New York, New York


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