

Karounos v Doulalas
2016 NY Slip Op 31148(U)
May 10, 2016
Supreme Court, Bronx County
Docket Number: 306594/2013
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 27

INDEX # 306594/2013

STEPHANIE KAROUNOS,
Plaintiff,

-against-

DECISION and ORDER

ATHANASIOS DOULALAS and MICHAEL DOULALAS,
Defendants.

Present: Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of the Defendants' motion for summary judgment pursuant to CPLR 3212 and Insurance Law 5102(d) seeking dismissal of the Complaint:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Plaintiff's Affirmation, Affidavit & Exhibits in Opposition	2
Reply Affirmation	3

This action arises out of a two vehicle accident on May 27, 2011. Plaintiff alleged she sustained injury to her neck, back, right shoulder and right knee.

After discovery Defendants move for an order granting summary judgment and dismissing Plaintiff's complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). In support of summary judgment Defendant submitted, *inter alia*, the medical affirmations of **Naunihal Sachdev Singh**, a Board Certified Neurologist, and **Jonathan D. Glassman**, a Diplomate of the American Board of Orthopaedic Surgery.

Dr. Singh conducted a neurological examination on August 26, 2015 and listed the medical records he reviewed. Plaintiff presented with complaints of pain in her neck which radiated to her right shoulder, and pain of her upper, mid and lower back which radiated to her buttocks and thighs. The medical records indicated Plaintiff was involved in a prior motor vehicle accident on 1/14/2008 in which she injured her neck, lower back, right shoulder and bilateral ankles. While in therapy for the accident on 5/27/2011, Plaintiff was involved in another motor vehicle accident on 6/13/2012 "with increasing pain in her neck and left shoulder."

On 8/26/2015 Singh conducted range of motion testing of the lumbar spine and shoulder joints. He reported deficiencies in both body parts. Singh found normal motor strength and

intact sensation of the upper and lower extremities; the tendon reflexes were symmetrical in all four extremities. Singh's impression was that "cervical, thoracic and lumbar spine sprain and strain" had all resolved; further, the "the cervical, thoracic and lumbar spine sprain and strain is superimposed upon underlying cervical spondylosis and degenerative disc disease of the spine." Singh noted that Plaintiff had "limited movements of the cervical and lumbar spines and both shoulders, however, muscle strength, sensations and reflexes are normal in the upper and lower extremities." Singh concluded that Plaintiff had "no neurological disability based on my examination today as a result of the accident on 5/27/2011 and she is not disabled from working or from activities of daily living."

Dr. Glassman conducted an orthopedic examination on September 21, 2015 and listed the medical records he reviewed. Glassman reported that Plaintiff presented with complaints of "intermittent discomfort in her neck and mid back, and near constant lower back pain...and right shoulder and mid back discomfort." Glassman conducted range of motion testing of the cervical and lumbar spines, right shoulder, both wrists and right knee. His impression was "status post sprain of the cervical spine, thoracic spine, lumbar spine, right shoulder and right knee ... [all] superimposed on pre-existing degenerative changes and with subsequent (higher impact) motor vehicle accident on 6/13/12." He found no evidence of bilateral carpal tunnel syndrome and reported that "the examinee has left lower extremity sensory complaints and swelling that she states is only due to her subsequent 6/13/12 date of injury." Glassman concluded that based upon his examination, "from the perspective of the subject motor vehicle accident there is no disability."

The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff did not sustain a "serious injury." Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774

N.E.2d 119 (2002); *Rubenscastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep't 2006).

In opposition to summary judgment, Plaintiff submitted, *inter alia*, medical records and doctors' affirmations relating to the 2008 accident. With respect to the accident at issue, Plaintiff submitted the medical affirmation of **Ariq Rabadi**, a Licensed Chiropractor, and **Sireen Gopal**, a Diplomate of the American Board of Physical Medicine and Rehabilitation. Dr. Rabadi examined Plaintiff on June 7, 2011 contemporaneously after the accident of 5/27/2011; Dr. Rabadi treated Plaintiff for four months post accident, and referred her for electro-diagnostic testing and MRIs of the lumbar spine and right shoulder, taken on 7/8/11 and 8/22/11 respectively. In his report Dr. Rabadi opined that Plaintiff sustained permanent injuries to her cervical and lumbar spines which were not degenerative or pre-existing prior to the accident of 5/27/2011.

Dr. Rabadi referred Plaintiff to Dr. John M. Olsewski, an orthopedist, who in turn, referred Plaintiff to Dr. Sireen Gopal, a pain management specialist, in January 2012. Dr. Gopal examined Plaintiff on January 17, 2012, February 28, 2012, April 23, 2012 and June 1, 2012. He reported restrictions on range of motion in the cervical and lumbar spines; he concluded that Plaintiff sustained disabilities involving the lumbar and cervical spine as a result of the accident on May 27, 2011, which were exacerbated as a result of the accident in June 2012.

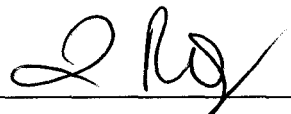
After consideration of Plaintiff's submission, the Court finds that the differing and/or contradictory medical opinions expressed by the parties' respective doctors raise issues of fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, plaintiff's submission raised material issues of fact *and credibility* as to whether she sustained a "significant limitation of use of a body function or system," and/ or "permanent consequential limitation of use of a body organ or member." At this juncture the court declines to dismiss these claims as matter of law. *Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005); *Cf. Castillo v. Abreu*, 132 A.D.3d 520, 18 N.Y.S.3d 378 (1st Dept. 2015); *Boateng v. Ye Yiyen*, 119 A.D.3d 424, 990 N.Y.S.2d 17 (1st Dept. 2014); *Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 (1st Dept. 2014); *Clementson v. Price*, 107 A.D.3d 533, 967 N.Y.S.2d 357 (1st Dept.

2013); *Angeles v. American United Transportation, Inc.*, 110 A.D.3d 639, 973 N.Y.S.2d 644 (1st Dept. 2013); *Brown v. Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1st Dept. 2011); *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010); *Deloris Brown v. Joseph Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1st Dept. 2011) (Plaintiff offered sufficient explanation for gap in treatment in that her no fault benefits were denied).

However, the Court finds that Plaintiff failed to meet her burden of rebuttal regarding the 90/180 claim, i.e., that she suffered “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.” Here, Plaintiff reported to Dr. Singh that on 5/27/2011 she was working as a case worker and continued to work until her lung surgery in June 2015.

For the foregoing reasons, Defendants’ motion and cross-motion for summary judgment dismissing the complaint for Plaintiff’s failure to meet the “serious injury” threshold of Insurance Law §5102(d) is **granted** solely to the extent that Plaintiff’s 90/180 claim is **dismissed**. Defendants’ motion is otherwise **denied**, as herein above described.

Dated: May 10, 2016



Hon. Julia I Rodriguez, J.S.C.