

Figueroa v Berroe

2016 NY Slip Op 31153(U)

May 17, 2016

Supreme Court, Bronx County

Docket Number: 307470/2012

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

-----X
Lisa Figueroa

Plaintiff,

-against-

Andres Berroe, et al

Defendants.

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DECISION and ORDER
Index No. 307470/2012

Hon. Sharon A.M. Aarons

Plaintiff alleges that she sustained a serious injury as a result of a motor vehicle accident that occurred on January 9, 2012. Defendants Andres Berroa, incorrectly s/h/a Andres Berroe, and Zaheer Bros. Corp. move for summary judgment pursuant to CPLR 3212 on threshold grounds pursuant to Insurance Law § 5102(d). Defendant Midga Rodriguez separately moves for the same relief and adopts the arguments and proof submitted by defendants Berroa and Zaheer Bros. Corp. Plaintiff opposes both motions. The motions are granted in part and denied in part.

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) sets forth the serious injury threshold:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas*,

29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendants to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot*, 57 NY2d 230 [1982]; *Espinal v Senatore*, 65 NY2d 1017[1985].)

Defendants contend that plaintiff's injuries do not meet the statutory mandate of a serious injury. In support of their motion, defendants submit a copy of the pleadings, bill of particulars, plaintiff's deposition transcript, unsworn diagnostic records for the plaintiff, and the medical findings of Dr. Audrey Eisenstadt, and Dr. Alan M Crystal. Defendants submit the affirmed reports of Dr. Audrey Eisenstadt, a radiologist who stated that she reviewed the diagnostic tests of plaintiff's right knee, right shoulder, cervical and lumbar spine. Dr. Eisenstadt opined that her review of the MRI Scan of plaintiff's right knee dated November 17, 2012, revealed extensive hypertrophic spurring at the femoropatellar joint space which is not causally related to the accident and appears to be from extensive arthritic disease. Severe loss of meniscal substance in the posterior horns of the medial and lateral menisci which is another manifestation of longstanding degenerative joint disease. Chronic meniscal tear noted with no indication of any recent traumatic injury. No evidence of recent traumatic etiology. With regard to the MRI of plaintiff's right shoulder dated November 17, 2012, she opined that the findings of bony productive changes or hypertrophic spurring at the acromioclavicular joint are typical in appearance and distribution for arthritis and have no traumatic etiology. There is a partial supraspinatus tendon tear and impingement syndrome which are longstanding in etiology and predate the subject accident. There is also incidental bone cysts in the humeral head most likely degenerative in etiology but have no traumatic basis or casual relationship to the subject accident.

Dr. Eisenstadt next examined the MRI of plaintiff's cervical spine dated March 26,

2012 finding widespread degenerative disc diseases which are typical in appearance for arthritis. Osteophyte formation seen from C3-4 through C6-7 levels. Disc degeneration at C4-5 and C5-6 with desiccation at C6-7. Widespread disc bulging seen from C3-4 through C6-7 levels. Her conclusion is that there was no cervical degeneration, bulges or abnormality casually related to the instant motor vehicle accident. With regard plaintiff's lumbar spine taken approximately two months subsequent to the accident, revealed disc degeneration from L1-2 through L4-5. Osteophyte formation is seen throughout the lumbar spine. No annular tears or fractures noted. Dr. Eisenstadt stated that these findings are degenerative in etiology that predates the accident and have no casual relation to the accident.

Dr. Alan M. Crystal, the defendants' orthopedic surgeon, examined the plaintiff on January 9, 2014. During his examination, he performed range of motion tests using a goniometer on the plaintiff's lumbar spine, right shoulder and right knee that revealed restrictions except no restrictions noted in the cervical spine. He opined that the claimed injuries cannot be casually related to the accident because all of the claims are secondary to degeneration and not to trauma. Based on the foregoing, the defendants have established prima facie that plaintiff did not suffer a serious injury (*Clemmer v Drah Cab Corp.*, 74 A.D.3d 660, 667 [1st Dept 2010]). Consequently, it is incumbent upon plaintiff to come forward and present proof of a serious injury in admissible form. (*See Grasso v Angerami*, 79 NY2d 814 [1991]).

In opposition plaintiff submits her own affidavit, emergency medical records from Lincoln Hospital Center, diagnostic test results of plaintiff's right shoulder, right knee, lumbar and cervical spine, medical records from Dr. Peter C. Kwan, affidavit of Walter J Ciesarski, and the affirmed reports from Dr. Russell S. Golkow, Dr. Albert Graziosa, Dr. Narayan Parachuri.

The evidence proffered by the plaintiff's experts showing disc herniations and bulges in the cervical spine, right shoulder tear and right knee meniscus tear which required surgical intervention along with restricted range of motions to the cervical spine, right shoulder, right knee and persistent pain associated with this accident are sufficient to establish that there are

divergent medical opinions from both sides on the question of whether or not these injuries are causally related to the accident. Also, Dr. Cesarski and Dr. Graziosa opined that the injuries were caused by subject accident and not merely as a result of degeneration.

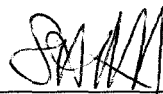
The dispute between the parties' experts as to whether plaintiff's injuries were causally related to the accident or degenerative in etiology, raises issues of fact (*Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]). A jury must determine the physicians' credibility and the weight to be accorded to their expert testimony (*Windisch v Weiman*, 161 AD2d 433 [1st Dept 1990]). Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiff, the Court finds that the plaintiff has provided sufficient medical evidence to raise a factual issue which requires resolution by a jury.

Notwithstanding the above, this court finds that the plaintiff does not fall under the 90/180 day category wherein serious injury is defined as a plaintiff's inability to perform "substantially all of the material acts which constitute[d][her] usual and customary activities for not less than 90 of the 180 days immediately following the date of the accident" (Insurance Law § 5102[d]). To prevail under this category, a plaintiff must demonstrate through competent, objective proof that she sustained a "medically determined injury or impairment of a nonpermanent nature (Insurance Law § 5102[d]) which would have caused the alleged limitations on the plaintiff's daily activities, and a curtailment of the plaintiff's usual activities to a great extent rather than some slight curtailmen." (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000]; *Licari v Elliott*, 57 NY2d 230 [1982]). Here, the evidence submitted by defendants, i.e., plaintiff's deposition transcript, and medical records, demonstrates that plaintiff cannot establish an inability to perform the requisite acts within the prescribed period.

Accordingly, defendants' motions for summary judgment are denied except for plaintiff's serious injury claim under the 90/180 day category which is dismissed.

This is the Decision and Order of the Court.

Dated: May 17, 2016



Sharon A.M. Aarons, J.S.C.