

Nicole v RJ Lease Mgt. Corp.
2016 NY Slip Op 31987(U)
September 15, 2016
Supreme Court, Bronx County
Docket Number: 306743/2013
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 306743/2013
Motion Calendar No. 12
Motion Date: ~~6/3/16~~ 6/13/16

-----X
YESSINA NICOLE,

Plaintiff,

-against-

RJ LEASE MANAGEMENT CORP. and "JOHN DOE",
RAMON DIAZBONSENOR and "JOHN DOE"

Defendants.
-----X

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support,	
Exhibits Thereto	1
Notice of Cross-Motion, Affirmation in Support,	
Affirmation in Opposition, Exhibits thereto.....	2
Affirmation in Opposition.....	3
Reply Affirmation	4
Reply Affirmation.....	5

Motion decided as follows: Upon deliberation of the application duly made by defendant, RJ LEASE MANAGEMENT CORP. (hereinafter "RJ") by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, granting RJ summary judgement and dismissing plaintiff's Complaint due to plaintiff's failure to meet the serious injury threshold requirement mandated by Insurance law §5102(d), is heretofore denied. Upon deliberation of the application duly made by plaintiff, YESSINA NICOLE (hereinafter "NICOLE"), by **NOTICE OF CROSS-MOTION**, and all the papers in connection thereto, for an Order, pursuant to CPLR §3212, granting summary judgement on liability, is heretofore granted.

This action involves injuries suffered by plaintiff as a result of a March 31, 2013 motor vehicle collision which occurred at or near 1521 Sheridan Avenue, Bronx County, New York. Plaintiff was riding in the back seat of a taxi owned by RJ when it was struck by a vehicle operated by RAMON DIAZBONSENOR (hereinafter "DIAZBONSENOR"). As a result of the accident, plaintiff alleges, among other injuries: a left wrist tear of the triangular fibrocartilage resulting in surgery with scarring; left shoulder partial rotator cuff tear resulting in surgery with scarring; cervical sprain; and a lumbar strain.

RJ has made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning New York Sate Insurance Law §§ 5102(d) as a result of accident in question. RJ attached the report

of Orthopedic Surgeon, Dr. John Buckner. The doctor examined the plaintiff and reviewed her medical records pertaining to the accident in question and found that plaintiff did not sustain any trauma or injuries as a result of the March 31, 2013 accident. The doctor performed range of motion testing on plaintiff's cervical spine, which he attributed as a normal variant or "feigned." Furthermore, the doctor concluded that for the exception of the healed arthroscopy incisions, which were not causally related to the accident, plaintiff's musculoskeletal examination was entirely normal. Moreover, he concluded that plaintiff's subjective complaints were not supported by the objective findings of the examinations. Lastly, the doctor opined that there was no permanency as a result of the accident.

The burden then shifts to plaintiff to demonstrate, at the very least, an issue of fact that she did sustain a serious injury as defined by Insurance law §5102(d) as a result of the March 31, 2013 accident. Based on the physician's affirmations and records of Dr. Capoila, Dr. Kolb, Dr. Narkhede, Dr. Post and Dr. Vasile, as well as the testimony of plaintiff herself, plaintiff has created an issue of fact that she suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system as a result of the accident in question.

On March 25, 2013, plaintiff first presented to Orthopedic Surgeon, Dr. Capiola, with complaints of pain in the left shoulder, left wrist, neck and lower back; as well as weakness of the left shoulder and wrist. The doctor examined the plaintiff and found limited range of motion and pain in plaintiff's left shoulder; limited range of motion and pain in plaintiff's left wrist; limited range of motion and pain in plaintiff's cervical spine; and limited range of motion and pain in plaintiff's lumbar spine. The doctor diagnosed plaintiff with post traumatic pain in plaintiff's left shoulder; left wrist; cervical spine; and lumbar spine and recommended that she have an M.R.I.s done and follow up in two (2) weeks. The doctor affirmed that plaintiff's injuries were traumatically induced and were a direct result of the March 11, 2013 motor vehicle accident.

Plaintiff again presented to Dr. Capiola, on May 20, 2013, with complaints of worsening pain in her left shoulder, left wrist, neck and lower back; as well as weakness of the left shoulder and wrist. The doctor noted that lifting and reaching aggravated pain and that she had limitation when pulling and pushing. Dr. Capiola's examination of plaintiff found limited range of motion and pain in the left shoulder; limited range of motion and pain in plaintiff's left wrist; limited range of motion and pain in plaintiff's cervical spine; and limited range of motion and pain in plaintiff's lumbar spine. Furthermore, the doctor notes the following test results: (1) March 21, 2013 X-Ray of the cervical spine revealed grade retrolisthesis of C3 upon C4; (2) April 25, 2013 M.R.I. of cervical spine revealed disc herniation at C3-4, C4-5 and C5-6; (3) April 25, 2013 M.R.I. of lumbar spine revealed subligamentous disc herniation at L5-S1 and disc bulges at L3-4 and L4-5; (4) April 27, 2013 M.R.I. of left wrist revealed peripheral tear of the triangular fibro cartilage and a ganglion cyst; and (5) April 27, 2013 M.R.I. of plaintiff's left shoulder revealed a cleavage tear of the anterior inferior labrum (these results are also referenced by Dr. Kolb, Dr. Narkhede and Dr. Vasile). Dr. Capiola indicates that plaintiff could not perform her usual and customary daily activities since her injuries and that the March 11, 2013 accident was a competent producing cause of the patient's disability.

Plaintiff again presented to Dr. Capiola on May 28, 2013 to have the following performed: (1) left wrist examination under anesthesia; (2) left wrist arthroscopy; (3) triangular fibrocartilage complex tear debridement; (4) extensive synovectomy; and (5) chondroplasty. The preoperative diagnosis was a left wrist triangular complex tear and synovitis. The post operative diagnosis was left wrist triangular complex tear, synovitis and chondromalacia. The doctor affirmed that plaintiff's injuries were traumatically induced and were a direct result of the March 11, 2013, motor vehicle accident.

Plaintiff again presented to Dr. Capiola on July 30, 2013 to have the following performed: (1) left shoulder examination under anesthesia; (2) left shoulder arthroscopy; (3) extensive synovectomy; (4) rotator cuff debridement; and (5) subacromial decompression. The preoperative and postoperative diagnosis was a left shoulder impingement and partial rotator cuff tear. The doctor affirmed that plaintiff's injuries were traumatically induced and were a direct result of the March 11, 2013, motor vehicle accident.

Finally, plaintiff presented to Dr. Capiola on September 9, 2013 to have the following performed: (1) left shoulder examination under anesthesia, left shoulder arthroscopy/biceps tenodesis utilizing pitchfork/whipstitch technique; (2) lysis of adhesions; and (3) soft tissue subacromial decompression. The preoperative and postoperative diagnosis was a left shoulder biceps tear, labral tearing and adhesions. The doctor affirmed that plaintiff's injuries were traumatically induced and were a direct result of the March 11, 2013, motor vehicle accident.

Plaintiff presented to Dr. Paul Post on May 27, 2015 for an orthopedic consultation. The doctor took a full history and noted that plaintiff had the following complaints: weakness in the left wrist with difficulty twisting; intermittent neck pain and stiffness, particularly on the left, with radiation to the left shoulder and left upper extremity; pain and tightness in the left shoulder and difficulty lifting; and persistent pain in the mid to lower back with difficulty in bending and intermittent pain radiating to the right lower extremity. Upon examination, Dr. Post noted restricted range of motion in plaintiff's neck; limited range of motion in plaintiff's left shoulder; limited range of motion and weakness in the plaintiff's left wrist; and limited range of motion in plaintiff's back. Based on the doctor's findings, he determined that as a result of the March 11, 2013 accident, plaintiff sustained the following injuries: (1) cervical derangement with disc herniation C3-C4, C4-5 and C5-6 with root irritation right; (2) internal derangement left shoulder with impingement and partial rotator cuff tear which necessitated operative intervention; (3) triangular fibrocartilage complex tear with traumatic synovitis left wrist which necessitated operative intervention; and (4) lumbosacral derangement with root irritation right with subligamentous disc herniation L5-S1 and traumatic disc bulges L3-L4 and L4-L5. The doctor notes that permanence is present as result of the underlying accident.

The reports by plaintiff's treating physicians clearly create, at the very least, an issue of fact as to whether plaintiff suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system as a result of the accident in question.

Moreover, plaintiff has created an issue of fact as to whether she was able to perform her usual and customary activities for 90 out of 180 days following the accident in question. Plaintiff swears that

as a result of the accident, she is experiencing severe pain in her left shoulder, left wrist neck and back on a daily basis. Moreover; she claims that she is no longer able to perform household chores or play with her child or even lift up her child. She claims to have difficulty standing up and sitting down for long periods of time as a result of the accident. Moreover, she claims that as a result of the accident she was not able to leave her home for three (3) months besides to go to doctors appointments due to pain. Dr. Capiola and Dr. Post also note in their reports how plaintiff was not able to perform particular customary daily activities as a result of the accident in question.

As there are issues of fact as to whether plaintiff suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system as a result of the accident in question and whether plaintiff was able to perform her customary activities for 90 out of 180 days following the accident in question, RJ's application for summary judgment must be denied in its entirety.

Furthermore, plaintiff's application for summary judgement is heretofore granted. It is not disputed that plaintiff was an innocent passenger in an automobile that was struck by defendant. Although there may be conflicting stories about how the accident occurred, none of the stories implicate any fault to plaintiff. As plaintiff cannot be at fault, she is not restricted by any potential issues of comparative negligence between the defendants. See Garcia v. Tri-Country Ambulete Serv., 282 A.D.2d 206, 723 N.Y.2d 163 (2001). As such, plaintiff's application for summary judgement on liability heretofore granted.

Accordingly, it is:

ORDERED that the motion by defendant RJ for summary judgement and dismissing the plaintiff's Complaint due to plaintiff's failure to meet the serious injury threshold requirement mandated by Insurance law §5102(d), is heretofore denied. It is further

ORDERED that the motion by plaintiff for an Order, pursuant to CPLR §3212, granting summary judgement on liability, is heretofore granted.

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants within thirty (30) days from the date of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: **SEP 15 2016**



WILMA GUZMAN
J.S.C.