Abboud v Pawelec
2016 NY Slip Op 32181(U)
October 26, 2016
Supreme Court, New York County
Docket Number: 150966/13
Judge: Leticia M. Ramirez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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DEMA ABBOUD,

Plaintiff(s),

-against-

LUDWIK PAWELEC and JAWINA PAWELEC,

Defendant(s).

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Index #: 150966/13
Mot. Seq: 03

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff 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 triable issues 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)*. In deciding summary judgment motions, 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)*. While plaintiff has the burden of proof, at trial, of establishing a *prima facie* case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a *prima facie* showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *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)*. Defendants' failure to make such a showing mandates the denial of a summary judgment motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

In this action, defendants failed to meet their burden of making a *prima facie* showing that plaintiff did not sustain a "serious injury," as a matter of law. *Zuckerman v City of New York, supra.; Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

According to her Bill of Particulars, plaintiff alleges sustaining, *inter alia*, disc herniations at C3-4, C4-5 and C5-6; a disc bulge at L5-S1; and lumbar radiculopathy at L4-5 and S1 as a result of the subject accident of May 10, 2011.

A bulging or herniated disc or radiculopathy may also constitute evidence of a "serious injury" in accordance with the 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 claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982)*; *Pommells v Perez, 4 N.Y.3d 566 (2005).*

In support of his motion, defendants submitted, *inter alia,* the affirmed report of Dr. Arnold Berman, who conducted an orthopedic examination of the plaintiff on December 11, 2014. Upon his examination, Dr. Berman noted, *inter alia*, that, although plaintiff had full range of motion of her thoracolumbar spine, plaintiff's cervical spine range of motion was limited, to wit: flexion was to 40 degrees (normal is 50 degrees), extension was to 0 degrees (normal is 60 degrees), left and right lateral flexion was to 30 degrees (normal is 45 degrees) and left and right rotation was to 6 degrees (normal is 80 degrees). Dr. Berman opined that plaintiff's cervical spine limitations resulted from subjective complaints of pain, not objective findings. Given this, Dr. Berman's report raises triable issues of fact that preclude the grant of summary judgment in favor of defendants. The finder of fact must determine whether plaintiff's cervical limitations are due to actual injuries or are subjective in nature. *Hourigan v. McGarry, supra.*

Defendant also submitted the affirmed report of Dr. Robert April, who conducted a neurological examination of the plaintiff on November 24, 2014. Upon his examination, Dr. April noted that a straight leg raising test was "resisted after 10 to 20 degrees in either leg (normal range is 60 to 90 degrees)," thereby further raising a material issue of fact as to whether the lumbar spine limitation finding were subjective or objective. *Hourigan v. McGarry, supra.* In addition, Dr. April noted that plaintiff was able to bend forward from standing to 75 degrees. However, he did not compare plaintiff's actual measurement to the normal range of motion or state whether he was testing the plaintiff's cervical or lumbar spine or both, rendering that finding

without probative value. *Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002); Manceri v Bowe, 19 A.D.3d 462 (2nd Dept. 2005).*

Based upon the foregoing, those portions of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation" and "permanent consequential limitation" categories are denied.

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez, 77 A.D.3d 403 (1st Dept. 2010).*

It is also unnecessary for the Court to consider plaintiff's opposing papers, since defendants have not meet his burden of demonstrating the absence of a "serious injury," as a matter of law. *Licari v Elliot, supra.*; *Winegrad v New York Univ. Med. Ctr., supra.; Alvarez v Prospect Hosp., supra.*; *Manceri v Bowe, 19 A.D.3d 462 (2nd Dept. 2005).*

Notwithstanding, plaintiff sufficiently raised triable issues of fact as to whether she sustained, *inter alia*, disc herniations at C3-4, C4-5 and C5-6; a disc bulge at L5-S1; and/or lumbar radiculopathy at L4-5 and S1 as a result of the subject accident of May 10, 2011, and whether she sustained a "significant limitation" or "permanent consequential limitation" of her cervical spine and/or lumbar spine as a result of the subject accident, with the affirmation of Dr. Ali Guy, the unsworn NCV/EMG report of Neal Goldsmith, D.C. dated July 7, 2011 and unsworn lumbar and cervical MRI reports from Upright Imaging dated June 2, 2011 and June 7, 2011, respectively. Although said reports are unsworn, as defendants' experts Dr. Berman and Dr. April reviewed said MRI reports, noted the findings in their reports and considered the findings in forming their opinions and Dr. April reviewed said NCV/EMG report, noted the findings in his report and considered the findings in forming his opinion, the NCV/EMG and cervical and lumbar MRI findings are properly before the Court for consideration. *Nelson v Distant*, 308 A.D.2d 308 (1st Dept. 2003).

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, supra.; Andre v. Pomeroy, , supra.; Moreno v. Chemtob, , supra.*

Next, as defendants improperly raised the issue of a gap in medical treatment for the first time in their reply papers, that issue is not properly before this Court, and, thus, was not

considered. *McNair v Lee, 24 A.D.3d 159 (1st Dept. 2005); Ritt v Lenox Hill Hospital, 182 A.D.2d 560 (1st Dept. 1992).*

Finally, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to raise a triable issue of fact as to whether she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Although plaintiff alleges that she was unable to return to work at the employment that she held at the time of subject accident as a result of the subject accident, plaintiff failed to submit contemporaneous competent objective medical evidence to support her "90/180" claim. *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999).* As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

Accordingly, defendants' summary judgment motion is denied in part and granted in part, as explained herein.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon defendants within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: October 26, 2016
New York, New York

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