

Glenn-Hershey v Soe Li Chong

2016 NY Slip Op 32234(U)

November 1, 2016

Supreme Court, New York County

Docket Number: 152591/15

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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LAURA GLENN-HERSHEY,
Plaintiff(s),

Index #: 152591/15
Mot. Seq: 01 & 02

-against-

DECISION/ORDER
HON. LETICIA M. RAMIREZ

SOE LI CHONG a/k/a SOE L. CHONG a/k/a CHONG
SOE SOE,
Defendant(s).

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Defendant’s 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) and plaintiff’s motion, pursuant to CPLR §3212, for summary judgment on the issue of liability. The motions are consolidated for disposition and decided as follows:

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), defendant has 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, defendant must submit admissible evidence to demonstrate that there are no material issues of fact that 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). Only if the defendant has met this burden, must the plaintiff then present evidence that she sustained a “serious injury” within the meaning of Insurance Law §5102(d). *Licari v. Elliot*, 57 N.Y.2d 230 (1982).

To establish the existence of a “serious injury” based upon the “permanent loss of use,” “permanent consequential limitation” or “significant limitation” categories, plaintiff must submit

competent objective medical evidence of a contemporaneous physical examination and a recent physical examination, in which a doctor either specifies plaintiff's actual limitations compared to normal ranges of motion and identifies the objective tests used to measure said limitations or provides a qualitative assessment of plaintiff's limitation, including an objective basis and a comparison of plaintiff's limitations to the normal function, purpose and use of the affected body function or system during the relevant time period. *Toure v Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *Perl v Meher*, 18 N.Y.3d 208 (2011); *Blackman v Dinstuhl*, 27 A.D.3d 241 (1st Dept. 2006); *Toulson v Young Han Pae*, 13 A.D.3d 317 (1st Dept. 2004); *Soho v Konate*, 85 A.D.3d 522 (1st Dept. 2011); *Mompremier v N.Y.C.T.A.*, 43 Misc.3d 1206A (Sup. Ct. N.Y. 2014).

To satisfy the "significant disfigurement" category of Insurance Law §5102(d), the plaintiff must demonstrate, with admissible evidence, that her scar is one that "a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn." *Sidibe v Cordero*, 79 A.D.3d 536 (1st Dept. 2010); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *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).

According to her Bill of Particulars, plaintiff alleges sustaining, *inter alia*, a large forehead laceration resulting in a scar requiring surgical repair; a disc herniation at L4-5; right hip strain; cervical spine strain; and right hip, left elbow, right rib and bilateral knee contusions as a result of the subject accident of May 6, 2014.

Plaintiff sufficiently raised a triable issue of fact as to whether her forehead scar is one that "a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn", with her deposition testimony, her affidavit and accompanying photographs, the affirmation of Dr. Elizabeth Sieczka dated May 23, 2016, the affirmed medical records of Dr. Elizabeth Sieczka and the affirmed report of Dr. Elizabeth Sieczka dated January 20, 2016. *Sidibe v Cordero*, *supra*; *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*.

During her deposition, plaintiff testified that she does not like looking at her scar and that she tries to cover it up, as she finds the scar to be "disturbing." She also stated that she has loss of sensation and loss of mobility of her forehead due to the scar, in that she cannot raise her left eyebrow as she can her right eyebrow. Furthermore, in her affidavit, plaintiff stated that the entire

area around her scar is numb to touch and that when she raises her left eyebrow, the left side of her forehead is no longer symmetrical with the right side of her forehead, because the left side of her forehead “does not move the same way that it did before.” She continued to state that she finds her scar to be “very disfiguring and unattractive”. She said that all of her dance students notice her scar and the discoloration in the surrounding area and that some of her “more blunt colleagues ask what happened” to her forehead “in a way that clearly shows they view the scar as prominent and unsightly.”

Accordingly to Dr. Sieczka, plaintiff’s plastic surgeon, plaintiff has an inverted “Y” shaped scar on the left side of her forehead that measures 2 cm in length. Dr. Sieczka described the scar as soft, pale, flat and non-tender. She stated that the frontalis muscle function was intact, but there was slight tethering inferiorly as well as decreased sensation to light touch at, and just lateral to, the scar, which extends into her scalp. Dr. Sieczka opined that the scar was permanent and caused a partial loss of sensation of the skin on the left side of plaintiff’s forehead and scalp.

In support of his motion, defendant submitted the affirmed report of Dr. Gary Bromley, a plastic surgeon, who examined plaintiff on December 14, 2015. According to Dr. Bromley, plaintiff, has an oblique scar located on the left side of her forehead extending laterally to the superior aspect of her left lateral eyebrow, which measures 5 cm in length and 1 mm in width. Dr. Bromley stated that the scar is flat and blends in very well with the surrounding skin and soft tissues. Dr. Bromley opined that the scar is cosmetically acceptable, requires no further treatment and does not interfere with plaintiff’s activities of daily living. Neither Dr. Bromley nor Dr. Naunihal Sachdev Singh, defendant’s neurological expert, stated an opinion as to plaintiff’s claims of decreased sensation to light touch in and around the area of the scar or tethering of the left side of the forehead as compared to the right.

Based upon the foregoing, plaintiff sufficiently raised a triable issue of fact as to whether her forehead scar is one that “a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn.” *Sidibe v Cordero, supra*; *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*.

Furthermore, 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.*

As such, that portion of defendant's motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant disfigurement" category is denied.

Next, those portions of defendant's motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "permanent loss of use," "significant limitation" and "permanent consequential limitation" categories are granted, as plaintiff failed to submit competent objective medical evidence of a contemporaneous physical examination and a recent physical examination to substantiate these claims. *Toure v Avis Rent-A-Car Systems, Inc., supra.*; *Perl v Meher, supra.*; *Blackman v Dinstuhl, supra.*; *Toulson v Young Han Pae, supra.*; *Soho v Konate, supra.*; *Mompremier v N.Y.C.T.A., supra.* As such, plaintiff's claim of sustaining a "serious injury" based upon the "permanent loss of use," "significant limitation" and "permanent consequential limitation" categories are dismissed.

Likewise, that portion of defendant's 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. Plaintiff testified that she was not confined to bed or home as a result of the subject accident and that she only missed a few days from her work as a dance teacher as a result of the subject accident. She did not recall if she missed any time from her work as a physician's assistant as a result of the subject accident. In addition, 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.

As defendant improperly raised the issue of a gap in medical treatment for the first time in the 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).

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

Finally, plaintiff's request for summary judgment on the issue of liability is denied, as plaintiff failed to meet her burden of eliminating all triable issues of fact as to how the accident happened and as to the extent of liability between the parties. *Oluwatayo v Hdulinayan*, 2016 NY Slip OP 05455 (1st Dept. 2016).

In moving for summary judgment on the issue of liability, plaintiff has the burden of making a *prima facie* showing that defendant's negligence was a substantial cause of the events that produced the alleged injury. *Maniscalco v New York City Transit Auth.*, 95 A.D.3d 510 (1st Dept. 2012). However, if in opposition, defendant comes forth with admissible evidence demonstrating comparative negligence on the part of plaintiff, summary judgment must be denied, as material questions regarding any negligence as to the respective parties must be resolved by a jury. *Maniscalco v New York City Transit Auth.*, *supra*. See also, *Thoma v Ronai*, 82 N.Y.2d 736 (1993). In addition, evidence demonstrating alternate theories of the cause of the accident raise material issues of fact that must be determined at trial. *Mitchell v The Maguire Co., Inc.*, 151 A.D.2d 355 (1st Dept. 1989). Credibility determinations must also be resolved by the trier of fact. *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

This motor vehicle accident occurred on May 6, 2014, between 8:30 p.m. and 9 p.m., at the intersection of 22nd Street and 7th Avenue, New York, New York. Plaintiff testified that she was a pedestrian crossing 22nd Street at the time of the accident within a marked crosswalk and with a traffic signal in her favor. Plaintiff stated that she checked for traffic before entering the crosswalk. Nothing was blocking her view. She did not hear any horns or skidding before the accident. She first saw defendant's taxicab when it was approximately 3 inches from her, as it was making a left turn from 7th Avenue onto 22nd Street. She stated that the taxicab was not speeding. In describing the point of contact, plaintiff testified that the middle of the taxicab's driver's side came into contact with her right hip. She stated that she saw a door handle in front

of her immediately prior to contact. She did not know whether it was the door handle for the driver's door or the rear door on the driver's side of the taxicab.

According to the certified police accident report, plaintiff stated that she was walking southbound in a marked crosswalk when defendant's vehicle struck her on the right arm. A witness stated that plaintiff "had a walking signal in crosswalk" and defendant never saw plaintiff. Defendant stated that he was making a left turn from 7th Avenue and never saw plaintiff until she fell.

Defendant testified that he did not see anyone in the crosswalk as he began to make a left turn from 7th Avenue onto 22nd Street. He first saw plaintiff immediately before the accident. Defendant claims that he did not speak to the police at the accident scene. In his certified MV104 report, defendant stated that he made a left turn from the left turn lane on 7th Avenue with a left turn signal in his favor. "When suddenly a pedestrian came from no where and walked into the driver's side fender," whereupon defendant claims that he saw a telephone, pen and newspaper fall out of plaintiff's hand, "showing that she was not paying attention."

Given the conflicting versions of how the accident occurred, to wit: whether defendant struck plaintiff while plaintiff was within a marked crosswalk with the traffic signal in her favor or whether defendant's vehicle was already in the crosswalk when plaintiff entered the crosswalk and walked into defendant's vehicle, summary judgment on the issue of liability is inappropriate in this action. *Maniscalco v New York City Transit Auth., supra.*; *Mitchell v The Maguire Co., Inc., supra.*; *Assaf v Ropog Cab Corp., supra.*

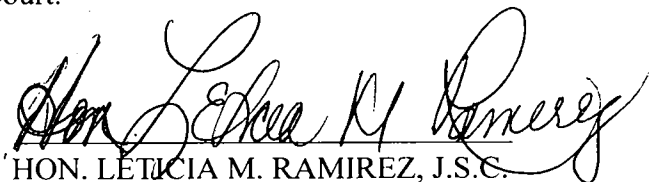
Accordingly, plaintiff's motion is denied, in its entirety.

The Court has considered the parties' remaining arguments and finds them to be without merit.

Defendants are directed to serve a copy of this Decision, with Notice of Entry, upon plaintiff within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: November 1, 2016
New York, New York


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