Antouri v Jibone
2016 NY Slip Op 32263(U)
November 7, 2016
Supreme Court, New York County
Docket Number: 153494/14
Judge: Leticia M. Ramirez

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

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CAROLE ANTOURI,

Plaintiff(s),

-against-

AUGUSTINE JIBONE and YEVSIF CAB CORP.,

Defendant(s).

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AUGUSTINE JIBONE and YEVSIF CAB CORP.,

Third-Party Plaintiff(s),

-against-

JUNE PASCOCELLO,

Third-Party Defendant(s).

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Index #: 153494/14
Mot. Seq: 03 and 04

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants/third-party plaintiffs' 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 third-party defendant's motion for the same relief. 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), 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 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). 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.*

A bulging or herniated disc or radiculopathy may 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 this action, plaintiff sufficiently raised triable issues of fact as to whether she sustained disc herniations at C3-4, C4-5, C5-6, C6-7 or L3-4, disc bulges at C2-3, C7-T1 or L4-5; and/or C5 radiculopathy and a "permanent consequential limitation" and/or "significant limitation" of her cervical or lumbar spine as a result of the subject accident on March 20, 2013, with the affirmations of Dr. Robert Diamond as to the MRIs of plaintiff's cervical spine, the affirmation of Dr. Keith Tobin as to the MRI of plaintiff's lumbar spine, the affirmed reports of Dr. Aric Hausknecht dated July 23, 2013, Augst 20, 2013, September 17, 2013, October 22, 2013 and April 14, 2016, the affirmed NCV/EMG report of plaintiff's upper extremities dated September 17, 2013, the sworn reports of chiropractor Joel Mittleman dated July 17, 2013 and April 22, 2016 and the affirmed report of Dr. Douglas Schottenstein dated October 14, 2013. *Assaf v Ropog Cab Corp., supra.; 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).*

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000).*

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

However, those portions of said motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the"permanent loss of use" category is granted. In Dr. Hausknecht's affirmation dated April 14, 2016 and the sworn report of chiropractor Mittleman dated April 22, 2016, these experts do not opine that plaintiff sustained a "permanent loss of use" of her cervical and lumbar spine. Instead, they opine that she sustained a "permanent consequential limitation" of her cervical and lumbar spine. As such, plaintiff's claim of sustaining a "serious injury" based upon the "permanent loss of use" category is dismissed.

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).*

Next, plaintiff sufficiently raised 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, with Dr. Hausknecht's affirmed reports dated July 23, 2013, August 20, 2013 and September 17, 2013, chiropractor Mittleman's sworn report dated July 17, 2013 and certified disability letters dated August 8, 2013 and September 13, 2013, plaintiff's deposition testimony and plaintiff's affidavit. *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, those portion of defendants/third-party plaintiffs' motion and third-party defendant's cross-motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is denied.

Contrary to third-party defendant's contention, the plaintiff's explanation for her gap in treatment in treatment was sufficient to raise a triable issue of fact as to this issue. *Ramkumar v Grand Style Tansp. Enters. Inc., 22 N.Y.3d 905 (2013); Francovig v Senekis Cab Corp., 41 A.D.3d 643 (2nd Dept. 2007).* Plaintiff testified that she did not seek treatment until 3 months after the accident because she did not have health insurance and she did not know about no-fault insurance. She started treatment once she learned about no-fault insurance. Her medical treatment ended once her no-fault benefits were exhausted on October 20, 2014, because she could not afford to pay for medical treatment.

As defendants/third-party plaintiff improperly raised the issue of a gap in medical treatment for the first time in their reply papers, they failed to properly submit that issue to this Court, and, thus, their argument as to that issue 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).*

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

Accordingly, defendants/third-party plaintiffs' motion and third-party defendant's cross-motion are 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 all parties within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: November 7, 2016
New York, New York

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