

Guzman v New York City Tr. Auth.

2016 NY Slip Op 32264(U)

November 7, 2016

Supreme Court, New York County

Docket Number: 154916/2013

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

ERICA RUIZ GUZMAN,

Plaintiff,

INDEX NO. 154916/2013

MOTION DATE 7/14/16

MOTION SEQ. NO. 992

002

- v -

**THE NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY, MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING
AUTHORITY and KEITH BYRDIE BURNETT,**

Defendants.

The following papers, numbered 27-47, 50-57, were read on this motion for summary judgment.

Notice of Motion —Affirmation—Affidavit of Service — Exhibits A-Q | No(s). 27-47

Affirmation in Opposition — Exhibits 1-4—Affidavit of Service | No(s). 50-55

Reply Affirmation—Affidavit of Service | No(s). 56-57

Upon the foregoing papers, it is ordered that defendants motion for summary judgment is granted in part to the extent of dismissing the allegations of a serious injury as to “permanent consequential limitation of use” of plaintiff’s lumbar spine, and the motion is otherwise denied.

On April 23, 2012, plaintiff was passenger in an ambulette that alleged made contact with a bus operated by defendant Burnett, on East 72nd Street and Park Avenue. Plaintiff claims that the bus rear-ended the ambulette.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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According to the bill of particulars, plaintiff suffered injuries to her cervical, thoracic and/or lumbar spine, and left shoulder, with loss and/or limitation of range of motion and/or use. Those injuries include, among other things, cervical and lumbar disc herniations; ligament tears of her left shoulder; straightening of the cervical lordosis; and sprain/strain. (Oparaku Affirm., Ex C [Verified Bill of Particulars] ¶ 10.) Plaintiff was allegedly confined to bed for approximately two weeks and to home for three months. (*Id.* ¶ 11.) The supplemental bill of particulars alleges that plaintiff suffered a T12/L1 disc bulge and levoscoliosis. (Oparaku Affirm., Ex E.)

Defendants now move for summary judgment dismissing the action on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the motion.

“In order to meet their prima facie burden, defendants were required to demonstrate that plaintiff has not suffered a ‘serious injury,’ which they could do through medical affirmations concluding that no objective medical findings support her claim that she suffered an injury resulting in permanent or significant limitations in use of her knee, and, if objective evidence exists, that the injury was caused by a preexisting condition and not the accident.”

(*Johnson v Salaj*, 130 AD3d 502, 502 [1st Dept 2015].)

In support of their motion, defendants rely upon the affirmed reports of Dr. Schwartz, an orthopedic surgeon, and Dr. Khaneja, a neurologist. (Oparaku Affirm., Exs P, Q.) Dr. Schwartz, who performed an orthopedic examination of plaintiff on November 16, 2015, measured normal ranges of motion in plaintiff’s cervical, thoracic and lumbar spine, and in plaintiff’s left shoulder. (*Id.*, Ex P.) The results of orthopedic tests were negative. Dr. Schwartz stated that plaintiff has pre-existing conditions of mild cervical, thoraco-lumbar and lumbar

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spondylosis and mild scoliosis. (*Id.*) Dr. Khaneja, who examined plaintiff on November 27, 2015, also measured normal ranges of motion in plaintiff's cervical and lumbar spine, and found no objective neurological disability or permanency. (*Id.*, Ex Q.)

These submissions were sufficient to meet defendants' prima facie burden, by demonstrating that no objective medical findings support plaintiff's claims that she suffered injuries resulting in permanent or significant limitations of use, which were caused by the accident.

In opposition, plaintiff submits an affirmation from Dr. Ali Guy, who first saw plaintiff on May 1, 2012. Dr. Guy states that he measured limited ranges of motion in plaintiff's lumbar spine on May 1, June 5, September 14, and November 6, 2012, and on January 1, 2013. (Verrelli Opp. Affirm., Ex 3 [Guy Affirm.] ¶¶ 5-11.) Guy states that he again found limited range of motion in plaintiff's lumbar spine at an examination on March 31, 2016. (*Id.* ¶ 11.) Dr. Guy opines that, to a reasonable degree of medical certainty plaintiff's injuries to her cervical and lumbar spine were caused by the accident and are not pre-existing. (Guy Affirm. ¶ 12.) He states that the limitation of range of motion in plaintiff's lumbar spine is permanent. (*Id.*) In a report of the March 31, 2016, Dr. Guy states, "It is my professional opinion that as of today this patient has reached maximum medical improvement with reference to the accident of April 23, 2012." (See Verrelli Opp. Affirm., Ex 3.)

Plaintiff failed to raise a triable issue of fact as to the existence of a "permanent consequential" limitation of use of her lumbar spine. There appears to be a three-year gap in treatment between visits with Dr. Guy in January 2013 and March 2016, and plaintiff offered no explanation for the gap in treatment. (*Sutliff v Qadar*, 122 AD3d 452, 453 [1st Dept 2014].) This apparent cessation in treatment renders Dr. Guy's finding of permanency speculative. (*Holmes v Brini Tr. Inc.*, 123 AD3d 628, 629 [1st Dept 2014].)

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Therefore, plaintiff's claim of serious injury based on permanent consequential limitation of use of her lumbar spine is dismissed.

"[A] significant limitation of use of a body function or system need not be permanent in order to constitute a serious injury." (*Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013] [citations and emendation omitted].) Here, Dr. Guy's findings of limited range of motion in plaintiff's lumbar spine from May 2012 until January 1, 2013 are sufficient to raise a triable issue of fact as to whether plaintiff suffered a significant limitation of use of her lumbar spine.

As to serious injury under the 90/180-day category, defendants failed to meet their prima facie burden that plaintiff did not suffer a serious injury under the 90/180-day category.

"In order to establish prima facie entitlement to summary judgment under this category of the statute, defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident. However, we have previously held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period."

(*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009].)

Here, defendants' submissions did not conclusively establish, as a matter of law, that plaintiff was not prevented from performing substantially all the activities constituting plaintiff's customary daily activities under the 90/180-day category.


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The fact that the medical records themselves do not express a specific finding or opinion that plaintiff was prevented from performing, or that plaintiff was advised not to perform her customary daily activities does not suffice to meet defendant's prima facie burden here, especially when the records themselves indicate that plaintiff had limited range of motion and muscle weakness during the 180 days following the accident. (See Oparaku Affirm., Ex O.) Defendants cannot meet their prima facie burden "by pointing to gaps in plaintiff's proof." (*Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617, 618 [1st Dept 2009], citing *Torres v Indus. Container*, 305 AD2d 136 [1st Dept 2003].)

Given that plaintiff raised triable issues of fact as to whether she suffered a significant limitation of use of her lumbar spine, and that defendants did not meet their prima facie burden for summary judgment dismissing serious injury under the 90/180-day category, the remainder of defendants' motion for summary judgment is denied.

Dated: 11/7/16
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

11/7/16