

Ramirez v American United Transp. Co Inc
2016 NY Slip Op 32428(U)
November 28, 2016
Supreme Court, Bronx County
Docket Number: 300674/14
Judge: Joseph E. Capella
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DEC 01 2016

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 30

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

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OMAYRA RAMIREZ and MIGDALIA ROLON,

Index #: 300674/14

DECISION/ORDER

Plaintiffs,

Present:

- against -

Hon. Joseph E. Capella
J.S.C.

AMERICAN UNITED TRANSPORTATION CO INC,
ABDUL ABUBAKAR, EROTAS TRANSPORT INC,
MOHAMMED BICHI, KID CAR NY LLC and
ALEXANDER HERNANDEZ,

Defendants.

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The following papers numbered 1 to 4 read on this motion, noticed on June 16, 2016 and duly submitted as no. _____ on the Motion Calendar of _____.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3
CROSS MOTION AND AFFIDAVITS ANNEXED	--
AFFIRMATION IN SUPPORT	4

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AND DENIED AS FOLLOWS:

In this action, which stems from an automobile accident from April 2013, the defendants move¹ for dismissal (CPLR 3212) based on an alleged failure to meet the serious injury threshold of Insurance Law § 5102(d). The defendants' neurologist, Dr. Singh, who examined plaintiff-Omayra Ramirez ("Ramirez") in May 2015, found, *inter alia*, that her cervical, thoracic, and lumbar spine range of motion tests were within

¹ The instant motion was transferred to Judge Capella the week of October 31, 2016.

normal limits. According to Dr. Singh, Ramirez has no neurological disability, all of her alleged injuries have resolved and she is able to perform her usual occupation and daily activities. The defendants' orthopedist, Dr. Nason, examined Ramirez in April 2015, and found, *inter alia*, that her cervical and lumbar spine, left shoulder and knee all had normal range of motion. According to Dr. Nason, she found no evidence of residuals or permanency, and concluded that Ramirez could perform her usual occupation and daily activities with no restrictions.

On the issue of Ramirez's 90/180 claim, given that the examinations by Dr. Singh and Dr. Nason took place some two years after the accident, these affirmations alone are insufficient to shift the burden to the plaintiffs regarding 90/180. (*Loesburg v Jovanovic*, 264 AD2d 301 [1st Dept 1999].) On the other hand, the defendants' radiologist, Dr. Eisenstadt, examined the MRIs of Ramirez's cervical, lumbar, left shoulder and knee taken after the accident. According to Dr. Eisenstadt, the cervical and lumbar spine MRIs from May 2013, taken about a month after the accident, revealed mostly disc degeneration with no tear to indicate a traumatic disc injury causally related to the accident. The left shoulder and knee MRIs from June 2013, taken less than two months after the accident, revealed similar degenerative conditions that could not have developed in the short time between the accident and the MRIs.

Lastly, the defendants' medical examiner, Dr. Kanter, reviewed the hospital emergency room records and found no vertebral bone tenderness, soft tissue swelling, bruising, abrasions, step-off deformities, radiating pain or neurological deficits noted in these records regarding the cervical and lumbar spines. As for the left shoulder and knee, these records did not indicate any joint related complaints, soft tissue swelling, joint effusion or limited range of motion. In addition, he notes that no immobilization devices were applied, and no radiographic imaging ordered. According to Dr. Kanter, the alleged injuries do not have an acute traumatic origin and could not be causally related to the accident. These findings by Dr. Eisenstadt and Dr. Kanter sufficiently address Ramirez's

90/180 claim. Therefore, based on the aforementioned, the burden now shifts to the plaintiff to establish material issues of fact, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]), regarding permanent consequential, significant limitation and 90/180.

On the issues of permanent consequential and significant limitation, the plaintiffs' provided an affirmation from their treating physician, Dr. Cabatu, who recently examined Ramirez in June 2016. However, his last exam of Ramirez took place in June 2014, some two years earlier. Dr. Cabatu does not address this gap in treatment, and his failure to do so renders his affirmation insufficient to meet plaintiffs' burden as to permanent consequential and significant limitation. (*Pommels v Perez*, 4 NY3d 566 [2005].) As for Ramirez's 90/180 claim, the plaintiffs' radiologist, Dr. Lichy, reviewed the same MRIs that defendants' radiologist reviewed. Dr. Lichy concluded, *inter alia*, that given Ramirez's age, history and lack of symptomatology before the accident, the disc herniations he found in the cervical and lumbar spine MRIs taken shortly after the accident were in fact traumatically induced by and causally related. According to Dr. Lichy, a review of the left shoulder MRI reveals a tear of the anterior superior labrum and a SLAP tear and partial tear of the infraspinatus tendon, all of which are not the products of degenerative and developmental changes, but were traumatically induced by the accident. He also found that the left knee MRI revealed joint effusion and partial peripheral detachment of the posterior horn of the medial meniscus consistent with traumatically induced injury and not, as alleged by defendants' experts, degenerative changes or joint disease.

In further support of the 90/180 claim, Dr. Cabatu's examinations from April 2013 through June 2014, revealed that even some fourteen months after the accident, Ramirez still had, *inter alia*, restricted range of motion and tenderness of the cervical and lumbar spine, and the left shoulder and knee. (*Osborne v Diaz*, 104 AD3d 486 [1st Dept 2013]; *Diaz v Dela Cruz*, 125 AD3d 552 [1st Dept 2015].) He goes on to state that during this time, the pain and discomfort experienced by Ramirez made for significant limitations of

her neck, back, left shoulder and knee, and a temporary disability that prevented the performance of typical and ordinary daily activities for at least ninety days, and she was advised to rest accordingly. According to Ramirez, she could not return to work until some five or six months after the accident. Given these contradictory expert opinions regarding Ramirez's 90/180 claim, (*Perl v Meher*, 18 NY3d 208 [2011]), issues of fact exist to warrant denial of summary judgment as to 90/180.

In sum, the plaintiff's permanent consequential and significant limitation claims are dismissed, and her 90/180 claim remains. This constitutes the decision and order of this court.

____ 11/28/16 ____
Dated

Hon. 
Joseph E. Capella, J.S.C.