Velez v Camilo
2017 NY Slip Op 30375(U)
January 3, 2017
Supreme Court, Bronx County
Docket Number: 24037/2013
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

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Maria Velez

Plaintiff

-against-

Alberto Camilo, Ricardo Nunez,
and **Ramon A. Luna,**

Defendants

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Decision and Order

Index No. 24037/2013

Howard H. Sherman
J.S.C.

The following papers numbered 1-3 read on this motion by Defendants for summary judgment submitted August 12, 2016

Notice of Motion - Affirmation , Exhibits A-H	1	
Affirmation in Opposition - Exhibits	2	
Affirmation in Reply	3	

Upon the foregoing papers, the motion of defendants is granted to the extent set forth below.

In this action plaintiff seeks recovery for serious injuries to her cervical and thoracic, and lumbar spine, and to both knees , and the left shoulder and right ankle alleged to have been sustained in a motor vehicle accident on April 20, 2013.

The Note of Issue was filed on May 10, 2016.

Motion

Defendants Nunez and Luna move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. In support defendants submit the

affirmed reports of independent medical evaluations of an orthopedist , and of a neurologist , and a copy of the plaintiff's deposition testimony . [1]

Plaintiff opposes the motion arguing alternatively that defendants fail to make their initial showing on the motion, and that the affidavits of the treating chiropractor and the MRI reports of the cervical and lumbar spine raise an issue of fact that she sustained an accident-related serious injury.

Discussion and Conclusions

The court first notes that there is no issue of fact that the soft-tissue injuries asserted would qualify in the permanent loss of use category asserted (see, Oberly v. Bangs Ambulance, Inc., 96 N.Y.2d 295, 297, 299, 727 N.Y.S.2d 378, 379, 381 (2001)).

The court finds that defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "significant" and "permanent consequential " loss of use of her cervical spine, lumbar spine, and both knees, and left shoulder , and right ankle by submitting competent and objective medical evidence that plaintiff did not suffer a loss of range of motion as to any of those organs or systems (see, Toure v. Avis Rent A Car Systems, 98 N.Y.2d 345, 350, 774 N.E.2d 1197 [2002] ; Townes v. Harlem Group, Inc., 82 A.D.3d 583, 920 N.Y.S.2d 21 [1st Dept. 2011]).

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[1]Though unsigned, the transcript is certified by the reporter, and there is no challenge to its accuracy. As a consequence , and despite plaintiff's assertions, the transcript is properly before the court (see, Franco v. Rolling Frito–Lay Sales, Ltd., 103 A.D.3d 543, 962 N.Y.S.2d 54 [1st Dept.2013]).

Dr. Parisien and Dr. Singh also conducted a series of objective tests upon recent examinations, and all yielded negative findings, and each expert concluded that there was no evidence of residuals or permanency in their respective specialty.

Concerning the 90/180 category of serious injury asserted, the court finds that defendants have failed to make their initial burden on the motion as plaintiff testified that she was unable to work for three months after the accident, and defendants come forward with no evidence either to conclusively dispute this assertion, or to demonstrate the absence of trauma-related findings in the contemporaneous diagnostic reports (see Reyes v. Esquilin, 54 AD3d 615, 615, 866 N.Y.S.2d 4 [1st Dept. 2008] ; Townes v. Harlem Group, Inc., 82 A.D.3d 583, 920 N.Y.S.2d 21 [1st Dept. 2011])

Upon consideration of the papers in opposition , as afforded all favorable inferences, the court finds that plaintiff has submitted sufficient probative medical evidence to rebut defendants' showing on the "significant" and "permanent consequential " loss of use categories asserted.

Dr. Morgan attests that he commenced treatment of plaintiff in May 2, 2013 , which ceased in October 2013, on his determination that she had then reached maximum medical improvement. While the probative value of the submission is diminished by the failure of the treating physician to annex the contemporaneous reports referenced, it is submitted that Dr. Morgan's findings of causally related restrictions of range of motion in every plane of the cervical and lumbar spine upon his initial examination , and on his recent evaluation more than three years later, raise an

issue of fact of a serious injury in both of the above categories.

Accordingly, it is

ORDERED that the motion be and hereby is granted solely to the extent of awarding defendants summary judgment dismissing the claims of serious injury in the permanent loss of use category.

This shall constitute the decision and order of this court.

Dated: ~~December 30, 2016~~ Jan 3, 2017

Howard H. Sherman