

Velez v Wys

2017 NY Slip Op 30766(U)

March 29, 2017

Supreme Court, Bronx County

Docket Number: 304278/2013

Judge: Howard H. Sherman

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



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Ana Velez, **Carmen Ramos**, and Anthea Joseph,

DECISION/ORDER

Index No. 304278/2013

Plaintiffs,

-against-

Salvador Wys, Luz Pagan , Thierno S. Barry,
and Autoworld NYC Leasing LLC.,
Defendants

Howard H. Sherman
JSC

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The following papers numbered 1-4 read on the motion of **Defendant Barry/Autoworld** for summary judgment dismissing the claims of plaintiff **Carmen Ramos** for lack of serious injury

Notice of Motion , Affirmation, Exhibits A-H	1
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Plaintiffs seeks damages for personal injuries alleged to have been sustained when they were struck by van on June 30, 2012 . Issue was joined in August 2013 , and the Note of Issue was filed on March 10, 2015.

Motion

Defendants Thierno S. Barry and Autoworld NYC Leasing LLC (hereinafter, Defendants) move for summary judgment dismissing the complaint of **Carmen Ramos** on the ground that she did not suffer a serious injury within the meaning of Insurance Law § 5102(d). In support of the motion, Defendants comes forward with the affirmed reports of recent independent medical evaluations conducted by Arnold T. Berman, , M.D., a board-certified orthopedist [Exhibit E], and Edward M. Weiland, M.D., a board-certified

neurologist [Exhibit F], and A. Robert Tantleff, M.D., a board-certified radiologist [Exhibit C], and a copy of plaintiff's deposition testimony [Exhibit G], and contemporaneous medical records consisting of an initial acupuncture evaluation [Exhibit H] .

Plaintiff **Carmen Ramos** alleges that as a result of the motor vehicle accident she sustained injuries to her cervical, and thoracic, and lumbar spine including multi-level bulging and herniations, and a left knee tear of the anterior horn of the lateral meniscus, and right shoulder partial supraspinatus muscle tear [Verified Bill of Particulars ¶ 11], and that she was confined to bed for three days, and that she remains confined to home to date ¹ [Id. 11].

The injuries sustained by plaintiff are alleged to be permanent, but there is no assertion of the specific statutory categories deemed applicable.

The court will consider only those applicable , i.e., “permanent consequential limitation of use of a body organ or member” , and a “significant limitation of use of a body function or system” , and a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

¹ The bill of particulars is dated September 23, 2012.

Dr. Berman found plaintiff to have no evidence of spasm, and full range of motion of the cervical , and thoracic, and lumbar spine as quantified and compared to normal readings.² The right shoulder was found to demonstrate full range of motion without evidence of heat, swelling , or erythema, or effusion. The left knee range of motion in flexion and extension was found to be normal, and there were negative findings on all other objective tests addressed to the knee, and to the left ankle.³ Dr. Berman concluded that all injuries alleged were fully resolved without objective findings or residuals.

Upon a “normal “ neurological examination conducted on March 3, 2014, Dr. Weiland also concluded that the spinal injuries alleged had resolved . His findings revealed full range of motion⁴ of the cervical and lumbar spine, and exclusively negative results on a series of objective tests, including Soto-Hall , and Babinski’s , and Straight leg raising .

Upon evaluation of the contemporaneous diagnostic studies, A. Robert Tantleff, M.D., found that the **MRI of the left knee** revealed advanced degenerative changes consistent with chronic wear and tear , and a possible degenerative tear of the lateral

² All R.O.M. testing was made with the use of a goniometer, with normal ranges based on AMA Guides to the Evaluation of Permanent Impairment , Fifth Edition.

³No injury to the left ankle is alleged.

⁴ The range- of- motion testing was conducted with a goniometer .

meniscus .⁵ Dr. Tantleff concluded that these findings represent chronic overuse and repetitive stress changes to the knee that are not the result of a single date of incident and have no correlation to the motor vehicle accident. The films of the **cervical spine MRI** revealed no evidence of compression , deviation or displacement of the cervical cord and no manifestations of acute or recent injury, while those of the **lumbar spine** also revealed discogenic changes with degeneration , desiccation, and loss of height indicative of and consistent with longstanding chronic degenerative disc disease, and a congenital transitional lumbosacral junction , which may be causative of pain and symptoms , and which exacerbates degenerative changes of the spine. Dr. Tantleff concluded that the lumbar spine MRI revealed no manifestations of acute or recent injury.

Discussion and Conclusions

Upon consideration of exclusively negative findings rendered upon a series of objective tests on recent evaluations conducted by defendant's experts, and clinical assessments of full ranges of motion as quantified and compared to normal readings of the cervical, thoracic and lumbar spine, and of both shoulders and the left knee, and the findings of the expert radiologist of no indicia of trauma-related pathology in the contemporaneous diagnostic studies of the cervical and lumbar spine, and the left knee, the court finds that defendants have met their prima facie burden of summary judgment

⁵ Plaintiff was fifty-nine years old at the time of the accident.

as defined in either the "significant" or "permanent consequential" loss of use category (see, Vega v. MTA Bus Co., 96 A.D.3d 506, 507, 946 N.Y.S.2d 162 [1st Dept 2012].) . In addition, in reliance on plaintiff's deposition testimony , and Dr. Tantleff's findings of no trauma-related pathology, defendants have also made their prima facie showing with respect to any "90/180" claim .

In light of this showing, the burden then shifts to plaintiff to raise a triable issue of fact that she sustained a serious injury.

Medical Evidence in Opposition

Plaintiff comes forward with the affirmation of Emil Stracar, M.D., who examined plaintiff on July 3, 2012 , and on four follow-up evaluations through November 14, 2012 [Exhibit C]. On the initial examination, Dr. Stracar prescribed a physical therapy rehabilitation program , acupuncture and chiropractic care , and subsequently referred plaintiff for further diagnostic testing including a series of computerized range of motion and muscle testing, and pain management treatment that incorporated nerve blocks [01/10/13- 03/20/2013] . The findings of the 07/03/12 examination are summarized in the affirmation , and a copy of the contemporaneous report is annexed . These findings include evidence of spasm in all spinal areas, and a positive McMurray's on the left knee, medially. On July 18th, plaintiff underwent an initial Computerized Range of Motion test conducted by Dr. Stracar [Exhibit D], and it revealed restrictions in all planes of the

cervical, thoracic and lumbar spine. ⁶ Dr. Stracar affirms that plaintiff was discharged from care “when she reached maximum medical benefit” , and she was advised to continue with a home exercise program. As pertinent here, Dr. Stacar concludes with a reasonable degree of medical certainty that the injuries treated are traumatic, finding no “evidence of a pre-existing arthritic condition upon which these injuries could be an overlay. “ Upon the final ROM study of 10/01/12 , there were continuing restrictions in plaintiff’s cervical and lumbar spine including further diminishments in cervical extension and lateral flexion , and in flexion of the lumbar spine. The left knee was found to have “61 % of normal range of motion” , and the right knee , 51 % of normal.

Dr. Stracar performed a further evaluation on December 30, 2014 , and it revealed evidence of spasm over the cervical and lumbar spine, and a range of motion study conducted on that date found continuing quantified and significant ROM restrictions in the cervical, and thoracic, and lumbar spine.

Upon consideration of the above and the contemporaneous reports, the court finds that plaintiff has raised an issue of fact that she sustained a serious injury in the “significant” and “permanent consequential” loss of use categories. Plaintiff comes forward with no medical proof to raise an issue of fact of a serious injury in the 90/180 day

⁶ . Dr. Stracar’s readings are stated as “Percent of Normal.” As extrapolated, these restrictions range from a 90 % in cervical flexion, and a 75 % in cervical extension , to a 47 % in lumbar flexion. The left knee was found to have “60 %” of normal ROM in flexion.

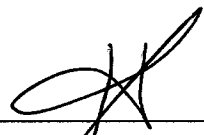
category.

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of awarding summary judgment in favor of defendants dismissing the claim of serious injury in all categories with the exception of "significant" and "permanent consequential" loss of use.

This shall constitute the decision and order of this court.

Dated: March 29, 2017



Howard H. Sherman