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| Beato v Ottenwalder |
| 2017 NY Slip Op 30919(U) |
| April 12, 2017 |
| Supreme Court, Bronx County |
| Docket Number: 300209/14 |
| Judge: Armando Montano |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VIVIAN BEATO,

Plaintiff,

-against-

JUAN OTTENWALDER and ARBEE
MANAGEMENT, LTD.,

Defendants.

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Index No. 300209/14

DECISION AND ORDER

HON. ARMANDO MONTANO:

The following papers were considered in reviewing defendants’ motion for summary judgment against plaintiff:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| Defendants’ Motion for Summary Judgment and annexed Exhibits..... | 1 |
| Plaintiff’s Affirmation in Opposition and annexed Exhibits..... | 2 |
| Defendants’ Affirmation in Reply..... | 3 |

Upon the foregoing papers, defendants’ motion for summary judgment is granted in part and denied in part for the reasons set forth herein.

The instant action arises from a motor vehicle accident that occurred on September 12, 2013 in which plaintiff alleges to have sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff has failed to prove a serious injury as required by Insurance Law § 5102(d).

The function of the Court in a motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 396 [1957]). Summary judgment is a drastic remedy that should not be granted if there is any doubt whatsoever as to the existence of any triable issues of fact. (*Bral v City of New York*, 221 AD2d 283, 283 [1st Dept 1995]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant. (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). It is well-settled law that a movant for summary

judgment has the burden to prove that no triable issues of fact exist. (*Calcagno v Rodriguez*, 91 AD3d 468, 471–72 [1st Dept 2012]). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a movant satisfies this initial burden, the party opposing the motion must produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. If the evidence is equally balanced, the movant has failed to meet its burden. (*300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 56 [1st Dept 1997]).

Furthermore, pursuant to Insurance Law § 5104, a plaintiff in a personal injury action arising out of the negligence in the use or operation of a motor vehicle must establish that the plaintiff has either incurred a basic economic loss exceeding \$50,000 or must establish that the plaintiff has suffered a serious injury. Insurance Law § 5102(d) defines a serious injury, in relevant part as applicable to the instant matter, as a

...permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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.

When a claim is based on the “permanent consequential limitation of use of a body organ or member”, “significant limitation of use of a body function or system,” or a “medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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”, in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury.” (*Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345 [2002]). Furthermore, an expert's qualitative assessment of a plaintiff's condition can also be used to prove the extent or degree of physical limitation so long as the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id* at 351). In *Toure v Avis Rent A Car Systems Inc.*, the Court of Appeals made clear that an expert's

conclusory findings, without support, does not suffice to establish a serious injury under Insurance Law § 5102(d).

Where the defendant moves for summary judgment on the issue of serious injury, the burden rests on the defendant to establish a prima facie entitlement to summary judgment by submitting evidentiary proof in admissible form demonstrating that the plaintiff has not suffered a serious injury. (*Kearse v New York City Transit Authority*, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2nd Dept 2005]). In the event that defendant fails to meet this burden, dismissal of the motion is required regardless of the sufficiency of the opposing papers. (*Winegrad v NYU Medical Center*, 64 N.Y.2d 851, 853 [1985]). In the event that defendant meets his burden, the burden then shifts to the plaintiff who must provide prima facie evidence in admissible form to support the claim of serious injury. (*Id*; *Licari v Elliott*, 57 NY2d 230, 240 [1982]). “Failure to raise a triable issue of fact require[s] the granting of summary judgment and dismissal of the complaint.” (*Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]).

As a result of the September 12, 2013 accident, plaintiff herein alleges to have sustained serious injuries to her cervical spine and lumbar spine. Plaintiff claims to have undergone a cervical discectomy on December 18, 2013.

This court finds that defendants herein have met their prima facie burden of establishing that plaintiff did not sustain a serious injury. The affirmed report of defendants’ independent medical examiner Dr. Christopher Cassels reveals that after performing an orthopedic examination on the plaintiff on February 12, 2015, Dr. Cassels is of the opinion that despite minor loss of motion in plaintiff’s cervical and thoracolumbar spine, plaintiff did not sustain significant or permanent injury to her cervical spine or to her thoracolumbar spine. According to Dr. Cassels’ findings, all range of motion of plaintiff’s cervical spine are within normal limits, as measured by a goniometer, except for right rotation which is 30 degrees, compared to the normal limit of 45-80 degrees. As to plaintiff’s left shoulder and knees, the report of Dr. Cassels reveals that the range of motion of the left shoulder and knee are within normal limits. With respect to plaintiff’s thoracolumbar spine, Dr. Cassels affirms that all range of motion are normal except for (1) right/left bending which is 15 degrees, compared to the normal of 25-35 degrees, and (2) extension which is 10 degrees, compared to the normal of 20-30 degrees. Based on the orthopedic examination and a review of plaintiff’s medical records, Dr. Cassels concludes, in relevant part, as follows: (1) That aside from *minor* restriction in motion, the clinical evaluation

of plaintiff's cervical spine and thoracolumbar spine reveals findings that are essentially normal; (2) That an MRI of the cervical spine and thoracolumbar spine performed and interpreted by the facility radiologist reveal no findings indicative of any acute traumatic injury; (3) That based on his examination of plaintiff and his review of plaintiff's medical records, plaintiff did not sustain any significant or permanent injury to the cervical spine or to the thoracolumbar spine as a result of the accident; (4) That plaintiff "may have sustained a *minor* sprain/strain of the cervical spine and to the thoracolumbar spine but that plaintiff has fully recovered from any *minor* trauma sustained in the subject accident"; and (5) That the clinical examination of the knees reveals full range of motion of the knees. Based on these findings, Dr. Cassels is of the opinion that plaintiff "has no functional disability, no permanency and is fully functional to perform all normal daily activities including work without restrictions." Notwithstanding that Dr. Cassel's report reveals decreased range of motion of plaintiff's cervical spine and lumbar spine, Dr. Cassel concludes that plaintiff's restriction in motion is *minor* (and not significant or permanent as required by Insurance Law § 5102[d]) and therefore this Court finds that defendants have met their prima facie burden of establishing that plaintiff did not sustain a serious injury.

In further support of his motion, defendants include affirmed reports from Dr. Audrey Eisenstadt, an independent radiologist who reviewed plaintiff's MRI films of the cervical spine and lumbar spine conducted on October 11, 2013. In his report dated August 13, 2014, Dr. Eisenstadt opines, in essence, that there is no evidence in the MRI to indicate that any injury was posttraumatic in origin or casually related to the accident. Contrary to plaintiff's argument, Dr. Eisenstadt's opinion is not conclusory in that he states that his opinion is based upon the review of plaintiff's MRI of the cervical and lumbar spine.

Lastly, defendants include the affirmed report of Dr. Timothy Haydock dated August 22, 2014. Dr. Haydock reviewed plaintiff's emergency room records of September 12, 2013 and based on his review, he opines "there was no acute traumatic findings to casually relate the plaintiff's accident and the claimed injury other than musculoskeletal pain." The affirmed reports of Dr. Audrey Eisenstadt and Dr. Timothy Haydock further establish that plaintiff's alleged injuries are not casually related to the subject accident.

Given that this Court finds that defendants have met their burden, the burden now shifts to the plaintiff who must provide prima facie evidence in admissible form to support the claim of serious injury. (*Winegrad v NYU Medical Center*, supra). This Court finds that plaintiff raises

triable issues of fact as to the existence of a serious injury with respect to her cervical spine as she produced objective, contemporaneous and qualitative medical evidence regarding the injury. (See *Blackman v Dinstuhi*, 27 AD3d 241, 242 [1st Dept 2006]). Plaintiff submits the affirmed report of Dr. Arden Kaisman who performed a final evaluation on plaintiff on August 16, 2016. Dr. Kaisman's findings reveal that on December 18, 2013, plaintiff underwent a cervical discectomy at the C5-C6 level under fluoroscopic guidance at Queens Surgical Center. Dr. Kaisman's findings further reveal that plaintiff's range of motion, as measured by a goniometer, of her cervical spine is not within normal limits. Specifically, the range of motion of plaintiff's cervical spine are as follows: flexion is 35 degrees (compared to the normal of 45 degrees); extension is 30 degrees (compared to the normal of 45 degrees); right lateral bending and left lateral bending are 30 degrees (compared to the normal of 45 degrees); and right lateral rotation and left lateral rotation are 60 degrees (compared to the normal of 80 degrees). Dr. Kaisman further states in her report, in relevant part, that plaintiff suffered from a disc protrusion at levels C4-C5 with disc herniation at C5-C6 with cervical radiculopathy and myofascial pain syndrome. Dr. Kasiman opines as follows: (1) That plaintiff's injuries are causally related to the motor vehicle accident; and (2) That a permanent disability is present in plaintiff's cervical spine. Accordingly, given Dr. Kaisman's findings of disc herniation in plaintiff's cervical spine coupled with decreased range of motion in plaintiff's cervical spine, this Court finds that plaintiff has successfully raised triable issues of fact as to whether plaintiff has suffered a permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system with respect to plaintiff's cervical spine. Additionally, in her affirmed report, Dr. Kaisman has raised an issue of fact as to causation as she opines that plaintiff's injury was causally related to the subject accident.

However, Dr. Kaisman does not make any findings as to plaintiff's lumbar spine. In addition, plaintiff has not provided any other objective evidence to support the claim of serious injury to her lumbar spine. Accordingly, this Court further determines that plaintiff has not met her burden of establishing a serious injury as to plaintiff's lumbar spine.

Furthermore, as to the 90/180 claim, defendants submit the affirmed report of Dr. Jimmy U. Lim who conducted an orthopedic evaluation of plaintiff on December 23, 2013. Based on his evaluation, Dr. Lim opines that based on the December 23, 2013 evaluation, "there is evidence of a mild orthopedic disability." He further states in his report that notwithstanding that at the

time of the examination plaintiff had decreased range of motion to her cervical spine, plaintiff was capable of working as well as conducting her daily activities with restrictions of no lifting or carrying over 30 pounds. Given the findings of Dr. Lim and that this examination was conducted six months immediately after the accident, defendants met their burden to establish that plaintiff did not sustain a serious injury be reason of having been incapacitated from performing substantially all of her customary and daily activities for 90 of the 180 days following the accident. (*See Toussaint v Claudio*, 23 AD3d 268 [1st Dept 2005]). In opposition, plaintiff testified during her examination before trial that she was unable to work as a home attendant for six months immediately after the accident. Plaintiff also submits the affirmed report of Dr. Arden Kaisman, as indicated above, wherein Dr. Kaisman states that upon examining plaintiff on November 21, 2013, plaintiff had restricted range of motion to her cervical spine. Specifically, on November 21, 2013, the range of motion of plaintiff's cervical spine was as follows: flexion of 30 degrees (compared to the normal of 45 degrees); extension, left lateral bending, and right lateral bending of 25 degrees (compared to the normal of 45 degrees); and left and right rotation of 45 degrees (compared to the normal of 80 degrees). Further, Dr. Kaisman notes that plaintiff underwent a cervical discectomy on December 18, 2013. Viewing this evidence in the light most favorable to the plaintiff, this Court determines that plaintiff has raised a triable issue fact under the 90/180 category.

For the foregoing reasons, this Court determines that defendant's motion for summary judgment is granted in part and denied in part. Defendant's motion for summary judgment is granted to the extent that this Court finds that defendant successfully established that plaintiff did not sustain a serious injury to her lumbar spine. Defendant's motion for summary judgment is denied in part to the extent that plaintiff has successfully raised triable issues of fact as to whether plaintiff has suffered a permanent consequential limitation of use of her cervical spine and/or significant limitation of use of her cervical spine and whether plaintiff sustained a serious injury under the 90/180 category.

This constitutes the Decision and Order of this court.

Dated: 4/12/17



Hon. Armando Montano, A.S.C.J.

HON. ARMANDO MONTANO