

Torres v Budlong

2017 NY Slip Op 32399(U)

October 6, 2017

Supreme Court, Bronx County

Docket Number: 0301252/2013

Judge: Wilma Guzman

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

Index No. 0301252/2013
Motion Calendar No. 29
Motion Date: 7/17/17

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ANA TORRES,

Plaintiffs,

-against-

ANNE E. BUDLONG and KATHERINE A. BUDLONG,

Defendants.
-----x

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	Numbered
Notice of Motion, Affirmation in Support,	
Exhibits Thereto	1
Affirmation in Opposition	2
Reply Affirmation	3

Motion decided as follows: Upon deliberation of the application duly made by defendants, ANNE E. BUDLONG and KATHERINE A. BUDLONG (hereinafter collectively "defendants"), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, dismissing plaintiff's Complaint for failure to meet the threshold limits set by New York State Insurance Law §§ 5102(d) and 5104(a), is heretofore granted.

This action involves injuries suffered by plaintiffs as a result of a May 22, 2012 motor vehicle accident that occurred on Maple Street at or near the intersection of Municipal Place. Plaintiff claims she was struck by a vehicle that was owned by ANNE E. BUDLONG and operated by KATHERINE A. BUDLONG. As a result of the accident, plaintiff claimed injuries include, but are not limited to: a L4-L5 annular tear at the right neural foraminal; (2) C4-C5 central herniation; L3-L4 disc bulge; thoracic sprain/strain; right shoulder sprain/strain; right wrist sprain/strain; right wrist joint effusion; and straightening of the lordosis.

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See Zuckerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

Pursuant to Insurance Law §5104(a), a person injured in an automobile accident caused by

negligence may only recover non-economic loss if she sustained a serious injury. Pursuant to Law §5102(d), a serious injury is defined, in pertinent part, as:

“a personal injury which results in... permanent loss of use of a body member, function or system; 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.”

Defendants made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning New York State Insurance Law §§ 5102 and 5104. Specifically, defendants have not demonstrated, as a matter of law, that the plaintiff has not suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system as a result of the accident in question.

It appears that plaintiff had a previous motor vehicle accident that occurred on January 10, 2012. On February 4, 2012, plaintiff underwent an MRI of her cervical spine. Dr. William A. Weiner reported finding a C4-C5 central herniation. On February 18, 2012, plaintiff underwent an MRI of her lumbar spine. Dr. Wan C. Kim reported finding a L4-L5 annular tear at the right neural foraminal region. Plaintiff also underwent an MRI of her lumbar spine on that date, and Dr. Kim reported to have found an L3-L4 disc bulge. On February 26, 2012, plaintiff underwent an MRI of her right wrist. Dr. Kim reported to have found right wrist joint effusion. Plaintiff also claims to have sustained the aforesaid injuries as a result of the May 22, 2012 accident.

Defendants attach the medical records from Prestige Medical, P.C., and Nexray Medical Imaging, P.C., which demonstrate that plaintiff was underwent treatment for the a L5 annular tear at the right neural foraminal; (2) C4-C5 central herniation; L3-L4 disc bulge; thoracic sprain/strain; right shoulder sprain/strain; right wrist sprain/strain; right wrist joint effusion.

On October 9, 2014, plaintiff presented to Orthopedist, Dr. Arnold T. Berman, with various physical complaints, including neck pain, right arm pain, finger pain, shoulder pain and lower back pain. The doctor took a history of treatment subsequent to the May 22, 2012 accident. Moreover, the doctor noted that plaintiff missed 2-3 days from work due to this accident. It appears that plaintiff did not specify her past medical history. The doctor reviewed plaintiff’s February 26, 2012 MRI Report of the right wrist; February 19, 2012 MRI Report of the right shoulder; February 18, 2012 MRI report of the lumbar spine; February 4, 2012 MRI Report of the Cervical Spine; as well as various other medical records. Upon physical examination, Dr. Berman found no limitations in plaintiff’s cervical spine, thoracic spine, right shoulder, left shoulder, right upper arm, right forearm, right wrist, left wrist, right hand and left hand. The doctor’s diagnosis was that of a resolved cervical spine strain/sprain, right wrist strain/sprain, lumbar spine strain/sprain and shoulder strain/sprain.

According to Dr. Berman, there was no aggravation of any preexisting condition, her prognosis was good for continued stable function at the current level.

Plaintiff testified at her Examination Before Trial (hereinafter “EBT”) that as result of her January 10, 2012 accident, she underwent extensive treatment for the above mentioned injuries, which includes three (3) months of treatment at Prestige Medical which consisted of electric stimulation massage, chiropractic adjustments; trigger point injections; and exercises for her neck and back. Plaintiff also commenced a lawsuit which ultimately resulted in a settlement. Plaintiff also testified to being involved in a prior accident in 2003 where she was also treated for two (2) to three (3) months for injuries she sustained to her right arm, back and neck.

Plaintiff testified at her examination before trial that prior to the May 22, 2012 accident, she was working for thirty (30) hours a week. After the accident, plaintiff missed two (2) days of work and was not confined to her home. She thereafter was forced to leave her job due to reasons unrelated to her alleged injuries.

As defendants have set forth *prima facie* evidence of entitlement to summary judgment, the burden shifts to plaintiff to demonstrate an issue of fact that would preclude this Court from granting summary judgement. Plaintiff has failed to set forth sufficient evidence.

Plaintiff fails to set forth an issue of fact with respect whether she sustained a serious injury for ninety days during the one hundred eighty days immediately following the accident. It should be noted from the outset that plaintiff attaches the unsworn, unaffirmed reports from Bear Mountain Physical Therapy, P.C. which only cover the period of May 29, 2012 through August 10, 2012, to demonstrate her care and treatment subsequent to accident. Even if this Court were to consider these records, which it will not due to them being improperly certified, these records do not cover, at the very least, ninety days. Moreover, plaintiff testified that she only missed two days of work as a result of the accident and returned to work thereafter. A self serving affidavit that she was having trouble lifting heavy things, bending and standing for long periods of time, sitting for long periods of time, walking long distances, going grocery shopping, combing her hair, raising both hands above her head and cooking, is not sufficient, without more to create an issue of fact with respect to the 90/180 day requirement. See Thomson v. Abbasi, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dept. 2005); Cruz v. Rivera, 94 A.D.3d 576 (1st Dept. 2012).

Moreover the report by Dr. Paul Lerner is insufficient, as a matter of law, to rebut defendant’s *prima facie* burden. Defendant presented to Dr. Lerner on August 2, 2016 for examination. It should be noted from the outset that Dr. Lerner did not find any limitation to plaintiff’s thoracic spine, right shoulder or right wrist. As plaintiff has not set forth any objective medical findings from a recent examination with respect to those claimed injuries, any claim of “serious injury” to such portions should be dismissed. See Rovelo . Volcy, 83 A.D.3d 1034 (2011).

Furthermore, Dr. Lerner acknowledged reviewing plaintiff’s February, 2012 MRI film reports and treatment with respect to previous 2012 accident. However, Dr. Lerner fails to discuss such treatment and alleged resolution and how the accident at issue represented a “traumatic exacerbation of the injuries sustained in January, 2012”. The doctor’s conclusions appear speculative at best given the lack of discussion and given that the examination took place four (4) years after the accident at issue, and therefore do not suffice to raise an issue of fact. See Nieves v. Castillo, 74 A.D.3d 535, 902 N.Y.S.2d 91 (1st Dept.).

Accordingly, it is:

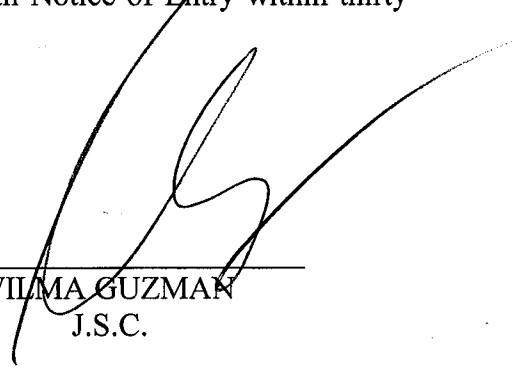
ORDERED that the motion by defendants, for an Order, pursuant to CPLR §3212, dismissing plaintiff's Complaint for failure to meet the threshold limits set by New York State Insurance Law §§ 5102(d) and 5104(a), is heretofore granted. It is further

ORDERED that the Clerk of the Court mark this matter as dismissed. It is further

ORDERED that defendatns shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 10/6/17



WILMA GUZMAN
J.S.C.

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