

Hidalgo v Feliciano
2017 NY Slip Op 33474(U)
June 2, 2017
Supreme Court, Westchester County
Docket Number: Index No. 65715/2015
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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ALEJANDRA HIDALGO,

Plaintiff,

Index No. 65715/2015

– against –

DECISION & ORDER

ERMELINDA FELICIANO, LINDA RIOS and TOYOTA
MOTOR CREDIT CORP.,

Defendants.

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In this action to recover damages for personal injuries arising out of a motor vehicle accident, the defendants Ermelinda Feliciano and Linda Rios move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102(d):

Papers Considered

1. Notice of Motion/Affirmation of Ryan Mainhardt, Esq./Exhibits A-E;
2. Affirmation of Dino Mastropietro, Esq. in Opposition/Exhibits A-F;
3. Reply Affirmation of John Loccisano, Esq.

Factual and Procedural Background

Plaintiff commenced this action against Ermelinda Feliciano and Linda Rios with the filing of a summons and complaint¹. This action arises out of a motor vehicle accident that occurred on January 9, 2013.

Plaintiff testified, at an examination before trial, that the airbags did not deploy as a result of the accident. Plaintiff was brought to the hospital and complained of pain to her left thigh. Plaintiff was discharged after a couple hours. After two weeks, plaintiff went back to work. Plaintiff next sought treatment in the beginning of February with Harvey Family Chiropractic Physical Therapy and Acupuncture. She treated with Dr. Harvey for approximately eleven months and last went for treatment in November 2013. Plaintiff

¹ The action was dismissed against Toyota Motor Credit Corp. pursuant to an order of this Court dated February 17, 2016.

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testified that she was in a prior car accident in October 2010 wherein she injured her back, neck, and left shoulder, and treated for approximately six months as a result.

Defendants move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102(d).

Defendants submit an affirmed report dated March 7, 2013, of Jeffrey R. Beer, M.D. Dr. Beer noted that plaintiff reported a prior cervical and lumbar injury secondary to a motor vehicle accident that occurred in 2011.

Dr. Beer's physical examination revealed severe tenderness to palpation in the cervical region with trigger points noted. Left shoulder pain was positive. Cervical range of motion was mildly limited secondary to pain. Evaluation of the lumbar spine revealed severe tenderness to palpation in the lumbar region with trigger points noted. Lumbar range of motion was limited secondary to pain. Dr. Beer noted that plaintiff was diagnosed with cervical myofascial pain and possible cervical and lumbar radicular syndromes. Conservative treatment consisting of anti-inflammatory medication, muscle relaxants and chiropractic or physical therapy was found reasonable. Dr. Beer noted plaintiff's prior motor vehicle accident in 2011. Based upon the medical records, he concluded that her injuries were an exacerbation of a pre-existing condition.

Defendants also submit an affirmed report of Howard Levin, M.D., an orthopedic surgeon, dated March 21, 2013. Dr. Levin noted plaintiff's complaint of left shoulder, neck and back pain, and tingling in the second, third and fourth fingers of the left hand. Based upon an examination of the cervical spine, range of motion revealed left lateral rotation to 70 degrees with 70 degrees being normal; right lateral rotation of 70 degrees with 70 degrees being normal; extension of 40 degrees with 40 being normal; and flexion of 40 degrees with 40 being normal. Dr. Levin's examination of the lumbar spine revealed straight leg raising to 90 degrees with 80 to 90 being normal and flexion of 90 degrees with 70 to 90 being normal.

Dr. Levin's examination of the left shoulder found no scarring or evidence of muscle atrophy. Palpation of the AC joint, rotator cuff and biceps were without tenderness. There was active forward flexion to 180 degrees with 160 to 180 being normal and passive forward flexion to 180 degrees with 160 to 180 being normal. The examination of the right shoulder was without scars or evidence of muscle atrophy. Palpation of the AC joint, rotator cuff, and biceps was without tenderness. Forward flexion was found to 180 degrees with 160 to 180 being normal and passive forward flexion to 180 degrees with 160 to 180 being normal. Dr. Levin diagnosed plaintiff with cervical sprain with referred pain to the posterior aspect of the left shoulder, thoracic sprain, and non-causally related left carpal tunnel syndrome. Dr. Levin found a causal relationship between the diagnosis and the accident. According to Dr. Levin there was no need for further orthopedic treatment or follow-up.

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In further support of their motion, defendants submit the affirmed report of Michael I. Weintraub, M.D. Dr. Weintraub performed a neurological independent medical examination of plaintiff on September 20, 2016. At that time, plaintiff complained only of neck pain related to the subject accident and denied any lower back pain. Dr. Weintraub noted that an MRI of the cervical spine taken on October 20, 2013, did not reveal any cervical disk herniation. An MRI of the left shoulder taken on December 23, 2010, prior to the subject accident, revealed supraspinatus tendinopathy and a shoulder joint effusion.

According to Dr. Weintraub, plaintiff had a normal neurological exam for neck and back. There was some reduced elevation of the right shoulder by 20 to 30 degrees. Based upon plaintiff's history, Dr. Weintraub concluded that the January 9, 2013 accident produced a soft tissue injury which appeared to have resolved. Although plaintiff had some subjective complaints, she was able to work without restriction and did not require any further diagnostic testing or treatment.

In opposition, plaintiff argues that defendant failed to make a prima facie showing of entitlement to summary judgment. Moreover, plaintiff argues that issues of fact exist as to whether plaintiff sustained a serious injury. Plaintiff argues that she sustained permanent significant limitations as she has been diagnosed with a herniated and bulging disc and limitations in range of motion of the cervical and lumbar spine and left shoulder.

Plaintiff submitted a radiology report of Harvey L. Lefkowitz, M.D. dated February 26, 2013, reviewing an MRI of the cervical spine. Dr. Lefkowitz found a disc herniation at C3-4. Plaintiff also submitted a radiology report of Dr. Lefkowitz, dated March 20, 2013, reviewing an MRI of the lumbar spine. Dr. Lefkowitz found the vertebral bodies intact and no fracture was identified.

Plaintiff submitted an affirmed report from Dr. David Dynof, dated January 18, 2017, who examined plaintiff on that date and stated that plaintiff was last evaluated on December 4, 2013. Contrary to her complaints to Dr. Weintraub, plaintiff complained to Dr. Dynof of neck pain as well as lower back pain.

Dr. Dynof examined plaintiff's cervical range of motion and found flexion at 40 degrees with 50 being normal, extension of 45 degrees with 50 being normal, left rotation of 75 degrees with 85 being normal, right rotation of 75 degrees with 85 being normal, left flexion of 40 degrees with 45 being normal, and right flexion of 35 degrees with 45 being normal.

Dr. Dynof found moderate tenderness on the thoracic spine and tenderness on the left shoulder. Dr. Dynof noted that range of motion tests on the left and right shoulder revealed forward flexion of 180 degrees with 180 being normal, extension of 45 degrees on the left and 50 degrees on the right with 50 being normal, abduction of 120 degrees on the left and 130 degrees on the right with 130 being normal, internal rotation of 85 degrees on the left and 90 degrees on the right with 90 being normal, and external rotation of 90 degrees on the left and 90 degrees on the right with 90 being normal.

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Dr. Dynof found that plaintiff sustained a disc herniation at C3-4. He concluded that the motor vehicle accident of January 9, 2013, was the cause of plaintiff's pain to her cervical and lumbar spine and left shoulder. He found that she has a permanent partial disability and is able to perform moderate daily activities but will experience episodes and exacerbation of her symptoms on a regular basis. She requires future physical therapy and chiropractic treatment when symptoms worsen.

Plaintiff also submitted a report from Dr. Dynof dated February 20, 2013, which was affirmed on December 16, 2016. Dr. Dynof's range of motion findings for the cervical spine as well as the left and right shoulder were similar to the findings in his January 2017 report with some improvement noted in 2017.

Discussion

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendants are required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]). "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

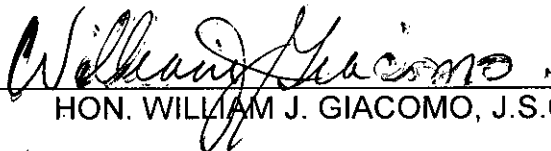
The defendants made out their prima facie case showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). In opposition, plaintiff failed to raise a triable issue of fact. The plaintiff's treating physician, while setting forth limitations as to the plaintiff's ranges of motion as to various parts of her body, were insufficient in that they failed to account for the three-year gap between the last treatment of plaintiff in December 2013, and January 18, 2017, when she was examined by Dr. Dynof in direct response to the defendants' motion for summary judgment. There was no evidence that the plaintiff underwent any medical treatment in this time period and no explanation as to why none was appropriate (see *Ning Wang v Harget Cab Corp.*, 47 AD3d 777 [2d Dept 2008]; *Ferraro v Ridge Car Serv.*, 49 AD3d 498 [2d Dept 2008]; *Caracci v Miller*, 34 AD3d 515 [2d Dept 2006]).

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In response to defendants' prima facie showing, the plaintiff's submissions also failed to set forth competent medical evidence that the injuries she allegedly sustained as a result of the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days following the accident (see *Husbands v Levine*, 79 AD3d 1098 [2d Dept 2010]; *Nieves v Michael*, 73 AD3d 716 [2d Dept 2010]).

Accordingly, defendants' motion for summary judgment, pursuant to CPLR 3212, is GRANTED and the complaint is dismissed.

Dated: White Plains, New York
June 2, 2017


HON. WILLIAM J. GIACOMO, J.S.C.