

Varon v Sateriale

2017 NY Slip Op 33514(U)

July 26, 2017

Supreme Court, Westchester County

Docket Number: Index No. 62825/2015

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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

-----x
SASHA VARON and ALEJANDRA SANCHEZ,

Plaintiffs,

DECISION AND ORDER

-against-

Sequence No. 1
Index No. 62825/2015

JOHN SATERIALE and NEW YORK DRIVEWAY
SEALING, LLC, d/b/a NEW YORK SEALCOATING,

Defendants.

-----x
RUDERMAN, J.

The following papers were considered in connection with defendants' motion for summary judgment pursuant to CPLR 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - E	1
Affirmation in Opposition, Exhibits 1 - 11	2
Reply Affirmation	3

Defendants move for an order granting summary judgment in favor of defendants only with regard to the claim brought by plaintiff Alejandra Sanchez, on the ground that her injuries do not qualify as serious under Insurance Law 5102(d). Plaintiff opposes.

This action was commenced on July 28, 2015, to recover damages for personal injuries plaintiffs allegedly sustained in a motor vehicle accident that occurred on January 16, 2015 on Armory Place near the intersection with Westchester Avenue in White Plains, New York. Plaintiff Alejandra Sanchez was in the front passenger seat in a vehicle operated by her daughter, plaintiff Sasha Varon, when their stopped vehicle was hit in the rear by a vehicle operated by

defendant John Sateriale and owned by defendant New York Driveway Sealing LLC d/b/a New York Sealcoating.

Plaintiff Sanchez alleged in her bill of particulars that she sustained injuries satisfying the following three statutory categories defining serious injury under Insurance Law § 5102(d): (1) a permanent consequential limitation of use of a body function or system, (2) a significant limitation of use of a body function or system, and (3) a medically determined injury or impairment of a non-permanent nature which prevented her from performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Among the particular injuries and complications she claimed in her bill of particulars were radiculopathy of the cervical spine, decreased range of motion in her cervical and lumbar spine, spasms and tenderness of muscles throughout the spine, injury to her lumbar and cervical spine, radiating back and neck pain, occipital headaches, the inability to sit, stand, ambulate, work or participate in recreational activities free of pain, and sciatica.

In moving for summary judgment as against plaintiff Sanchez, defendants assert generally that she sustained only soft tissue injuries to her neck and back, none of which qualify as serious injuries under the statute. To challenge the aspect of her claim based on the category of non-permanent impairment for 90 out of the first 180 days, defendants point to plaintiff's deposition testimony stating that after missing work for two weeks after the accident, she first returned to work for 20 hours per week, and then after one month, worked 32 hours per week, and is currently working 40 hours per week. They further observe that she testified that she walks every day, and that after the accident she was able to continue taking care of her household chores.

With regard to the permanent consequential limitation or significant limitation categories of serious injury, defendants submit a report by neurologist Dr. Kishore Ranade, who conducted an examination of plaintiff on December 27, 2016 and characterized her injuries as cervical and lumbar strain, observing that the results of her cranial nerve exam, motor exam and sensory exam were normal, and reporting some range of motion limitations.

In opposition, Sanchez offered evidence of her medical treatment and testing following the accident. On January 22, 2015 she came under the care of Dr. Michael Daras, a neurologist, who examined her and referred her for a cervical MRI. According to Dr. Daras's report, his examination revealed decreased range of motion of the cervical and lumbar spine and left shoulder, and spasm and tenderness of the paraspinal muscles. He concluded that Sanchez sustained headaches and cervical and lumbar injury as a result of the accident on January 16, 2015. The report of the cervical MRI conducted on February 19, 2015 indicates a right foraminal protrusion at C3-4.

Sanchez also saw Dr. Louis Rose, an orthopedist, on March 11, 2015. Dr. Rose's report of his examination disclosed a loss of range of motion in Sanchez's cervical and lumbar spine, and decreased sensation at C6 and C7 dermatomal levels of the right upper extremity, and at L3, L4 and L5 dermatomal levels of the right lower extremity. He reviewed the MRI of her cervical spine and opined that she sustained a herniated disc at C3-4 with radiculopathy and a lumbar spine sprain with possible bulging discs. He also prescribed a lumbar spine MRI.

The MRI report by Dr. Michael Singer following the lumbar MRI performed on March 20, 2015 indicated a "3mm central protruding disc herniation and annular fissure at the L5-S1 level caused compression upon the thecal sac and abuts the descending S1 nerve roots bilaterally."

Dr. Rose examined Sanchez again on April 22, 2015, and he reported a continued loss of range of motion in her lumbar and cervical spine, as well as decreased sensation at C6-C7 and L4-L5. He concurred with the radiologist's finding that Sanchez sustained a herniated disc at L5-S1, causing compression on the descending nerve roots bilaterally at S1. He asserted that these injuries were caused by the accident of January 16, 2015.

On April 28, 2015, Sanchez testified, she also underwent a nerve test performed by Dr. Devi, a neurologist, and that Dr. Devi reported that the test revealed abnormal findings consistent with the presence of radicular pathology involving damage to the right C6 and right C5 sensory nerve roots.

On November 14, 2016, Sanchez again saw Dr. Daras. The physical examination conducted by Dr. Daras on that date still disclosed loss of range of motion in the cervical and lumbar spine in all planes, accompanied by spasms and tenderness, as well as loss of range of motion in her thoracic spine and shoulder.

Sanchez states that she is unable to go to the gym anymore or engage in recreational activities with her children, and needs help from her daughter doing things around the house. Her pain has continued and progressed, and the pain in her lower back radiates down her legs and makes them numb. At one point this problem necessitated a visit to the hospital by ambulance, where she was given a shot of an anti-inflammatory.

Analysis

On a motion for summary judgment dismissing a complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), the defendant bears the initial burden of establishing, prima facie, that plaintiff did not sustain a serious injury caused by the accident" (*Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]). If a

defendant satisfies this burden, the plaintiff must present evidence sufficient to raise issues of fact as to whether she sustained serious injury of a type defined in the statute (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]).

“[W]hether a limitation of use or function is ‘significant’ or ‘consequential’ . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Toure*, 98 N.Y.2d at 353).¹ “[S]ubjective complaints alone are not sufficient’ to support a claim of serious injury; there must be ‘objective proof’” (*Perl v Meher*, 18 NY3d 208, 216 [2011]). Such proof must establish (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff’s injuries were causally related to the accident and (2) recent examination to establish the required permanency (*see Perl v Meher*, 18 NY3d at 217).

In the affirmed report of defendants’ medical expert, Dr. Ranade, he states that he reviewed the notes of Sanchez’s treating physicians, the two MRI reports, and other medical reports. He also reports the results of the physical examination he conducted on Sanchez on December 28, 2016. According to Dr. Ranade’s report, he found limitations in her ranges of motion as follows: cervical extension 15 degrees where normal is 30-45 degrees, cervical side bending 15 degrees where normal is 30-45 degrees, and lumbar flexion 60 degrees when normal is 70-90 degrees. His report discusses neither the findings of the MRI reports nor his own findings regarding Sanchez’s range of motion when he concludes that Sanchez merely sustained a “mild cervical and lumbar strain.”

While evidence of bulging or herniated discs is not sufficient to establish a serious injury

¹ Sanchez has apparently abandoned her claim of serious injury based on the 90/180 category of the statute.

in the absence of “objective evidence of the extent of alleged physical limitations resulting from the disc injury” (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2d Dept 2005]), where the defendant’s expert also acknowledges significant limitations in range of motion, the defendant’s showing fails to establish a prima facie right to summary judgment. The *Kearse* decision cites *Klimis v Lopez* (290 AD2d 538 [2002]), where the defendants’ expert acknowledged that an MRI indicated a disc herniation at L4-5, and further acknowledged that the injured plaintiff could only flex his lower back to approximately 50% of normal. The *Kearse* decision explained, “[b]ecause of this reported limitation of motion, the [*Klimis*] defendants failed to establish as a matter of law that the injured plaintiff did not suffer a serious injury” (*Kearse v New York City Tr. Auth.*, 16 AD3d at 50). Similarly, *Kearse* discussed *Asta v Eivers* (280 AD2d 565, 566 [2d Dept 2001]), where “the defendants’ examining neurologist referred in his report to an MRI of the injured plaintiff’s cervical spine which showed the presence of a bulging disc.” Because “the neurologist also found that the injured plaintiff’s neck had a ‘decreased range of movements to extension’ . . . the [*Asta*] defendants failed to demonstrate prima facie that the injured plaintiff’s bulging disc did not constitute a serious injury” (*Kearse*, 16 AD3d at 50-51).

Even a physician’s determination that the plaintiff has a limitation of movement of the neck of 10 degrees to the right or left has been considered “sufficient for the denial of summary judgment to defendants” (*Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]). Inasmuch as Dr. Ranade’s measurements are objective findings, his failure to characterize as “significant” his determination of at least a 10-15% loss of range of motion in several areas does not alter the fact that his affirmed report fails to sustain the defendants’ burden of establishing, prima facie, that Sanchez did not sustain a serious injury (*see Asta v Eivers*, 280 AD2d at 566).

Based upon the foregoing, it is hereby,

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that all parties appear in the Settlement Conference Part on Tuesday, August 29, 2017 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
July 26, 2017



HON. TERRY JANE RUDERMAN, J.S.C.