

Roundtree v Mushtaq
2018 NY Slip Op 30515(U)
February 22, 2018
Supreme Court, Queens County
Docket Number: 712325/2015
Judge: Leslie J. Purificacion
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

CYNTHIA ROUNDTREE,

Plaintiff

Index No: 712325/2015

-against-

Seq # 2

AHMED MUSHTAQ, JASWINDER SINGH
AND A.V. WILLIAMS,

DECISION/ORDER

Defendants.

The following papers numbered 1 to 8 read on defendant's motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5104(a) and §5102(d).

Papers
Numbered

N.M., Aff., Exhibits and Service.....1-4
Opp., Aff., Exhibits and Service.....5-8

Upon the foregoing papers, it is ordered that this motions is determined as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiff Cynthia Roundtree ("Roundtree") in a motor vehicle accident that occurred on December 22, 2013 on Nassau Expressway near its intersection with the Belt Parkway in Queens County, New York. In the verified bill of particulars, plaintiff alleges injuries of C3-4, C5-6, C7-T1 herniations, L4-5 bulge, right shoulder interstitial tear of the supraspinatus tendon, anterior and superior labral tear, partial thickness tear of the rotator cuff tendon, and left foot plantar fascia tear.

Plaintiff asserts that as a result of the accident she suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation

of use of a body organ or member; a significant limitation of use of a body function or system; and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]).

Defendants Ahmed Mushtaq and Jaswinder Singh now move for summary judgment asserting that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of its application, defendants submit *inter alia* the affirmed reports of Stacey M. Donegan, M.D., Mark J. Decker, M.D., Thomas P. Nipper M.D., Edward M Weiland, M.D. and plaintiff's examination before trial testimony.

Dr. Donegan, board certified in emergency medicine, reviewed the bill of particulars, police report and Emergency Department ("ED") report, and determined that plaintiff did not sustained any significant injury, and the injuries claimed were not causally related to the subject accident. In her report of May 25, 2016, Dr. Donegan opined that had plaintiff sustained any significant neck or back injury as a result of the accident, plaintiff would have sought immediate emergency care. Dr. Donegan noted that plaintiff did not seek emergency care until 5 days after the accident, on December 27, 2013. Dr. Donegan states that plaintiff expressed little neck pain and denied back pain at the ED, and that plaintiff only demonstrated mild right paravertebral tenderness at C5-7. Dr. Donegan concluded that the alleged injuries to plaintiff's cervical and lumbar spine were unsupported by plaintiff's complaints and the x-ray taken of her back.

On July 24, 2016, Dr. Decker, a radiologist, conducted an evaluation of plaintiff's medical records, namely MRIs of plaintiff's left foot, right shoulder and lumbar spine. Upon review of theses MRIs, Dr. Decker concluded that no acute traumatic injury was sustained, and that the MRI findings are degenerative in nature and not causally related to the December 22, 2013 accident.

Dr. Nipper performed an orthopedic evaluation of plaintiff on December 8, 2016, and determined plaintiff did not suffer from an acute traumatic injury. Upon review of plaintiff's MRIs, Dr. Nipper also concluded that the findings were degenerative in nature and not causally related to the December 22, 2013 accident. Using a goniometer, Dr.

Nipper found plaintiff's cervical spine, lumbar spine, shoulders, ankles/feet range of motion to be all in the normal range.

Dr. Weiland, a board certified neurologist, performed an independent medical examination of plaintiff on December 13, 2016. Dr. Weiland performed a range of motion test with a goniometer and found normal ranges of motion regarding plaintiff's cervical, lumber and thoracic spine. Dr. Weiland concluded that there is no neurological residual or permanency based upon the examination findings.

Defendant has satisfactorily proffered admissible proof that plaintiff did not suffer a serious injury and thus, the burden shifts to the plaintiff to come forward with sufficient evidence that she sustained serious injuries (see, Gaddy v Eyler, 79 NY2D 955).

In opposition to the motion, plaintiff submits her affidavit of plaintiff and that of David Hong, D. C., Daniel Yoo, M.D., Benjamin Chang, M.D., Mary Hu, M.D., and Narayan Paruchuri, M.D.

Plaintiff, by affidavit and deposition, in sum attests that she could not perform material acts i.e., heavy lifting; walk, stand or sit for a long period of time, and has difficulty with household chores such as cleaning, laundering and cooking which constitute daily activities as a result of the accident. Plaintiff claims she received physical therapy and treatment for two to three times a week for approximately seven months, injections in her left foot for pain; and that she is unable to perform duties at work as a result of the accident. At the time of the accident, plaintiff was a residential manager at a medical facility. Plaintiff remained at home for two days after the accident, subsequently returned to back to work. Due to injuries resulting from the accident, plaintiff said she struggled to perform her duties, reduced her hours at work and then

stopped working from July 2014 to June 2015. Plaintiff contends her limitation in daily activities and chronic pain due to injuries to her back, right shoulder and left foot as a result of the accident continue to date.

Plaintiff was examined by Dr. Hong, a chiropractor, on December 30, 2013. Using a goniometer, Dr. Hong found plaintiff's cervical spine to be limited with pain severely aggravated by movement and with results of flexion 20 degrees less than normal, extension 20 degrees less than normal, right lateral flexion 15 degrees less than normal, left lateral flexion 15 degrees less than normal, right rotation 20 degrees less than normal and 30 degrees less than normal. He also conducted a range of motion on plaintiff's lumbar spine and found up to a 30 degree decrease in range in motion. Dr. Hong instructed plaintiff to avoid strenuous activities including vocational duties which would prohibit proper healing. Dr. Hong opined that plaintiff's injuries: cervical sprain and strain, thoracic and lumbar sprain and strain, were causally related to the accident of December 2013. He continued to treat plaintiff for 6 months and upon re-evaluation on June 20, 2014, the patient still remained symptomatic.

On February 15, 2014, Mary Hu, M.D., a radiologist, conducted an MRI of plaintiff's right shoulder, and on March 1, 2014, an MRI of plaintiff's left foot. Dr. Hu found that plaintiff's right shoulder injuries are interstitial tear of the supraspinatus tendon, anterosuperior labral tear/SLAP lesion, bicipital tenosynovitis, periarticular bursitis; and plaintiff's left foot injuries are diffuse nonspecific subcutaneous and soft tissue edema, suggestion of plantar fascia tear or fasciitis, probable lipoma in the medial aspect of the plantar subcutaneous soft tissue.

Narayan Paruchuri, M.D., a radiologist, conducted MRIs of plaintiff's lower back and neck on March 1, 2014. Dr. Paruchuri found plaintiff's lower back injuries are at L5-S1 level and L4-5 level. At the L5-S1 level, there is a reduction in disc signal intensity, a disc bulge and a bilateral foraminal herniation, bilateral foraminal impingement more prominent on the right than on the left, and impingement upon the S1 nerve roots. At the L4-5 level, there is a disc bulge and bilateral foraminal impingement. Dr. Paruchuri found plaintiff's neck back injuries are a central disc herniation with the anterior thecal sac impingement at the C3-4 and C5-6 levels, and left foraminal impingement at the C7-T1 level.

On March 29, 2014, Dr. Yoo, board certified orthopedic surgeon, examined plaintiff's right shoulder which revealed a painful abduction greater than 90 degrees; impingement signs of Neer and Hawkins were positive and O'Brien test was positive. Dr. Yoo referred plaintiff for an MRI of the left foot. Upon a followup examination on April 26, 2014, Dr. Yoo found plaintiff's were right shoulder impingement syndrome, right shoulder partial thickness tear of the rotator cuff tendon, right shoulder anterior superior labral tear, left foot pain, and left foot plantar fasciitis with possible plantar facial tear. Upon review of plaintiff's MRIs, medical records and physical examinations of plaintiff, Dr. Yoo concluded that the plaintiff's injuries were sustained and causally related to the subject motor vehicle accident.

Benjamin Chang, M.D., board certified physician in physical medicine and rehabilitation, reviewed plaintiff's MRIs and medical records including Dr. Hong's range of motion test. Dr. Chang conducted a range of motion test on September 7, 2017 using a goniometer of plaintiff's neck, lower back and bilateral shoulders. The

examination revealed that plaintiff continued to exhibit soft tissue inflammation in the cervical and lumbar spine, paravertebral spasms in the neck and lower back, and myofascial trigger points. The range of motion was restricted with pain in the neck. Spurling's test was positive. Based on this most recent examination of plaintiff, Dr. Chang diagnosed plaintiff with post traumatic cervical sprain with disc herniations and foraminal impingement; post traumatic lumbar spine with bilateral foraminal herniation at L4-L5 and L5-S-1 and right S1 nerve root impingement; post traumatic cervical and lumbar myofascial pain syndrome, right shoulder pain from interstitial tear of supraspinatus tendon, labral tear/SLAP tear bicipital tenosynovitis and periarticular bursitis, left ankle and foot pain.

Dr. Chang stated that MRI findings of plaintiff's cervical spine, lumbar spine, right shoulder and left foot were consistent with the physical examination of plaintiff, and such injuries were causally related to the accident and not degenerative in nature. Dr. Chang opined that plaintiff continues to suffer from significant limitations in the use of her neck, lower back, right shoulder which leaves her with difficulty of performing her usual and customary daily activities without experiencing pain, and is permanent in nature.

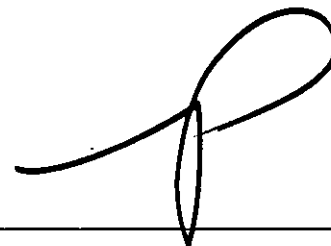
Plaintiff has sufficiently proffered objective proof and sworn medical reports in support of plaintiff's claim of serious injury to raise a triable issue of fact. Dr. Hong found a significant loss in range of motion to plaintiff's neck and back upon a physical examination conducted on December 30, 2017. The exam was reasonably contemporaneous to the December 22, 2017 accident. Plaintiff was instructed by Dr. Hong to avoid strenuous activities including vocational duties. Dr. Hong treated plaintiff

for about six to seven months, and re-evaluated plaintiff. In June 2014, he found plaintiff's condition still remained symptomatic. Dr. Yoo, a board certified orthopedic surgeon, found positive results of significant injuries to plaintiff's right shoulder and left foot causally related to the accident. Upon a current medical examination in 2017, Dr. Chang concurred with the findings of Dr. Hong and Yoo. He found plaintiff had reductions in normal range of motion in all aspects of plaintiff's cervical spine, lumbar spine and right shoulder, and observed soft tissue inflammation in plaintiff's neck and back. Dr. Chang determined that plaintiff's chronic painful conditions are substantiated with positive disc related findings in the objective findings in the MRIs and observations of involuntary muscle spasms during the physical examination. Dr. Chang concluded plaintiff's condition from the injuries sustained as a result of the December 22, 2013 accident is permanent.

Accordingly, the motion is denied.

This is the decision and order of the court.

Date: February 22, 2018



Hon. Leslie J. Purificacion, J.S.C.

FILED
MAR 19 2018
COUNTY CLERK
QUEENS COUNTY