

Chuva v Medina
2018 NY Slip Op 33490(U)
December 5, 2018
Supreme Court, Queens County
Docket Number: 708/16
Judge: Leslie J. Purificacion
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
MARIA CHUVA and SEGUNDO CASTRO,

Plaintiff,

--against--

FERNANDO MEDINA and ALESSANDRA
ROSITA MEDINA CASTILLO

Defendants,

-----X

Index Number 708/16

DECISION/ORDER

Motion Sequence No. 3

OS

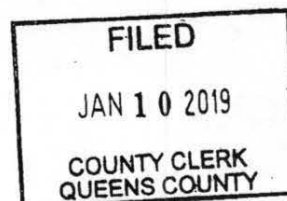
The following papers numbered 1 to 17 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiffs on the grounds that plaintiff Maria Chuva's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d) and plaintiff Segundo Castro on the counterclaim's cross motion for the same relief.

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Upon the foregoing papers, it is ordered that the motion and cross motion determined as follows:

In this personal injury action, plaintiff Maria Chuva seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 31, 2015 on St. Nicholas Avenue at or near its intersection of Greene Avenue in Kings County, New York. In her verified bill of particulars, plaintiff alleges injuries to her right hip, right knee, right shoulder, left shoulder, cervical spine and lumbar spine. 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"; "significant disfigurement"; 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 assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted. Plaintiff Segundo Castro on the counterclaim cross moves for the same relief and adopts the arguments of defendants.

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 their application, defendants submit the properly affirmed reports of orthopedist Howard Levin, plaintiff's verified bill of particulars and plaintiff's examination before trial testimony.

On October 23, 2017, Dr. Howard Levin performed an orthopedic examination of the plaintiff. In his report, Dr. Levin indicates the medical records he reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Levin found that range of motion of the cervical spine, thoracic spine, lumbar spine, right shoulder, left shoulder, right hip, left hip, right knee, left knee, right foot and left foot were all within normal ranges. All other objective testing was negative. Dr. Levin opined that plaintiff's cervical spine sprain, thoracic spine sprain, lumbar spine sprain, right shoulder sprain, left shoulder sprain, right hip sprain and S/P surgery, right knee sprain, left knee sprain, right foot sprain and left foot sprain were resolved. He further stated that there was no objective evidence of disability.

Defendants' also submit a report from Dr. Levin, dated September 7, 2016, wherein he reviews the plaintiff's medical records related to her right hip surgery performed on December 21, 2015, including the operative report dated December 21, 2015, by Richard Seldes, M.D., copies of the intra-operative photos dated December 21, 2015, and the MRI report of the right hip dated August 6, 2015. Dr. Levin states that the operative report lists the preoperative diagnosis as labral tear of the right hip and synovitis of the right hip. Dr. Levin does not state what the post-operative

diagnosis was. Instead, Dr. Levin states that he reviewed 6 operative photos and concludes there were no post-traumatic findings identified.

Defendants also submit the plaintiff's examination before trial deposition transcript taken on June 26, 2017. Plaintiff testified that prior to the accident she worked as a cleaning person in her husband's restaurant 7 days a week. After the accident, plaintiff averred that she never returned to working at the restaurant because she could not do the work. Plaintiff approximated that she missed "months" of work until her husband had to sell the restaurant. When questioned about whether her doctor told her a specific amount of time period to take off, plaintiff responded that Dr. Seldes did not specify an exact time period but told her that she should not perform strenuous work if she wanted to fully heal. Plaintiff also testified that she stopped treatment because she could not care for her four children and maintain her household and continue treatment.

The court finds that the defendants' submissions establish prima facie that the plaintiff did not sustain "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"; "significant disfigurement" or "a significant limitation of use of a body function or system (CPLR 5102(d)). The burden thus shifts to plaintiff to raise a triable issue of fact with respect to whether she has sustained a "serious injury". The court further finds that the report of Dr. Levin, wherein he reviews the plaintiff's medical records related to her right hip surgery is of no probative value as to whether plaintiff's hip surgery was to repair injuries that were pre-existing to the accident. Dr. Levin does not state any basis for his blanket conclusion that the intra-operative photos did not indicate any post-traumatic

findings. In addition, Dr. Levin omitted from his analysis the post-operative diagnosis made by the plaintiff's orthopedic surgeon in his report.

The defendants have failed to refute plaintiff's claim that she suffered "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". In the deposition transcript of plaintiff submitted by the defendants, Mrs. Chuva testified that she was unable to return to work for several months due to her injuries and eventually they had to sell their business.

In opposition, plaintiff submits the properly affirmed narrative report of plaintiff's treating orthopaedic surgeon Richard M. Seldes, M.D., wherein he incorporates his treatment records; the affirmation of radiologist Michael Green, M.D. who performed the MRI of plaintiff's lumbar spine, right knee and right hip; the certified records of Action Sports Medicine and Physical Therapy; the uncertified records of ASW Chiropractic, P.C.; and the examination before trial deposition testimony of co-plaintiff Segundo Castro.

In his affirmation, dated February 26, 2018, Dr. Seldes states that he began treating the plaintiff on June 25, 2015 after she sustained injuries in the instant motor vehicle accident. With the use of a goniometer, Dr. Seldes found that plaintiff exhibited significant objective range of motion deficiencies in her lumbar spine, cervical spine, left shoulder, right hip and right knee. He also documented muscle spasm and pain with palpation, bending and rotation in her cervical and lumbar spine; internal rotation to L3

bilaterally in the shoulders; and popping and catching in the right hip. In addition, the right knee was positive for McMurray's sign and patellar grind test. Dr. Seldes continued to examine and treat Mrs. Chuva for her continued complaint of pain on October 29, 2015 and recommended she do physical therapy. On December 10, 2015, despite a normal MRI of her right hip, Dr. Seldes opined that plaintiff clinically appeared to have a tear in her right hip and recommenced diagnostic arthroscopy of the right hip with lavage and injection. On December 21, 2015, Dr. Seldes performed the surgery and confirmed that Mrs. Chuva had a labral tear with synovitis of the right hip.

On February 5, 2018, Dr. Seldes reexamined the plaintiff, who again complained of pain in the right hip, right knee, neck and back with difficulty walking and standing for prolonged periods of time. Dr. Seldes found that the plaintiff had significant objective range of motion deficiencies in her right hip and right knee. He also noted pain with extremes of range of motion, catching and popping, as well as pain laterally in the right hip. An examination of the right knee revealed positive patellar grind test, positive patellar apprehension test, joint line tenderness and swelling. Dr. Seldes opined that Mrs. Chuva's clinical features were consistent with a right hip labrum tear with persistent pain and right knee pain with probable tear/cartilage injury. He recommended continued therapy, medicine, injections and arthroscopy of the right hip and right knee. While Dr. Seldes noted pain in her lower back and neck, he did not set forth any range of motion findings or diagnosis. Dr. Seldes concluded that the plaintiff has sustained permanent structural damage and significant limitations to her right knee and right hip. He also concluded that there is a direct cause and effect relationship between the plaintiff's current condition and the subject accident.

The court finds that the reports of plaintiff's treating doctor is sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained 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 and a significant limitation of use of a body function or system to her right hip and right knee. Since plaintiff did not submit a recent examination of her lumbar spine, cervical spine or shoulders or any evidence of disfigurement, the court further finds that she has failed to raise a triable issue of fact with respect to whether she suffered a serious injury to her cervical spine, lumbar spine and shoulder and whether she has sustained a "significant disfigurement".

Accordingly, defendants' motion and the cross motion are granted to the extent that those portions of plaintiff's complaint asserting "significant disfigurement" and "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" or "a significant limitation of use of a body function or system" to her cervical spine, lumbar spine and shoulders are dismissed.

In all other respects, the motion and cross motion are denied.

This is the decision and order of the court.

Date: DEC 05 2018



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

