Torres v Espinal
2018 NY Slip Op 34110(U)
April 6, 2018
Supreme Court, Bronx County
Docket Number: Index No. 21201/2013E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART 20

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GREYSI TORRES,

Plaintiff,

- against -

JUAN ESPINAL, FURNITURE DISCOUNT OUTLET II, INC., ADOLFO TAVARES and SHERMAN AVENUE THREE, INC..

Defendants.

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DECISION AND ORDER
Present: Hon. Mary Ann Brigantti
Index No. 21201/2013E

Defendants, Juan Espinal and Furniture Discount Outlet II, Inc. (hereinafter movant-defendants), moved for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102(d). Thereafter, defendants, Adolfo Tavares and Sherman Avenue Three, Inc. (hereinafter cross-defendants), cross-moved for summary judgment to dismiss the complaint on the same grounds. Plaintiff submitted written opposition to both motions. For purposes of the within motions, wherever applicable, the term "defendants" shall apply collectively to both the movant-defendants and the cross-defendants. Based on the following, the defendants' motions are granted.

This personal injury action arises from a two-car accident that took place on or about April 14, 2012 on West Kingsbridge Road at or near its intersection with Webb Avenue at approximately 8:30 p.m. At the time of the accident, it is uncontested that plaintiff was a passenger in the backseat of a taxicab; that she was approximately 9 months pregnant; and she was unrestrained (i.e., not wearing her seatbelt). The rear of the taxicab was impacted. Resultant from said impact, plaintiff alleges that she sustained lower pain.

Plaintiff alleges serious injuries as defined by Insurance Law § 5102(d), in that she

suffered, *inter alia*, thoracolumbar sprain/strain, L4/5 posterior disc bulge and L5/S1 posterior disc bulge. In her opposition papers, plaintiff contends that the applicable serious injuries categories, under Insurance Law § 5102(d), are the following: permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and the 90/180-day category (i.e., "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 support of their motion, movant-defendants, submit, among other things, the pleadings and verified bill of particulars; the deposition testimony of plaintiff; and affirmed report of orthopedic doctor Martin Barschi, M.D.

In support of their cross-motion, cross-defendants, submit, among other things, the pleadings and verified bill of particulars; the deposition testimony of plaintiff; and affirmations of doctors Edward Weiland, M.D. and Mark Decker, M.D.

In opposition, plaintiff submits, among other things, the affirmations of doctors John Vlattas, M.D., Robert Diamond, M.D., and Vijay Sidhwani, D.O.

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102(d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident'" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]); *Haddadnia v Saville*, 29 AD3d 1211, 1211 [3d Dept 2006]). Once the proponent of a motion for summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see Gaddy v Eyler*, 79

NY2d 955 [1992]), through the submission of admissible "objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was 'serious'" (*Charley v Goss*, 54 AD3d 569, 570 [1st Dept 2008], *affd* 12 NY3d 750 [2009]).

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the claims of serious injury premised on the following serious injury categories: permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system. Defendants' medical evidence demonstrated that plaintiff has a full range of motion, plaintiff's injuries have resolved, and plaintiff's injuries are not the result of the subject accident (*see Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573 [1st Dept 2017]; *Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]). Specifically, Dr. Barschi, orthopedic and independent medical examiner for the movant-defendants, performed an examination on plaintiff on January 6, 2016, where he concluded that any injuries that occurred on the date of the accident have completely resolved as there is no objective evidence of any residuals. Dr. Barschi performed objective tests and determined that further treatment for the alleged injuries (i.e., lower back pain), would neither be indicated nor necessary. Additionally, Dr. Weiland, independent medical examiner for the cross-defendants performed a neurological examination on plaintiff on October 20, 2015. Dr. Weiland performed objective tests and opined that, at the time of the examination, there were no lateralizing neurological deficits and plaintiff should be able to perform activities of daily living and seek gainful employment activities without restrictions. Lastly, Dr. Decker, radiologist and independent medical examiner for the cross-defendants, reviewed plaintiff's MRI films, of her lumbar spine, from December 26, 2012. Dr. Decker, concluded that the bulge at L4-L5 was

degenerative, longstanding and not causually related to the date of the accident of April 14, 2012.

Moreover, "a defendant who submits admissible proof that a plaintiff has a full range of motion and that he or she suffers from no disabilities has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), despite the existence of an MRI report which shows herniated or bulging discs" (*Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 30 [2d Dept 2005]).

Plaintiff failed to raise a triable issue of fact, regarding any permanent and/or significant injuries under categories 7 and 8 of Insurance Law § 5102(d), because plaintiff failed to submit evidence of a recent examination (*see Toure v Avis Rent A Car Systems,* Inc., 98 NY2d 345, 350-51 [2002]; *Lake v Celen,* 27 Misc 3d 284, 286 [Civ Ct 2009]). Rather, plaintiff supplied an affirmation from Dr. Vlattas memorializing her initial evaluation, post-accident, from December 19, 2012, and a report from Dr. Sidhwani dated April 24, 2013. Plaintiff also supplied an affirmation from radiologist, Dr. Diamond, dated September 6, 2016; however, its purpose was to affirm the truth and accuracy of the MRI films produced in December of 2012. No additional medical proof was submitted to explain the absence of a more recent medical examination. To that end, plaintiff failed to include a recent medical report prepared in rebuttal to defendants' medical experts' allegations that plaintiff exhibited full pain-free range of motion in all tested areas including her cervical spine and lumbar spine.

> [A]n opposing affidavit based upon a recent medical examination substantiates, or, at the very least, purports to substantiate, that portion of a plaintiff's serious injury claim which alleges some sort of permanent or significant injury - that is, an injury which has an extended *duration* element. Conversely, the absence of proof of a recent medical examination leaves an important evidentiary vacuum in a plaintiff's opposition to a motion for summary judgment, where the plaintiff is claiming some form of permanent or significant injury. *Troutovski v Sitnir*, 180 Misc 2d 124, 126 (Civ Ct 1999).

Here, the record reveals that plaintiff's opposition is based on stale medical evidence. Thus, she

failed to raise a triable issue of fact. Additionally, it should be noted that, "while a significant limitation of use of a body function or member 'need not be permanent in order to constitute a serious injury, . . . any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well'" (*Lively v Fernandez*, 85 AD3d 981, 982 [2d Dept 2011] quoting *Partlow v Meehan*, 155 AD2d 647, 648 [2d Dept 1989]).

Additionally, plaintiff failed to supply medical evidence rebutting cross-defendants' expert, Dr. Decker's, allegation that plaintiff's condition was degenerative, longstanding and not causally related to the accident. To that end, plaintiff failed to raise a triable issue of fact as to whether her injuries were degenerative in nature and, therefore, failed to raise a triable issue of fact as to whether the subject motor vehicle accident caused the alleged serious injuries (*see Franklin v Gareyua*, 136 AD3d 464 [1st Dept 2016] *affd* 29 NY3d 925 [2017]; *Khan v Goldmag Hacking Corp.*, 149 AD3d 403 [1st Dept 2017]; *Khanfour v Nayem*, 148 AD3d 426 [1st Dept 2017]; *Brown v Bawa*, 144 AD3d 448 [1st Dept 2016]).

Next, in order to make a prima facie showing of entitlement to judgment as a matter of law dismissing a claim of serious injury under the 90-180-day category, the defendants must either provide evidence that the plaintiff in fact performed her usual and customary activities, or submit medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature (*see Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]); *Callahan v Shekhman*, 149 AD3d 454 [1st Dept 2017]); *Brownie v Redman*, 145 AD3d 636 [1st Dept 2016]).

Defendant made a prima facie showing that plaintiff did not suffer a 90/180-day serious injury. Defendants' evidence established that plaintiff was not confined to bed and home immediately following the accident, and she returned to work, as a dental assistant, four days

after the accident - missing only two days of work. Furthermore, plaintiff continued to work on a part-time basis for approximately two weeks until she gave birth to her child. Defendants' relied on plaintiff's verified bill of particulars and deposition testimony.

Plaintiff failed to raise a triable issue of fact as to the 90/180-day claim. Plaintiff testified that she returned to work following the accident. Absent objective medical evidence, plaintiff's subjective statements that she was unable to perform her usual and customary daily activities during the statutorily-relevant time period, is insufficient to raise a triable issue of fact as to the 90/180-day category of Insurance Law § 5102(d) (*see Nieves v Bus Maint. Corp.*, 129 AD3d 539 [1st Dept 2015]); *Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]; *Pinkhasov v Waver*, 57 AD3d 334 [1st Dept 2008]).

Accordingly, it is

ORDERED that the movant-defendants' motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted in its entirety; and it is further,

ORDERED that the cross-defendants' cross-motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted in its entirety; and it is further;

ORDERED that the movant-defendants shall serve on all parties a copy of this Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: 4/6/18

ENTER,

Mary Ann Brigantti

MARY ANN BRIGANTTI, J.S.C.