

Nolasco-Ochoa v Kollanethu
2018 NY Slip Op 34186(U)
October 2, 2018
Supreme Court, Nassau County
Docket Number: Index No. 607803-16
Judge: Jerome C. Murphy
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

ROSARIO NOLASCO-OCHOA,

Plaintiff,

-against-

JACOB KOLLANETHU and BENZY JACOB,

Defendants.

TRIAL/IAS PART 14

Index No.: 607803-16

Motion Date: 8/2/18

Sequence No.: 001

DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

Defendants bring this application for an order pursuant to CPLR § 3212, dismissing the complaint on the basis that the defendants did not breach any duty owed to the plaintiff; or in the alternative, dismissing the complaint on the basis that the plaintiff did not sustain a “serious injury” under Section 5102(d) of the Insurance Law. Plaintiffs have submitted opposition to this application and defendants have replied.

BACKGROUND

This action arises from a two-car collision which occurred on July 5, 2016 at approximately 6:50 A. M. According to the police report, the accident occurred on East Barclay Street, at its intersection with Bay Avenue, Hicksville, New York. While the police report indicates that this was a head-on collision between two vehicles traveling in opposite directions, defendants contend that plaintiff was making a left turn into his lane of traffic. Plaintiff indicated

that when the light turned green she began to move forward, but did not begin her turn. To the contrary, the defendant claims that she had turned her vehicle into his lane of travel immediately before the impact occurred.

Defendants moved to dismiss the Complaint on the grounds that they did not owe any duty to plaintiff. It is certainly less than clear as to precisely what transpired. Plaintiff alleges that she was stopped when she was struck by the other car while defendant contends that she had moved toward the left in the intersection in an effort to make a left turn.

Defendant also moves to dismiss the complaint on the grounds that plaintiff has failed to sustain a serious injury within the meaning of Insurance Law §5102. Defendant submits a report of Ronald A. Light, M.D., an orthopedic surgeon who examined plaintiff on August 21, 2017. At that time the reviewed numerous records including the verified Bill of particulars, the examination report from New York Spine Specialist dated December 5, 2016, MRI report of the thoracic spine by David Are. Payne, M. D., MRI report of the lumbar spine also performed by Dr. Payne; Office visit report of Dr. Ronda Bachenheimer, initial narrative report of Long Island Chiropractic and Wellness, functional evaluation report from Medical Diagnostic Services, PC; and EMG/NCV study by Frank Anderson, D.C. dated August 3, 2016.

He performed range of motion testing, using a hand-held goniometer, based on published guidelines by AMA 5th edition. He tested the Cervical Spine, Thoracic Spine, Lumbar Spine, Right Shoulder, Left Shoulder, Right Elbow, Left Elbow, Right Wrist/Hand, Left Wrist/Hand, Right Hip, Left Hip, Right Knee, Left Knee, Right Ankle/Foot, and Left Ankle/Foot. All ranges of motion were within normal limits, except for the and Right Shoulder, for which the findings were as follows:

RIGHT SHOULDER	PATIENT	NORMAL
FORWARD FLEXION	180°	180°
EXTENSION	40°	40°
ABDUCTION	180°	180°
ADDUCTION	30°	30°
INTERNAL ROTATION	90°	80°
EXTERNAL ROTATION	80°	90°

DISCUSSION

The motion to dismiss the Complaint on the question of liability is denied. A review of the transcripts of their respective testimony leaves it uncertain as to whether or not plaintiff had, in fact, begun a left turn into the lane of travel of the defendant, or whether plaintiff was at a stopped position waiting for the red light to change to green.

The standards for seeking recovery for non-economic injuries sustained as a result of a motor vehicle accident are governed by the provisions of Insurance Law §§ 5102(d) and 5104(a). The former defines "serious injury" as follows:

(d) "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The latter limits the entitlement of a person claiming to be injured as a result of an automobile accident to seek recovery for non-economic loss, except in the case of a serious injury. It states as follows:

(a) Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. The owner, operator or occupant of a motorcycle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, shall not be subject to an action by or on behalf of a covered person for recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

A defendant may raise an issue as to the seriousness of the plaintiff's injuries by sworn statements of their own examining physician, or the unsworn reports of the Plaintiff's treating

physician (*Pagano v. Kingsbury*, 182 A.D.2d 268 [2d Dept. 1992]). If sufficient to raise the serious injury issue, the burden shifts to the Plaintiff to submit prima facie evidence in admissible form to support the claim (*Licari v. Elliot*, 57 N.Y.2d 230 [1982]). To suffice, the affirmation or affidavit must be based upon the physician's own examinations, tests, and observations and record review, and not simply on the plaintiff's subjective complaints (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]).

Death, dismemberment, and loss of a fetus are self-explanatory, but some of the other definitions of "serious injury" are not.

Significant limitation of use of a body function or system

"In order to prove the extent or degree of physical limitation, and expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury." *Id.* at 348, citing *Dufel v. Green*, 84 N.Y.2d 795 (1995), and *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Id.*

Under certain circumstances, even where the plaintiff has established by competent evidence that they sustained serious injuries, Courts may consider additional factors, such as an unexplained gap in treatment, intervening medical problem, or a preexisting condition such as may interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]). But the mere existence of a preexisting condition does not automatically preclude a determination of serious injury. Where such conditions are quiescent, and the patient is asymptomatic, the aggravation of those conditions by the trauma of an automobile collision, if supported by the requisite objective findings, may constitute serious injury (*Mack v. Pullum*, 37 A.D.3d 1063 [4th Dept. 2007]; *Talcott v. Zurenda*, 48 A.D.3d 989 [3d Dept. 2008]; (*Bolowske v. Eastman Kodak Co.*, 288 A.D.2d 851 [4th Dept. 2001]).

Significant Disfigurement

Not all scarring constitutes a "serious injury." "(A)n injury is disfiguring if it alters for the worst plaintiff's natural appearance. A disfigurement is significant if a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive,

objectionable or as the object of pity or scorn.” It is not based upon the plaintiff’s subjective assessment of the level of disfigurement (*Pecora v. Lawrence*, 41 A.D.3d 1212, 1213 - 1214 [2007]).

Fracture

A fracture, to constitute a serious injury, must be of a bone, not, for example of cartilage (*Catalon v. Empire Storage Warehouse, Inc.*, 213 A.D.2d 366 [2d Dept. 1995]). But even a hairline fracture of a bone is sufficient to constitute a serious injury (*Poma v. Ortiz*, 2 A.D.3d 616 [2d Dept. 2003]).

Permanent loss of use of a body organ, member, function, or system

A person claiming under this element of serious injury must establish a permanent loss of use, and the loss must be total (*Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295[2001]). See also, (*Beutel v. Guild*, 28 A.D.3d 1192 [4th Dept. 2006]; *Ellithorpe v. Marion*, 34 A.D.3d 1195 [4th Dept. 2006]).

Permanent Consequential Limitation of Use/Significant Limitation of Use

The affirmation of the plaintiff’s physician, based upon six physical examinations over the course of 17 months beginning shortly after the accident, which included findings of limited ranges of motion in the cervical and lumbar spine, and right elbow, which assigned specific percentages and compared them to the normal range was adequate to meet the minimal standard to substantiate a claim of “serious injury.” (*Silva v. Vizcarrondo*, 31 A.D.3d 392 [1st Dept. 2006]). The limitation must be more than slight and be supported by medical proof based on credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eycler*, 79 N.Y.2d 678 [1987]; *Licari v. Elliot*, 57 N.Y.2d 230 [1982]).

In *Picott v. Lewis*, 26 A.D.3d 319, the finding by the defendant’s examining physician that the “range of motion of the lumbosacral spine showed complaints of pain beyond 70 degrees of flexion, 20 degrees of extension, 40 degrees of right and left lateral bending and rotation” was determined adequate to raise a triable issue of fact as to whether the plaintiff sustained a “significant limitation of use of a body function or system.”

90/180 Days

To prevail on the claim of serious injury under this subsection, the plaintiff must establish:

1. An injury which is objectively determinable and measurable (*Atkinson v. Oliver*, 36 A.D.3d 552 [1st Dept. 2007]);

2. The plaintiff must have been unable to perform “substantially all” of his usual daily activities. In *Uddin v. Cooper*, 32 A.D.3d 270 (1st Dept. 2006) the Court held that merely missing three months of work was insufficient, since there were no allegations of inability to perform other daily activities. Where the plaintiff acknowledged that approximately one month after the accident she was able to return to school, take her final exams, and receive an Associate’s Degree, she failed to raise a triable issue of fact under the 90/180 day category (*Shamsodeen v. Kibong*, 41 A.D.3d 577 [2d Dept. 2007]). The limitations of the usual daily activities must be “to a great extent rather than some slight curtailment.” (*Licari v. Elliot*, 57 N.Y.2d 230, 236 [1982]).

In *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002), the Court noted that in order to prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury; but an expert’s qualitative assessment of a plaintiff’s condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system.

The Court rejected the arguments of defendants that the quantitative measurements were required to be contemporaneous to the accident and based on recent findings. This was the rationale of the Appellate Division determinations in *Perl* and *Adler*. The Court concurred with the dissenters in the Appellate Division to the effect that the requirement of creating a contemporaneous numerical measurement would have the perverse effect of eliminating legitimate claims because plaintiff sought out physicians who were primarily interested in treating their conditions, as opposed to creating a record for litigation.

In this case plaintiff contends that she has sustained a significant limitation of range of motion. Defendant’s expert has found what is a minimal limitation of motion in her right shoulder, amounting to 11%. This is not a significant limitation (*Waldman v. Dong Kook Chang*, 175 A.D.2d 204 [2d Dept 1991]; *Licari v. Elliott*, 57 N.Y.2d 230 [1982]). Dr. Bachenheimer, D.C. reports substantial limitations in range of motion in multiple areas. However, she does not state the authoritative basis for her estimates of the normal range of motion. As such, they are

not objective, and are not to be considered (*Browdame v. Candura*, 25 A.D.3d 747, 748 [2d Dept. 2006]). In addition, plaintiff's radiology report, by Dr. Payne reveals bulging discs and herniations. While he affirmed that the statements in his report (Exh. "D" to Opposition) are true, he makes no statement that these findings are causally related to the accident. "The mere existence of bulging or herniated discs are not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Rivera v. Bushwick Ridgewood Props. Inc.*, 63 A.D.3d 712 [3d Dept. 2009]).

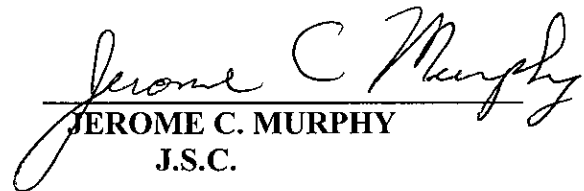
Defendants' motion to dismiss the Complaint based upon failure of plaintiff to establish the existence of a serious injury as a result of the accident, is granted.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
October 2, 2018

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED
OCT 04 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE