

Sola v Osborn

2018 NY Slip Op 34312(U)

April 13, 2018

Supreme Court, Orange County

Docket Number: Index No. EF001023-2016

Judge: Sandra B. Sciortino

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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 ORANGE

-----X

MARGARET SOLA,

Plaintiff,

DECISION AND ORDER

INDEX NO.: EF001023-2016

Motion Date: 2/19/18

Sequence No. 1

-against-

DAIN EDISON OSBORN, JR.,

Defendant.

-----X

SCIORTINO, J.

The following papers numbered 1 to 13 were considered in connection with the unopposed application of defendant for summary judgment:

PAPERS

NUMBERED

Notice of Motion/Affirmation (Aceste)/Exhibits A-K

1 - 13

Upon the foregoing papers it is ORDERED that defendant's motion for summary judgment is granted; and the complaint is dismissed.

Background and Procedural History

This personal injury action arises out of a two-car motor vehicle accident that took place on March 7, 2014. Plaintiff commenced this action by the electronic filing of a Summons and Complaint on February 12, 2016. (Exhibit A) Defendant served a Verified Answer (Exhibit B) and Demand for Bill of Particulars, along with other demands, on March 21, 2016.

Plaintiff served a Verified Bill of Particulars (Exhibit C) on or about February 20, 2017. The Bill claimed that plaintiff suffered serious injuries, including:

- Left Knee: torn meniscus, chondromalacia, synovial plica syndrome, ACL tearing, osteoarthritis, subchondral cysts, infrapatellar fibrosis, joint space narrowing, contusion, severe swelling, tenderness, decreased range of motion, ability to walk distances, severe pain
- Right Shoulder: impingement syndrome requiring arthroscopic surgery; fraying of the labrum; fluid in the bursa; bursitis; type II acromion; glenoid lesion; severe sprain/strain; swelling, tenderness, decreased range of motion; severe pain and stiffness
- Brain: aneurysm; occipital headache; severe pain, swelling and tenderness
- Left Hip: left gluteus medius tendinosis; trochanteric bursal fluid; severe sprain/strain; tenderness; decreased range of motion; lack of proper hip function;
- Right Hip: trochanteric bursitis; severe sprain/strain; swelling; tenderness; decreased range of motion; lack of proper hip function;
- Cervical Spine: aggravation of prior C4-C5 disc bulge; aggravation of prior C6-C7 disc bulge; subluxation; whiplash; disc derangement; severe sprain/strain; radiating pain; severe pain; swelling; tingling; numbness; weakness; restriction of motion;
- Lumbar Spine: aggravation of prior L5-S1 disc herniation; aggravation of prior lumbar radiculitis; spondylosis; loss of function; disc derangement; severe sprain/strain; tightness; numbness; tingling; weakness; swelling; restriction of motion;

Thoracic Spine: subluxation; loss of function; disc derangement; radiating pain; tightness; tingling; numbness; weakness; swelling; restriction of motion.

Plaintiff's Examination Before Trial was taken on May 17, 2017. (Exhibit D) During her deposition, plaintiff testified that she was unemployed on the date of the accident, and had not worked since 1992, when she was disabled by a fractured coccyx while at work. (Exhibit D at 7, 12) She was granted Social Security disability in 1997 due to asthma and lower back issues. (Exhibit D at 13) In 2011, she was involved in a motor vehicle accident, for which she underwent treatment (Exhibit D at 10). After the 2011 accident, MRIs of her lower back showed a disc herniation and bulging discs in her lower back and neck. (Exhibit D at 16) She had pain in her back and neck, and suffered headaches after the 2011 accident. (Exhibit D at 20, 25) After the 2011 accident, she treated with a chiropractor, Dr. Blumenthal, for approximately two years. (Exhibit D at 26) She was unable to go to the park, fish, sit for prolonged periods, hold her children or grandchildren. (Exhibit D at 33) She spent her days reading, crocheting and watching TV. (Exhibit D at 35) After the 2014 accident, she had the same limitations. (Exhibit D at 36)

Plaintiff underwent two surgeries subsequent to the 2014 accident. The first, in 2015, was an arthroscopy on her left knee. (Exhibit D at 29) Although the surgeon, Dr. Hyman, believed there was a meniscal tear, the surgery revealed no tears. The doctor did excise synovial plica and other arthritic conditions. (Exhibit D at 29)

Plaintiff also underwent right shoulder surgery in June 2016 with Dr. Ashraf. (Exhibit D at 42) Dr. Ashraf shaved down osteophytes (which plaintiff called "spurs") in the shoulder. (Exhibit D at 42) No rotator cuff tears were found. (Exhibit D at 38)

After the 2014 accident, plaintiff experienced two slip and fall accidents, falling onto her right knee. (Exhibit D at 85) There is no claim that these accidents were related to the subject motor vehicle accident.

Plaintiff testified that post-accident MRI studies showed the same disc issues in her cervical and lumbar spine as existed after the 2011 accident. (Exhibit D at 32) Her daily activities are essentially the same as they were after the 2011 accident, i.e., reading, crocheting and watching TV. (Exhibit D at 36)

Summary Judgment Motion

By Notice of Motion electronically filed on January 15, 2018, defendant seeks summary judgment (Seq. #1) on the grounds that plaintiff failed to meet the threshold predicates of Insurance Law §5102.

In support of the motion, defendant appends records from St. Luke's Cornwall Hospital Emergency room (Exhibit F). He also appends the radiology records of Orange Radiology, contained in the office notes of plaintiff's treating physicians Dr. Blumenthal. (Exhibit G) The right shoulder operative notes of plaintiff's surgeon, Dr. Ashraf, are Exhibit H. The records of Dr. Hyman, who performed plaintiff's left knee surgery, are Exhibit I.

Defendant also appends the reports of two defense experts, Dr. Robert Hendler, an orthopedic surgeon (Exhibit J) and Dr. John Rigney, radiologist (Exhibit K).

The records from St. Luke's show essentially normal findings, except for complaints of pain. X-ray and CT scan of the cervical spine were normal, as was CT scan of the lumbar spine and brain, and left knee X-rays. (Exhibit F)

The Orange Radiology records contained in Dr. Blumenthal's records (Exhibit G) include pre-accident and post-accident MRI studies of the cervical and lumbar spine, together with a left knee MRI from the week after the subject accident. A report of the cervical spine MRI from May 31, 2014 shows no change from a similar study done in 2011. The June 2, 2014 MRI of the lumbar spine showed the same L5-S1 herniation seen in a 2011 study, however, the herniation was now smaller. Arthrosis was unchanged since 2011. The March 24, 2014 left knee MRI showed medial suprapatellar plica, but no meniscal or ligament damage. Right shoulder MRI studies taken on April 14, 2011 and April 27, 2016 (the latter requested by Dr. Ashraf) showed ongoing degenerative changes and impingement on the supraspinatus.

Dr. Ashraf's office note dated May 9, 2016 includes a notation that shoulder pain began in 2014, but that it "occurred without any known injury". (Exhibit H) His 2016 diagnosis of bursitis is consistent with the 2011 and 2016 shoulder studies. Nothing in the 2016 note, or the operative report of 2015, relates the shoulder condition to the 2014 accident.

Dr. Hyman's August 11, 2015 left knee surgery was based on a belief that there was a meniscal tear, but the operative report revealed no such damage. He removed plica only, reported to be pre-existing on pre-accident studies. (Exhibit I)

Defendant also presents the affirmed report of Dr. Robert C. Hendler dated August 1, 2017. (Exhibit J) In rendering his opinion, Dr. Hendler states that he reviewed plaintiff's Bill of Particulars, and medical records from St. Luke's; Dr. Blumenthal (including diagnostic testing studies); Dr. Gamburg, a pain management specialist; Dr. Ashraf and Dr. Hyman. On the date of her examination, July 18, 2017, plaintiff complained of problems with both hips, neck, low back, right shoulder and left knee. Dr. Hendler reviewed the Bill of Particulars and plaintiff denied any other

orthopedic complaints related to the 2014 accident. Dr. Hendler noted that, while Dr. Blumenthal's records do not mention any prior neck, back or other orthopedic issues, Dr. Hyman notes a prior left knee arthroscopy (1996), and prior neck and back problems. He also notes that plaintiff treated with Orthopedic & Sports Medicine (Dr. Ashraf) prior to the accident and continued to treat until 2015 without mentioning the 2014 accident. Plaintiff denied any prior problems with her right shoulder or her hips.

Dr. Hendler's examination of plaintiff's cervical spine showed full range of motion in all upper extremity joints, with normal values.¹ There was no cervical spasm, and no atrophy in any muscle group. All motor groups showed normal neurological findings. There were no sensory deficits, and no pain on palpation.

The lumbar spine examination revealed range of motion, with no muscle spasm. Reflexes and straight leg raising were normal. Bragard's test was negative, and there was no pain on palpation. Gait was unremarkable and there were no sensory deficits.

Both shoulders showed full range of motion, actively and passively. There was no atrophy of the musculature, palpable trigger zones, or crepitus on range of motion. Hawkins, Neer and O'Brien's tests were negative.

The knees also had full range of motion, bilaterally. There was no joint line tenderness, nor effusion or atrophy. McMurray's test was negative. There was no pain on palpation, and gait was normal.

Plaintiff's hips likewise had full range of motion, no thigh atrophy, and equal leg lengths.

¹Range of motion values were in accordance with AMA Guide to the Evaluation of Permanent Impairment, and testing was done by visual measurement.

Based on his review of the medical treatment records and his physical examination of the plaintiff, Dr. Hendler opined, with a reasonable degree of medical certainty, that plaintiff may have suffered a mild cervical and lumbar sprain, with temporary exacerbation of pre-existing neck and lower back conditions. His examination of her neck and lower back was completely normal, with no positive objective tests which correlate to a herniated disc in the neck or back. Hendler found no evidence of disability, and all *status quo ante* regarding her spine. She will have no permanent injury of her neck or lower back causally related to the accident of record.

With regard to her knee, Dr. Hendler notes that Dr. Hyman found no post-traumatic injury at the time of his 2015 arthroscopy. The need for the surgical procedure was unrelated to the accident of record.

In Hendler's opinion, plaintiff did not offer any mechanism of injury from the accident to cause a problem with the right shoulder, and there were no shoulder complaints in the emergency room. In fact, no right shoulder complaints were made until February 2016. Dr. Hendler found that the surgery performed by Dr. Ashraf was not causally related to the accident of record.² Physical examination is completely normal. Hendler opined that plaintiff had no present disability, and no permanent findings in her right shoulder causally related to the accident.

He found no causally related injury to either of plaintiff's hips.

In sum, Dr. Hendler opined, with a reasonable degree of medical certainty, that there is no present orthopedic disability and no permanency related to the accident of record. Her prognosis was good.

²Because of the pre-existing condition, Dr. Hendler did indicate that he would like to review the intraoperative photographs.

Dr. John Rigney, a Board-Certified Radiologist, also submitted a report dated September 20, 2017. (Exhibit K) He reviewed 38 radiographic examinations performed between 2006 and 2013, all prior to the accident. He found age-appropriate degenerative changes in the thoracic spine, both hip joints, both sacroiliac joints, both knees, the right elbow, both shoulders, both hands, the left foot, the lumbar spine, the cervical spine, the left ankle and the right wrist. The April 4, 2011 MRI of plaintiff's right shoulder showed multiple abnormal findings. A nuclear bone scan done on April 20, 2011, showed multilevel degenerative changes. A lumbar spine MRI from June 2011 showed fluid loss and disc degeneration at L5-S1, with a disc herniation near S1. A June 2011 MRI of the cervical spine showed minor posterior bulges at C5-C5 and C6-C7. All of these findings preceded the accident in question.

Subsequent to the accident, diagnostic studies reconfirmed the pre-existing degenerative changes, and were largely similar to the prior ones, or revealed no evidence of new injury. Dr. Rigney opined, with a reasonable degree of medical certainty, that apart from a small bruise of the left gluteus medialis muscle, there was no injury from the accident in question.

Defendant contends that the submissions of the reports of plaintiff's treating physicians, the reports Dr. Hendler and Dr. Rigney, and the records from St. Luke's and Mid Hudson, together with plaintiff's deposition testimony, are altogether sufficient to warrant summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury causally related to the accident at issue. Moreover, nothing in plaintiff's testimony establishes that she had any permanent or non-permanent injury, or was precluded from performing substantially all of her activities for 90 of the 180 days following the accident.

Plaintiff submitted no opposing papers.

Discussion

Civil Practice Law & Rules § 3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v. Johnson*, 276 AD2d 572 (2d Dept 2000)) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v. Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding the motion, the Court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v. Horton*, 83 AD3d 904 [2d Dept 2011])

Defendant moves for summary judgment claiming that plaintiff failed to meet the threshold requirements of Insurance Law §5104 as she has failed to provide proof that she sustained a serious injury as a result of the accident. Defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY2d 345 [2002])

A "serious injury" is a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss 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. Ins. Law §5102(d)

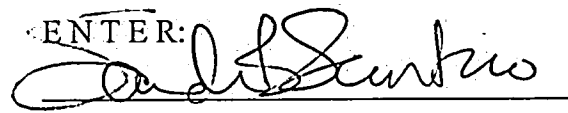
Where the defendant's argument relies on the findings of his witness, the findings must be in admissible form in order to demonstrate entitlement to judgment as a matter of law. (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]) Defendant has submitted such evidence in the affirmed reports of Dr. Hendler and Dr. Rigney, who both opined, within a reasonable degree of medical certainty, that plaintiff demonstrates no evidence of disability, serious injury, or permanent limitation in function or use of the cervical spine or right shoulder which would be related to the subject accident.

By the submission of the reports of Dr. Hendler and Dr. Rigney, the imaging study records from Orange Radiology (contained in Dr. Blumenthal's office records), the records from St. Luke's, and plaintiff's deposition testimony, defendant has produced evidence that plaintiff did not suffer any injury within the statutorily-defined categories of serious injury, and has met his *prima facie* burden of establishing entitlement to judgment as a matter of law. The burden shifts to plaintiff to come forth with evidence sufficient to raise a triable issue of fact with regard to at least one category of serious injury.

Based upon plaintiff's failure to have timely opposed the motion, and consequent failure to meet its burden, defendant's motion for summary judgment is granted.

This decision shall constitute the order of the Court.

Dated: April 13, 2018
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

Counsel of Record via NYSCEF