

Melendez v Alvarez

2018 NY Slip Op 34442(U)

March 27, 2018

Supreme Court, Nassau County

Docket Number: Index No. 606640/2015

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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BLANCA MELENDEZ,

Plaintiff,

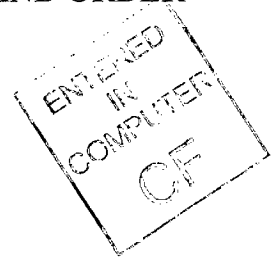
**IAS Part 17
Index No.: 606640/2015
Motion Seq. Nos. 001/002**

-against-

**CEAMARA VALLE ALVAREZ, IRENE AHEHKORA
and RENEE ADU-MINTA,**

Defendants.
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DECISION AND ORDER



LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Motion Seq. Nos. 001 and 002

Defendant’s (Ceamara Valle Alvarez) Notice of Motion, Affirmation, Affidavit & Exhibits.....	1
Defendants’ (Irene Ahenkora and Renee Adu-Minta) Notice of Cross-Motion, Affirmation & Exhibits	2
Plaintiff’s Affirmation in Opposition & Exhibits.....	3
Defendants’ (Irene Ahenkora and Renee Adu-Minta) Reply Affirmation.....	4
Defendant’s (Ceamara Valle Alvarez) Reply Affirmation	5

In two separate applications, all defendants seek an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint as against them. In support of the applications, defendants contend that plaintiff has failed to sustain injuries sufficient to satisfy the no-fault threshold set forth in Insurance Law Article 51. Plaintiff opposes the application.

The underlying action was commenced by plaintiff in October 2015 to recover for serious injuries she allegedly sustained as result of a car accident that occurred on April 27, 2015, on North Brookside Avenue at or near the intersection of West Forest Avenue in

Freeport, New York. At the time of the accident, plaintiff was a passenger in the vehicle driven by defendant Alvarez.

In her Bill of Particulars plaintiff identifies injuries to her left knee, shoulder, neck and back as well as disc herniations and bulges. She further alleges that she “sustained a fracture, a significant limitation; a 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; 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 activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.” (Plaintiff’s Bill of Particulars, Exhibit C.)

At the time of her deposition in November 2016, plaintiff was employed at Maple Pediatric as a receptionist and had been working there since August of 2016. Prior to August 2016, she worked at Home Goods on a part-time basis as a sales associate. Before working at Home Goods—and at the time of the accident—she was a taxi driver for Taxi America. Plaintiff began driving as an independent contractor for Taxi America shortly before the accident.

Plaintiff testified that prior to the accident she worked for Taxi America as a driver Monday through Saturday from 6:00 or 7:00 a.m. to 6:00 p.m. Following the accident, she returned to work after one week but claims she was unable to sit and drive for long periods. Therefore, she only drove two or three days per week and modified her working schedule—she began her working day at 10:00 or 11:00 a.m. and worked until 4:30 or 5:00 p.m. Plaintiff could not recall for how long she remained on this modified schedule. Plaintiff also testified, however, that she worked when she was needed and called.

Plaintiff testified that she visited an emergency room on the day of the accident. She further testified that following the accident she stayed in bed for three to four days because she had a fever. She began receiving medical treatment two weeks after the accident at Sports Medicine and Spine Rehabilitation, PC. Specifically, she began treatment with this

provider on May 11, 2015 and was treated there until January 6, 2016.¹ In March 2016, she began treatment with Dr. Robert Gellman, a chiropractor who stated in his affidavit that plaintiff remained under his care until July 2017. Both Dr. Gregorace and Dr. Gellman assert that she stopped treatment as her condition plateaued and that her no-fault benefits concluded. Plaintiff testified that she stopped treatment because her no-fault benefits ceased and the treatment made her feel worse.

Plaintiff testified that the injuries from the accident prevent her from bending down and also cause back pain. She testified that her limitations include pain when sitting for extended periods of time. Also, when she lifts her knee to put on clothing such as leggings, it hurts her lower back. With regard to her knee, plaintiff testified that it swells if she walks long distances. She also testified that she cannot go to the gym.

On a motion for summary judgment, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that he/she is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). To obtain summary judgment, the moving party must establish his/her claim or defense by tendering proof, in admissible form, sufficient to warrant the court to direct judgment in the movant's favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation. CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092 (1985). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form.

¹ Plaintiff testified that she stopped treating at Sports Medicine & Spine Rehabilitation, PC in November 2016. However, the sworn affidavit provided by Dr. Gregorace, the owner of that facility, reflects that she treated there until approximately January 2016.

Zuckerman v. New York, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a “serious injury” as enumerated in Insurance Law § 5102(d). To satisfy the burden, a defendant’s medical expert(s) must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff’s range of motion, must compare any findings to those ranges of motion considered normal for the particular body part under evaluation. *Black v. Robinson*, 305 A.D.2d 438 (2d Dept. 2003); *Minlionica v. Shahabi*, 296 A.D.2d 569 (2d Dept. 2002). The burden then shifts to a plaintiff to set forth sufficient evidence demonstrating that he/she sustained a serious injury within the meaning of the statute. *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 (1992).

Serious injury is defined as:

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. Insurance Law §5102(d).

Defendants’ Motion for Summary Judgment

In support of the application, defendants provided the affirmed medical examination report prepared by Dr. Leon Sultan, Diplomate American Board Certified Orthopedic Surgeon, who examined plaintiff on June 29, 2017. The report reflects that his examination of plaintiff’s cervical spine’s range of motion revealed “head and neck extension is to 30° (normal 25-35°), flexion is to 45° (normal 40-50°), rotation to right and left is to 50° (normal

45-60°), tilting to the right and left is to 25° (normal 20-30°).” Dr. Sultan’s examination of plaintiff’s left shoulder thoracolumbar revealed no range of motion restrictions. With regard to Dr. Sultan’s examination of plaintiff’s left knee he noted that “left knee extension is complete at 0 (normal 0) and flexion is to 120 (normal 145) with limitation of flexion secondary to her large size.” He further noted “equal motion findings on the right side.” The report reflects that the range of motion examinations are based upon a combination of the AMA Guidelines 5th Edition, N.Y.S. guidelines and McBride’s Guide to Permanent Disability, along with more than 40 years of clinical experience, and the readings were obtained with goniometric measurement. Dr. Sultan concluded that “no residual permanency is noted. From an orthopedic point of view, there is no indication that she requires any additional testing or treatment for the occurrence of 4/27/15.”

Defendants have provided sufficient evidence to satisfy its burden that plaintiff did not sustain a sufficient injury under the 90/180 category. “When construing the statutory definition of a 90/180-day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his or her usual activities to a great extent, rather than some slight curtailment.” *Thompson v. Abbasi*, 15 A.D.3d 95 (1st Dept. 2005). Plaintiff was out of work for a limited amount of time as a result of the accident and there is no testimony that she was unable to perform substantially all of her daily activities.

With regard to the categories of permanent loss of use of a body organ, member, function or system and disfigurement, defendants have satisfied their *prima facie* burden since there is no evidence in the record of any injury that falls within those categories.

Defendants have further satisfied their burden with regard to the categories of a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body function or system. Defendants have provided sufficient medical evidence to reflect that plaintiff has not suffered an injury sufficient to satisfy these categories.

Plaintiff's Opposition

With regard to the categories of permanent loss of use of a body organ, member, function or system and disfigurement, plaintiff has not come forward with any evidence that would establish an issue of fact nor has she addressed the categories at all in her opposition.

With regard to the 90/180 category, plaintiff has provided the medical reports from her initial treatment with Sports Medicine and Spine Rehabilitation, P.C. At the time of her initial examination on May 11, 2015, plaintiff presented with pain in her low back, left shoulder and a stiff neck. The report from this examination reflects that she exhibited range of motion limitations in her cervical and lumbar spines and left shoulder following objective testing through the use of a hand-held goniometer. She was prescribed pain medication.

Plaintiff also provided a copy of a medical report of Sports Medicine dated May 25, 2015, in which she again exhibited range of motion limitations in her cervical and lumbar spines and left shoulder and knee. She was directed to continue physical therapy three times each week and was prescribed a different pain medication. These range of motion tests were also completed through the use of a hand-held goniometer. Three weeks later, she again appeared at Sports Medicine and continued to exhibit range of motion limitations in the same areas and was directed to continue to undergo physical therapy three times a week. She was advised by her medical provider to be cautious so as not to exacerbate her injuries. At each of these appointments plaintiff reported pain.

Plaintiff has provided the affirmations of Steven Winter, a licensed radiologist, who reviewed plaintiff's MRI reports of her Cervical Spine and Right Shoulder both taken on June 7, 2015 and Lisa Corrente, M.D. who reviewed the MRI report of her left knee on August 31, 2015. The MRI report of her cervical spine reflects C5-6 disc herniation accompanied by radial annular tear; C4-5 disc herniation; C3-4 disc bulge impressing on the thecal sac; C6-7 disc bulge impressing on the thecal sac; and cervical straightening through C6 representing spasm. The MRI report of her lumbar spine reflects L3-4 disc bulge impressing on the thecal sac; and L4-5 disc bulge encroaching on the thecal sac.

Plaintiff's most recent medical reports reflect continued range of motion restrictions of her cervical and dorso-lumbar spines. At her most recent examination on September 27, 2017, plaintiff continued to exhibit range of motion limitations in her cervical and lumbar

spines. Counsel for plaintiff also points to plaintiff's testimony in which she states that she continues to suffer from pain. The objective medical evidence presented on behalf of the plaintiff is sufficient to raise triable issues of fact as to whether she sustained a serious injury under Insurance Law § 5102 (d) with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories. The report of the left knee MRI reflects a "grade I medial collateral ligament sprain."

The medical evidence provided, as well as her testimony, raise a triable issue of fact as to the 90/180 category as well. As discussed above in more detail, plaintiff has provided the medical records from her treating medical providers following the accident. The initial reports reflect range of motion limitations. Plaintiff further testified that after the accident she was unable to continue to work for the same amount of daily hours that she would prior to the accident because of continued pain. Plaintiff testified that she eventually stopped working and did not begin working at her next employer, Home Goods, until November 15, 2015.

Defendants argue that a gap in treatment exists. However, plaintiff and Dr. Gregorace sufficiently explain that the effectiveness of plaintiff's treatment was limited and that her no fault benefits ended. Specifically, Dr. Gregorace states in his affirmation that "Ms. Melendez stopped treatment due to the fact that her no-fault benefits had been cut-off as well as her reaching maximum medical improvement through physical therapy treatment at the time. Any additional physical therapy treatment would have been palliative in nature at that point." Plaintiff has provided sufficient explanation to substantiate the claim that any gap was triggered by a discontinuance of no-fault benefits and that the benefit of treatment had reached its peak. *See Pommells v. Perez*, 4 N.Y.3d 566 (2005).

Although plaintiff's injuries consist mainly of disc bulges and sprains, such injuries can be "serious" if accompanied by objective evidence of physical limitations of long duration. *Cf Shvartsman v. Vildman*, 47 A.D.3d 700 (2d Dept. 2008). The objective medical evidence presented on behalf of plaintiff is sufficient to raise triable issues of fact as to whether she sustained a serious injury under Insurance Law § 5102 (d) with respect to the

“permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories and the 90/180 category.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Any relief requested not specifically addressed herein is denied.

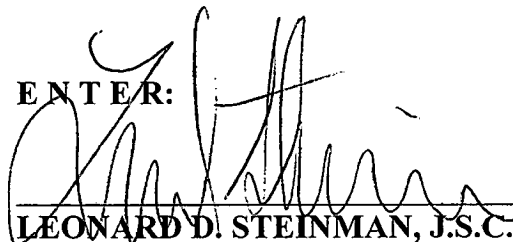
Dated: March 27, 2018
Mineola, New York

ENTERED

MAR 30 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



LEONARD D. STEINMAN, J.S.C.