

Gomez v Markham

2019 NY Slip Op 31320(U)

March 18, 2019

Supreme Court, Queens County

Docket Number: 707712/16

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

DIANA R. GOMEZ,

Plaintiff

Index No: 707712/16

-against-

DECISION/ORDER

CHADOTSANG MARKHAM and EMILE
ROSIAS,

Defendants.

Motion Seq # 1

The following papers numbered 1 to 9 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	<u>Papers Numbered</u>
N.M., Aff., Exhibits and Service.....	1-4
Answering Aff., Exhibits and Service.....	5-7
Reply.....	8-9

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

This is an action to recover for personal injuries allegedly sustained by plaintiff in a two vehicle accident that occurred on May 9, 2015. Defendants move, for dismissal of the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

In her bill of particulars, the plaintiff alleges that as a result of the accident she

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; a 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 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)).

Specifically, plaintiff claims, inter alia, that she suffered, inter alia: injury to her cervical and lumbar spine, right and left shoulders, and right and left knees.

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 the motion, defendants submit the properly affirmed reports of neurologist A. Robert Tantleff, M.D., neurologist Chandra M. Sharma, M.D. and orthopedist Howard V. Katz, M.D., plaintiff's bill of particulars and plaintiff's examination before trial testimony.

Dr. Tantleff performed a radiological review of plaintiff's cervical, lumbar and right shoulder MRIs, taken on June 29, 2015, October 13, 2015, and June 29, 2015, respectively. He concluded that the spine studies revealed longstanding degenerative disc disease and with no evidence of recent trauma. The shoulder study revealed regional wear and tear and overuse changes caused by tendinosis of the supraspinatus and infraspinatus tendons, consistent with age related degeneration. He found no evidence of trauma related injury.

Dr. Sharma examined the plaintiff on September 18, 2017. On that date, plaintiff reported ongoing pain in her neck, right shoulder, lower back and right knee. Dr. Sharma found the plaintiff's mental status, cranial nerves, motor system, reflexes, sensory, gait and coordination were all normal. Range of motion testing of the cervical spine reveal flexion 40 degrees (50 degrees normal), extension 20 degrees (60 degrees normal), right/left lateral rotation 40 degrees (80 degrees normal) and right/left lateral flexion 10 degrees (45 degrees normal). Range of motion of the lumbar spine showed flexion 60 degrees (60 degrees), extension 10 degrees (25 degrees normal), right/left lateral rotation 10 degrees (25 degrees normal) and right/left lateral flexion 10 degrees (25 degrees normal). Dr. Sharma opined that these are subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent

neurological problems. Dr. Sharma concluded that the cervical and lumbar sprain/strain had resolved. He did not examine plaintiff's right shoulder.

On February 15, 2018, Dr. Katz performed an orthopedic evaluation of the plaintiff. At time of the examination, plaintiff presented with complaints of neck, lower back, bilateral shoulder and bilateral knee pain. An examination of the cervical spine exhibited no limitations of range of motion. Range of motion of the lumbar spine showed flexion 80 degrees (60 degrees), extension 20 degrees (25 degrees normal), right/left lateral bending 20 degrees (25 degrees normal) and lateral bending 25 degrees (25 degree normal). Straight leg test was negative. Dr. Katz also performed range of motion testing on plaintiff's right shoulder. Dr. Katz found some diminished range of motion in plaintiff's right shoulder. Examination of left shoulder reveal a limitation in internal rotation. He found no diminished range of motion with respect to either plaintiff's right or left knee. With respect to all of Dr. Katz's range of motion findings, he fails to indicate the use of a goniometer or other similar device.

The court finds that the defendants have failed to meet their *prima facie* burden with respect to whether plaintiff suffered a "permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system" (Insurance Law §5102[d]). Defendants' neurologist Dr. Sharma found significant limitations in the ranges of motion of plaintiff's cervical spine and lumbar spine, which she described as subjective mechanical limitations due to perception of pain not confirmed on objective examination. However, Dr. Sharma failed to explain or substantiate, with any objective medical evidence or examples of the spontaneous activity, the basis for the conclusion that the

restrictions noted as part of her qualitative assessment were subjective mechanical limitations (see Cuevas v. Compote Cab Corp., 61 A.D.3d 812; Delacruz v. Ostrich Cab Corp., 66 A.D.3d 818; Busljeta v. Plandome Leasing, Inc., 57 A.D.3d 469). In addition, defendants' orthopedist Dr. Katzi found that the plaintiff had significantly different ranges of motion in her cervical and lumbar spine. As such, the defendants' respective doctors have conflicting findings of range of motion for the plaintiff. In the absence of any explanation of the discrepancies, the court cannot speculate as to which report is correct. Moreover, Dr. Katz failed to indicate the use of a goniometer with respect to any of his measurements.

As to the 90/180 category, the court finds the defendants also failed to meet their *prima facie* burden. Plaintiff testified at her examination before trial that as a result of the accident she was out of work for three months.

With respect to plaintiff's claim of eye injury, defendants have met their burden to entitlement to summary judgment on that claim through the uncontradicted sworn report of Ari Weitzner, M.D., who examined plaintiff on September 11, 2017. He opined that plaintiff had a normal eye examination and that her poor vision in the left eye was caused by preexisting amblyopia.

Accordingly, the defendants' motion for summary judgment is granted solely to the extent that plaintiff's claim of eye injury is dismissed. In all other respects, the motion is denied.

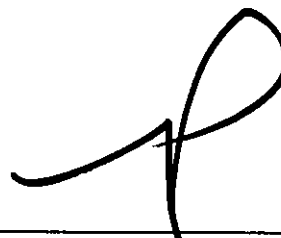
This is the decision and order of the court.

Date:

MAR 18 2019

FILED
APR 04 2019
COUNTY CLERK
QUEENS COUNTY

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