

Carrasco v Lease Plan U.S.A., Inc.
2019 NY Slip Op 32265(U)
June 20, 2019
Supreme Court, Bronx County
Docket Number: 300933/2015
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



LUIS A. CARRASCO, et al.,

Index No. 300933/2015

-against-

Hon. MARY ANN BRIGANTTI

LEASE PLAN U.S.A., INC., et al.

Justice Supreme Court

The following papers numbered 1 to 5 were read on this motion (Seq. No. 6)
for SUMMARY JUDGMENT noticed on December 5, 2018.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4
Replying Affidavit and Exhibits	No(s).	5

Upon the foregoing papers, the defendants Lease Plan U.S.A. Inc., Josue Miguel Grullon, and Autozone, Inc. ("Defendants") move for summary judgment, dismissing the complaint of the plaintiffs Luis A. Carrasco ("Carrasco") and Ramona A. Pena ("Pena")(collectively, "Plaintiffs") for their alleged failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d), and for an order dismissing Plaintiffs' claim that they sustained an economic loss greater than basic economic loss as defined by New York Insurance Law §5102(a). Plaintiffs oppose the motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendants carried their initial summary judgment burden by providing Plaintiffs' medical treatment records and sworn report from their expert Dr. Jonathan S. Garay who performed an extensive review of those records and conducted an independent medical examination of both plaintiffs. With respect to Carrasco, Dr. Garay found normal ranges of motion in the allegedly injured body parts and concluded that Plaintiff only sustained "resolved" shoulder strains, and he had recovered fully from bilateral ankle and foot injuries, and the alleged right knee injury. Dr. Garay further opines that Plaintiff's diagnostic images only showed degenerative, chronic changes that were unrelated to trauma. As for

Motion is Respectfully Referred to Justice:
Dated:

plaintiff Pena, Dr. Garay found only minor limitations in her cervical spine (*see Riollano v. Leavey*, 2019 N.Y. Slip. Op. 04660 [1st Dept. June 11, 2019]). While he found some minor deficits in the lumbar spine, Dr. Garay opined that these restrictions were "of no functional significance" and he found that, at most,³³ Plaintiff sustained spinal strains and strains (*see Alston v. Elliott*, 159 A.D.3d 575 [1st Dept. 2018]). He also found "positive" straight-leg raise for posterior leg pain into her lower back, but Dr. Garay opined that Plaintiff had no objective neurological deficits (*see, e.g., Rodriguez v. Konate*, 161 A.D.3d 565 [1st Dept. 2018]).

Carrasco

In opposition to the motion, Carrasco raised a triable issue of fact as to whether his left shoulder injury constituted a "permanent consequential" or "significant" limitation of use category of injury. The treatment records annexed to Defendants' moving papers show contemporaneous complaints of pain and limitations in the left shoulder and positive diagnostic tests. A follow-up examination from August 2015 shows that Carrasco's physician obtained an MRI of the left shoulder and it showed "possible partial thickness undersurface infraspinatus tendon tear with rotator cuff tendinosis, subacromial bursitis and glenohumeral joint effusion, as well as acromioclavicular capsular hypertrophy intent upon underlying subacromial space." Plaintiffs were entitled to rely on these records because they were submitted in support of Defendants' motions (*see Tejada v. LKQ Hunts Point Parts*, 166 A.D.3d 436, 437 [1st Dept. 2018]).

Plaintiffs provide an updated affirmed narrative report from treating physician Dr. Kevin H. Weiner. Dr. Wiener examined Carrasco in December 2018 and measured range-of-motion deficits in the left shoulder upon elevation (165 degrees, 180 normal), abduction (155 degrees, 180 normal), internal rotation (75 degrees, 90 normal), and external rotation (55 degrees, 80 normal). Plaintiff also exhibited positive diagnostic tests. Upon his review of diagnostic studies, Dr. Weiner confirmed that the left shoulder MRI showed, among other things, a possible partial thickness tear. His ultimate impression was a posttraumatic left shoulder tendon tear, posttraumatic left shoulder rotator cuff tendinosis and bursitis, which he causally-relates to the subject accident. He further states that Carrasco sustained a permanent partial disability of the left shoulder. Dr. Weiner's findings, when coupled with the records and submissions annexed to Defendants' motion papers, are sufficient to raise triable issues as to whether Carrasco's claimed left shoulder injury constitutes a "serious injury" within the meaning of Insurance Law, as he refutes Defendants' expert's opinion that the injury had "resolved" (*see Wenegieme v. Harriott*, 157 A.D.3d 412, 412 [1st Dept. 2018]). To the extent that Dr. Garay attributed the shoulder injuries to pre-existing degeneration, Dr. Weiner adequately refuted that opinion by stating that Carrasco was previously asymptomatic and attributing the injuries to a "different, yet altogether equally plausible, cause, that is, the accident" (*Yuen v. Arka Memory Cab Corp.*, 80 A.D.3d 481, 482 [1st Dept. 2011][internal quotations omitted]).

Dr. Weiner's report and the submissions annexed to Defendants' moving papers similarly raise fact issues as to whether Carrasco's claimed right ankle or right knee injuries are related to this accident and not pre-existing (*Yuen*, 80 A.D.3d at 482). The moving papers contain a host of records showing that Plaintiff had contemporaneous treatment to those body parts, including right ankle swelling and positive McMurray's test in the knee. Carrasco's right knee MRI, as noted shortly after the accident, showed posterior horn medial meniscus tear and suprapatellar joint effusion and chondromalacia patella. Additional records annexed to the moving papers show that Carrasco's doctors were investigating the right ankle MRIs for a possible stress fracture and internal derangement. Dr. Weiner states in his report that Carrasco's right ankle MRI demonstrated an interstitial tear of the anterior tibifibular ligament, among other things, and stress-related marrow edema in the talar neck. He also confirmed that existence of a tear in the right knee. Dr. Weiner opined, based on his review of the records and examination of Carrasco, that the claimed right ankle and right knee injuries were traumatic in nature and causally related to the accident.

However, Dr. Weiner failed to raise an issue of fact as to whether Plaintiff's claimed right ankle or knee injuries were permanent or significant in nature. The only documented range-of-motion limitations of those body parts were taken in February 2015, within weeks of this accident. Plaintiff's medical records do not demonstrate any range-of-motion deficits in the right ankle. The report dated February 24, 2015, does not compare the ankle range-of-motion findings to normal. Dr. Weiner's report does not disclose any limitations as of December 2018, at his most recent examination of Carrasco. Accordingly, Carrasco failed to refute the findings of Defendants' expert that Carrasco's claimed ankle and knee injuries had resolved. "Absent limitations, there is no serious injury" (*Lopez v. Morel-Ulla*, 144 A.D.3d 504, 505 [1st Dept. 2016]). Nevertheless, if a trier of fact determines that Carrasco sustained a "serious injury" to his left shoulder, he may recover damages for all injuries causally-related to the accident, even those not meeting the "serious injury" threshold (*see Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

The Court notes that Carrasco's treating physician refers to other body parts - such as Plaintiff's cervical spine and lumbar spine - however these alleged injuries will not be considered as they were not alleged in Plaintiff's verified bill of particulars (*see Boone v. Elizabeth Taxi Inc.*, 120 A.D.3d 1143 [1st Dept. 2014]; *Dawkins v. Cartwright*, 111 A.D.3d 559, 560 [1st Dept. 2013]; *Marte v. New York City Transit Authority*, 59 A.D.3d 398, 399 [2nd Dept. 2009]).

Pena

Pena also raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of her cervical and lumbar spine as a result of this accident. Defendants' moving papers contain records showing that Pena had pain and range-of-motion limitations in her cervical and lumbar spine shortly after the accident and initial impressions included cervical/lumbar sprain versus disk herniation. Other records submitted with the moving papers demonstrate that MRIs of the cervical and

disk herniation. Other records submitted with the moving papers demonstrate that MRIs of the cervical and lumbar spine taken within weeks of the accident showed *inter alia* broad based central posterior disc herniation at C2-C4, disc bulging at C5-C6, and left paracentral broad disc herniation at L3 through L4. Further records demonstrate that Pena continued to treat for these conditions in the months that followed. Additional treatment records dated December 7, 2015 - or almost eleven (11) months after the accident - show that Pena continued to have significant range-of-motion deficits in the cervical and lumbar spine. Plaintiff's doctor Joshua Auerbach, M.D., states in a report that he concurred with MRI findings of disc bulging and herniations in the cervical spine, and a herniation in the lumbar spine. He further states that he reviewed the images and "would agree" with them. There is another report from Dr. Auerbach stemming from a June 6, 2016 examination wherein the doctor notes that Pena had persistent back pain. Dr. Auerbach states that "a new and updated MRI" is needed. At a follow up June 21, 2016 examination, Dr. Auerbach states that the updated lumbar spine revealed no nerve compression, herniations or bulges. Contrary to Defendants' contentions, this report does not defeat Pena's claims of a lumbar spine injury. Earlier treatment records note the existence of positive lumbar spine MRI findings including a disc herniation. Pena's physician Dr. Weiner confirms in his report that Plaintiff's February 3, 2015 lumbar spine MRI showed a herniation which he causally-relates to this accident. Defendants' expert Dr. Garay himself was "unable to explain" the inconsistency between the earlier lumbar spine MRI and a subsequent MRI which was apparently normal. Accordingly, there is no definitive showing that Plaintiff had no objective lumbar spine injury as a matter of law (*see, e.g., Glynn v. Hopkins*, 55 A.D.3d 484 [1st Dept. 2011]). Assuming that Dr. Garay competently opined that both the lumbar and cervical spine MRI showed degenerative, unrelated, pre-existing conditions, the medical records and opinion from Dr. Weiner raise an issue of fact as to causation (*see Yuen*, 80 A.D.3d at 482).

Dr. Weiner also found significant cervical and lumbar spine recent range-of-motion limitations at a recent 2018 examination, thus refuting Dr. Garay's contention that such injuries had resolved, and raising a triable issue of fact as to whether Pena's spine injuries constitute "permanent consequential" or "significant" limitations (*see Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]).

Gap in Treatment

With respect to both plaintiffs, Defendants failed to carry their initial burden of showing an unexplained gap or cessation in treatment. Defendants rely on Plaintiffs' respective deposition testimony admitting that they ended treatment around 2016. However, Carrasco testified that he stopped therapy because he "didn't have anymore money to continue to pay for it" (Carrasco EBT at 62). Pena testified that she stopped going to therapy because "[t]he pain continued. It was helping, but the pain was not going away, and they were charging for it" (Pena EBT at 41). A cessation of treatment due to the inability to pay for such treatment may constitute a reasonable explanation (*see, e.g., Ramkumar v. Grand Style Transp.*

Enterprises, Inc., 22 N.Y.3d 905, 906 [2013]). While both plaintiffs acknowledged that they had Medicaid, Defendants failed to show that their treatment would have been covered by insurance (*cf. Green v. Domino's Pizza LLC*, 140 A.D.3d 546, 547 [1st Dept. 2016][plaintiff acknowledged that Medicaid would have covered additional therapy after no-fault benefits were denied]). Defendants also failed to shift the burden on this issue because "they submitted no evidence showing that, at the time [P]laintiff[s] stopped treatment, [their] doctor continued to believe that [Plaintiffs] would actually benefit from any further treatment (*Lindo v. Brett*, 149 A.D.3d 459, 463 [1st Dept. 2017]).

"90/180 day" Injury Claim

Defendants, however, did demonstrate their entitlement to summary judgment with respect to Plaintiffs' "90/180 day" injury claims. Carrasco admitted in his verified bill of particulars that he was only confined to his bed for three days, and "intermittently thereafter," and confined to his home "intermittently" since the date of the accident. Pena admitted that she was confined to her bed for four days and "intermittently thereafter," and to her home "intermittently" since the date of the accident. This demonstrates that Plaintiff was not prevented from performing his usual and customary activities for 90 of the first 180 days following the accident

Fernandez v. Hernandez, 151 A.D.3d 581, 582 [1st Dept. 2017]; *Tejada v. LKQ Hunts Point Parts*, 166 A.D.3d 436, 437-38 [1st Dept. 2018]).

Basic Economic Loss

Defendants' motion for summary judgment seeking dismissal of Plaintiffs' claim for economic losses in excess of basic economic loss is granted without opposition. Plaintiffs failed to refute Defendants' initial showing that the claimed economic losses will not exceed basic economic loss (*see Wilson v. Colosimo*, 101 A.D.3d 1765 [4th Dept. 2012]).

Remaining Issues

Finally, there is no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use - therefore that claim is also dismissed (*Swift v. New York Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]). The record also discloses no evidence of injury under the remaining claimed categories - significant disfigurement or fracture - and therefore those claims are also dismissed.

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Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is granted to the extent of dismissing (1) Carrasco's claim that he sustained a "permanent consequential" or "significant" limitation of use of his right ankle or right knee, (2) Plaintiffs' claims that they sustained "significant disfigurement," a "fracture" a "permanent loss of use" or a "90/180 day" injury as a result of this accident, and it is further,

ORDERED, that Defendants' motion for summary judgment dismissing Plaintiffs' claims that they sustained economic loss in excess of basic economic loss is granted, and that claim is dismissed, and it is further,

ORDERED, that Defendants' motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: 6/20/19

Hon. Mary Ann Bguth J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT