

Arbelo v Kapica
2019 NY Slip Op 33790(U)
December 27, 2019
Supreme Court, Kings County
Docket Number: 511861/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

ANGEL ARBELO and MARIA RIVERA,

Plaintiffs,

-against-

STANLEY J. KAPICA,

Defendant.

DECISION / ORDER

Index No. 511861/17

Motion Seq. No. 3

Date Sub.: 11/21/19

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment.

Papers	NYSCEF No.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>44-59</u>
Affirmation in Opposition, and Exhibits Annexed.....	<u>60-66</u>
Reply.....	<u>67</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a personal injury action arising out of a motor vehicle accident. Defendant moves for summary judgment dismissing the plaintiffs' complaint, pursuant to CPLR Rule 3212, on the ground that neither plaintiff sustained "serious injuries" under Insurance Law § 5102(d). On December 27, 2014, plaintiff Rivera was the driver and plaintiff Arbelo was a passenger in a vehicle which was owned by a non-party, which was traveling on Interstate 87 in Rockland County, NY when plaintiffs' vehicle was rear-ended. The plaintiffs went to the emergency room at Coney Island Hospital the next day, where they were treated and released. They subsequently were treated at DHD Medical and had MRIs taken.

Defendant provides an attorney's affirmation, the pleadings, plaintiffs' bill of particulars, plaintiffs' EBT transcripts, a certified police report, affirmed IME reports for each plaintiff from Dr. Jeffrey Neil Guttman, an orthopedist, and affirmed reports from Dr. Darren Fitzpatrick, a radiologist.

Plaintiff Arbelo

Plaintiff claims in his Bill of Particulars that he injured his right shoulder, neck and back and that, as a result of the accident, he had arthroscopic surgery to his right shoulder. At the time of the accident, he was approximately 19 years old.

Jeffrey Neil Guttman, M.D. conducted an orthopedic exam of plaintiff (Exhibit L) on April 17, 2019. His range of motion testing of plaintiff produced normal results in his cervical, thoracic and lumbar spine. Dr. Guttman notes that plaintiff "claimed subjective tenderness." He concludes that plaintiff's sprains to his spine have "objectively resolved." However, Dr. Guttman's testing of plaintiff's right shoulder, post-surgery, did not produce normal results. Abduction of Arbelo's right shoulder was 170 degrees, when he states that normal is 180 degrees. Forward flexion was similarly restricted, 170 degrees when 180 is normal, and internal rotation is reported as 70 degrees, with 80 degrees being normal. Dr. Guttman states that plaintiff "exhibited decreased rotator cuff strength. . . [i]mpingement sign was positive; Hawkins sign positive; O'Brien's test positive." His conclusion with regard to plaintiff's shoulder is that "status post right shoulder arthroscopy superimposed upon pre-existing degenerative joint disease of the shoulder, objectively recovered." He does not explain why plaintiff (by then 23 years old) is diagnosed with pre-existing degenerative joint disease.

Defendant also provides reports from Dr. Darren Fitzpatrick, a radiologist.

Dr. Fitzpatrick reviewed the MRI of plaintiff's cervical spine taken a week after the accident, when plaintiff was 19 years old. He states that there is no traumatic injury shown, and his impression is "minimal to mild multilevel cervical degenerative disc disease." Dr. Fitzpatrick reviewed the MRIs of plaintiff's lumbar spine, also taken a week after the accident. He states that there is no traumatic injury indicated, but there are "broad-based disc bulges at L1-L2, L2-L3, L3-L4 and L4-L5" with "mass impression on the ventral thecal sac." His impression is also "minimal to mild multilevel lumbar degenerative disc disease without central canal stenosis or neural foraminal narrowing." Dr. Fitzpatrick reviewed the MRIs of plaintiff's thoracic spine, also taken a week after the accident. He states that there is no traumatic injury indicated, but there is a "small disc osteophyte at T10-T11 which partially effaces the ventral thecal sac without canal stenosis or neural foraminal narrowing." He states that this demonstrates "mild T10-T11 degenerative disc disease." Dr. Fitzpatrick also reviewed the films from the MRI of plaintiff's right shoulder, taken on January 16, 2015, a few weeks after the accident. He reports that he does not see any traumatic injury, and that it is a normal right shoulder MRI.

In his EBT testimony, (Exhibit J) taken January 10, 2019, plaintiff testified that he is plaintiff Rivera's grandson. He has a high school diploma and started his current job as an electrician in 2017. He was in the front passenger seat at the time of the accident, with his seat belt on. He went to the emergency room with his grandmother when they got back to Brooklyn. Then they went to DHD Medical. He had trouble remembering details with regard to his treatment. He testified that he had shoulder surgery, but he could not remember when it took place. He has not had any medical treatment for his

injuries since 2015 [Page 25 Line 7]. He has not injured his neck, back or shoulder before the accident or after it. Plaintiff was not asked at his EBT about the first six months after the accident, with regard to the 90/180 category. He was asked if he was confined to his bed or home, which is not a requirement for this category of injury, and he said he was, after the surgery to his shoulder, but he could not remember how long he was confined to his home. No other questions were asked about the six months after the accident, and the EBT was taken four years after the accident.

Defendant has failed to make a prima facie case that plaintiff Arbelo did not sustain a serious injury in the subject accident. Defendant does not provide any evidence in admissible form with regard to the 90/180 category of injury, and Dr. Guttman's abnormal right shoulder test results are insufficient as to the other applicable categories of injury. Dr. Fitzpatrick's conclusion that plaintiff had degenerative disc disease at the age of nineteen strains credibility, but in any event, a radiologist alone cannot make a prima facie case for dismissal.

Even if defendant had made a prima facie case, plaintiff overcomes it with the affirmed reports of his treating doctors. The range of motion testing at the initial exam after the accident was abnormal. In the most recent affirmed report, dated June 3, 2019, signed by Dr. David Delman (Exhibit C), he found significant restrictions in the range of motion in plaintiff's neck, back and right shoulder. He concludes that the injuries are significant, permanent and are causally related to the accident. Plaintiff has raised a "battle of the experts" sufficient to overcome the motion. (*See Burke v I Om Atif Hacking Corp.*, 146 AD3d 747 [2d Dept 2017]; *Hamdan v Taggart*, 154 AD3d 743 [2d Dept 2017].)

Plaintiff Rivera

Plaintiff claims she injured her neck and back as well as her left shoulder, left wrist and her right knee as a result of the accident. At the time of the accident, she was approximately 57 years old.

Jeffrey Neil Guttman, M.D. conducted an orthopedic exam of plaintiff (Exhibit L) on April 17, 2019. His range of motion testing of plaintiff produced completely normal results in her cervical, thoracic and lumbar spine. Dr. Guttman concludes that plaintiff's sprains to her spine have "objectively resolved." Range of motion testing of plaintiff's left shoulder and both knees produced normal results as well. He concludes that her left shoulder and bilateral knee sprains have objectively resolved. However, Dr. Guttman does not report any testing of plaintiff's left wrist, but concludes that her left wrist sprain has "objectively resolved." He states that "there is no objective orthopedic disability. Ms. Rivera is currently working full time as a letter carrier and can continue to do so without restrictions."

Defendant also provides reports from Dr. Darren Fitzpatrick, a radiologist. Dr. Fitzpatrick reviewed the MRIs of plaintiff's cervical spine taken a week after the accident. He states that there is no traumatic injury shown, and his impression is "moderate multilevel cervical degenerative disc disease, most prominent at C5-C6 where there is mild canal stenosis." Dr. Fitzpatrick reviewed the MRIs of plaintiff's lumbar spine, also taken a week after the accident. He states that there is no traumatic injury indicated, but there is "multilevel lumbar degenerative disc disease without central canal stenosis or neural foraminal narrowing. Disc material at L5, may contact the extraforaminal, exiting right L5 nerve root." Dr. Fitzpatrick reviewed the MRIs of

plaintiff's right knee, taken a few weeks after the accident. He states that there is no traumatic injury indicated, but there is a "complex tear at the junction of body and posterior horn medial meniscus with medial compartment cartilage thinning. Distal quadriceps tendinosis. Small joint effusion with small popliteal cyst." He concludes that plaintiff has "degenerative tears of the meniscus" and "the popliteal cyst . . . forms due to underlying knee arthropathy and are seen in damage to the cartilage as well as other etiologies including osteoarthrosis, rheumatoid arthritis and other causes of joint inflammation. . . . quadriceps tendinosis is a non-traumatic entity that is the result of chronic overuse . . . which causes micro-tears of the tendon . . . [and] results in painful range of motion." Dr. Fitzpatrick also reviewed the films from the MRI of plaintiff's left shoulder, taken on January 16, 2015, a few weeks after the accident. He reports that he does not see any traumatic injury, and that she has "mild rotator cuff tendinosis with findings of subacromial impingement. Acromioclavicular arthrosis." He concludes "tendinosis is a non-traumatic entity that is the result of chronic overuse. . . subacromial impingement is an acquired degenerative condition with no traumatic basis. . . acromioclavicular arthrosis is a degenerative entities [sic] due to repetitive, normal forces . . . over a protracted time course, requiring months or years to develop. Thus, these findings have no traumatic basis and were not the result of the injury on the stated date of loss."

In her EBT testimony, (Exhibit I) taken January 10, 2019, plaintiff testified that she was a seat-belted driver at the time of the accident. She began work as a letter carrier for the U.S. Postal Service in 2005. She is still employed as a letter carrier. She testified that she did not return to work for six months after the accident. The morning

after the accident, she woke up in terrible pain and went to the emergency room in a taxi with co-plaintiff, her grandson, who lives with her. The pain in her shoulder was 10 of 10 and she could barely stand up [EBT Page 32]. They then starting treating at DHD Medical in Bay Ridge. They were referred for MRIs. She had not been in a motor vehicle before and has not been in one since. She was given injections in her left shoulder and in her knees for pain. She had physical therapy. Her doctor, Dr. Baum, the doctor who administered the injections, gave her notes for her job, that she could not return to work [Page 46]. She returned to work when she ran out of sick leave [Page 48] after six months. She has not had any medical treatment for the injuries since 2015, when no-fault stopped paying for treatment [Page 52 Line 6]. She testified that she cannot cook or shop without pain and limitations [Page 56] and that she takes Tylenol every work day before she starts her job. Plaintiff was not asked at her EBT about the first six months after the accident, with regard to the 90/180 category. She was asked if she was confined to her home after the accident, which is not a requirement for this category of injury, and she said [Page 58] "I stayed home all the time. Just went to therapy, doctor and back home." There were no follow up questions about the six months after the accident. The EBT was taken four years after the accident.

Defendant has failed to make a prima facie case that plaintiff Rivera did not sustain a serious injury in the subject accident. Defendant does not provide any evidence in admissible form with regard to the 90/180 category of injury. In addition, Dr. Guttman did not examine her left wrist. As the defendant has not sustained their prima facie burden as to as to all of the plaintiff's claimed injuries and all of the

applicable categories of injury in Insurance Law §5102(d), it is unnecessary to determine whether the papers submitted by the plaintiff in opposition to the motion are sufficient to raise a triable issue of fact. (See, *Yampolskiy v Baron*, 150 AD3d 795, 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140, 1140 [2d Dept 2017]; *Koutsoumbis v Pacciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Even if defendant had made a prima facie case, plaintiff overcomes it with the affirmed reports of her treating doctors. The range of motion testing at the initial exam after the accident was abnormal. In the most recent affirmed report, dated June 3, 2019, signed by Dr. David Delman (Exhibit C), he found significant restrictions in the range of motion in plaintiff's neck, back, left shoulder, left wrist and both knees. He concludes that the injuries are significant, permanent and are causally related to the accident. Plaintiff has raised a "battle of the experts" sufficient to overcome the motion (See *Burke v I Om Atif Hacking Corp.*, 146 AD3d 747 [2d Dept 2017]; *Hamdan v Taggart*, 154 AD3d 743 [2d Dept 2017].)

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: December 27, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court