Rojas v Gartner
2019 NY Slip Op 33996(U)
March 29, 2019
Supreme Court, Nassau County
Docket Number: 602542-2017
Judge: Jerome C. Murphy

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 13

VERONICA ROJAS,

Plaintiff,

- against -

JON GARTNER,

Defendant.

Index No. 602542-2017
Motion Date: 2/1/19
Sequence No.: 001
MG

DECISION AND ORDER
XXX

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....1
Affirmation in Opposition and Exhibits.....2
Reply Affirmation.....3

PRELIMINARY STATEMENT

Defendant brings this application for an order pursuant to CPLR §3212 granting summary judgment to the defendant, Jon Garner, and dismissing plaintiff's Complaint in its entirety on the grounds that plaintiff has failed to demonstrate that she sustained a "serious injury" as defined by New York Insurance Law §5102 (d); and for such other and further relief as this Court may deem just and proper on the grounds that no materials issues of fact exist to warrant a plenary trial. Opposition and reply has been submitted to this application.

BACKGROUND

This action involves a claim that plaintiff sustained a "serious injury" on May 3, 2015 when a motor vehicle road over her left foot, throwing her onto the hood of the car, from where she fell back to the ground. She was transported by ambulance to South Nassau Community Hospital where she was examined by X-Ray, revealing no fracture. She was placed in a boot and

returned home that day. Defendants claim that plaintiff did not sustain a "serious injury within the meaning of Insurance Law §§ 5104 and 5102(d). In her Bill of Particulars (Exh. "C"), plaintiff alleges that, with respect to her left knee, she sustained the following injuries: Medial Meniscal tear; Internal derangement of the joint; Chondromalacia of patella; and Contusion of the knee. She claims in the Bill of Particulars that these are permanent in nature.

On May 4, 2017 she underwent surgery by Barry Katzman, M.D. at Hillside SurgiCare, in Hollis. The surgery consisted of 1. Left knee arthroscopy; 2. Partial medial meniscectomy; and 3. Plica debridement. She claims she was confined to home for 6 days following the accident, and for 11 days after the 2017 surgery.

DISCUSSION

The standards for seeking recovery for non-economic injuries sustained as a result of a motor vehicle accident are governed by the provisions of Insurance Law §§ 5102(d) and 5104(a). The former defines "serious injury" as follows:

> (d) "Serious injury" means a 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.

The latter limits the entitlement of a person claiming to be injured as a result of an automobile accident to seek recovery for non-economic loss, except in the case of a serious injury. It states as follows:

> (a) Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. The owner, operator or occupant of a motorcycle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, shall not be subject to an action by or on behalf of a covered person for recovery for non-economic loss, except in the case of a

serious injury, or for basic economic loss.

A defendant may raise an issue as to the seriousness of the plaintiff's injuries by sworn statements of their own examining physician, or the unsworn reports of the Plaintiff's treating physician (*Pagano v. Kingsbury,* 182 A.D.2d 268 [2d Dept. 1992]). If sufficient to raise the serious injury issue, the burden shifts to the Plaintiff to submit prima facie evidence in admissible form to support the claim (*Licari v. Elliot,* 57 N.Y.2d 230 [1982]). To suffice, the affirmation or affidavit must be based upon the physician's own examinations, tests, and observations and record review, and not simply on the plaintiff's subjective complaints (*Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345 [2002]).

Plaintiff asserts permanency in the Bill of Particulars, but may also assert a significant limitation of use of a body function or system

Significant limitation of use of a body function or system

"In order to prove the extent or degree of physical limitation, and expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury." *Id.* at 348, citing *Dufel v. Green,* 84 N.Y.2d 795 (1995), and *Lopez v. Senatore,* 65 N.Y.2d 1017 (1985). "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Id.*

Under certain circumstances, even where the plaintiff has established by competent evidence that they sustained serious injuries, Courts may consider additional factors, such as an unexplained gap in treatment, intervening medical problem, or a preexisting condition such as may interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez,* 4 N.Y.3d 566 [2005]). But the mere existence of a preexisting condition does not automatically preclude a determination of serious injury. Where such conditions are quiescent, and the patient is asymptomatic, the aggravation of those conditions by the trauma of an automobile collision, if supported by the requisite objective findings, may constitute serious injury (*Mack v. Pullum,* 37 A.D.3d 1063 [4th Dept. 2007]; *Talcott v. Zurenda,* 48 A.D.3d 989 [3d Dept. 2008]; (*Bolowske v. Eastman Kodak Co.,* 288 A.D.2d 851 [4th Dept. 2001]).

Permanent loss of use of a body organ, member, function, or system

A person claiming under this element of serious injury must establish a permanent loss of

use, and the loss must be total (*Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295[2001]). *See also,* (*Beutel v. Guild,* 28 A.D.3d 1192 [4th Dept. 2006]; *Ellithorpe v. Marion,* 34 A.D.3d 1195 [4th Dept. 2006]).

90/180 Days

To prevail on the claim of serious injury under this subsection, the plaintiff must establish:

1. An injury which is objectively determinable and measurable (*Atkinson v. Oliver,* 36 A.D.3d 552 [1st Dept. 2007]);

2. The plaintiff must have been unable to perform "substantially all" of his usual daily activites. In *Uddin v. Cooper,* 32 A.D.3d 270 (1st Dept. 2006) the Court held that merely missing three months of work was insufficient, since there were no allegations of inability to perform other daily activities. Where the plaintiff acknowledged that approximately one month after the accident she was able to return to school, take her final exams, and receive an Associate's Degree, she failed to raise a triable issue of fact under the 90/180 day category (*Shamsoodeen v. Kibong,* 41 A.D.3d 577 [2d Dept. 2007]). The limitations of the usual daily activities must be "to a great extent rather than some slight curtailment." (*Licari v. Elliot,* 57 N.Y.2d 230, 236 [1982]).

The Court of Appeals has acknowledged that "serious injury" claims remain a source of significant abuse, and that many courts, including theirs, approach claims that soft tissue injuries are "serious" with a " 'well-deserved skepticism.' " (*Perl v. Meher,* 18 N.Y.3d 208, 214 [2011]). The Court there confronted three matters involving plaintiffs Joseph Perl, David Adler, and Sheila Travis, all of whom sought to establish that their injuries, resulting from an automobile collision, were serious within the meaning of the Insurance Law.

The first matter was the review of the Appellate Division Second Department's reversal of an order of Supreme Court, Kings County, which denied defendant's motion to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The second was an appeal by permission of the Court of Appeals, also from an order of the Second Department, which reversed the judgment of the Supreme Court, Rockland County entered upon a jury verdict in favor of plaintiff and, in effect the denial of defendant's CPLR § 4401 motion for judgment as a matter of law. The third appeal, also by permission of the Court of Appeals, was from a First Department affirmation of an order of Supreme Court Bronx County, which granted defendant's motion for summary judgment.

The reviews considered three relevant categories of "serious injury listed in the standard definition: "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 preforming 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]). *Id.* At 215.

The plaintiffs in those actions relied on one or both of the first two categories, claiming permanent and significant limitations of their use of a bodily organ or system. Travis also relied on the third category, claiming disability from "substantially all" of her "usual and customary daily activities" for at least 90 out of the 180 days following her accident.

Perl and Adler offered testimony that their ability to function had been significantly limited since the accidents. Perl, age 82, stated that he could no longer garden, carry packages while shopping, or have marital relations. Adler, a school teacher testified that she could not move around easily, could not read for a long time and could not pick up his children. The Court noted that it had previously determined that such subjective complaints were insufficient to support a claim of serious injury, and there must be objective proof.

Both Perl and Adler were examined by Dr. Bleicher, who testified in each case that he had examined the injured plaintiff shortly after the accidents; that he performed a number of clinical tests, named but not described, which were positive, indicating some deviation from the norm; that he observed difficulty in moving and diminished strength; and that the range of motion was impaired. He did not quantify the range of motion on the initial examination, except to say that Perl's was "less than 60% of normal in the cervical and lumbar spine." In each case, however, he examined the plaintiffs several years later, using instruments to make specific, numerical range of motion measurements.

In *Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345, 350 (2002), the Court noted that in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury; but an expert's qualitative assessment of a plaintiff's condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

While finding the original observations of Dr. Bleicher detailed, it was debatable

whether they had an objective basis or were simply a recording of the patients' subjective complaints. But under the quantitative prong of *Toure,* Bleicher's later, numerical measurements were sufficient to create an issue of fact as to the seriousness of Perl's and Adler's injuries.

The Court rejected the arguments of defendants that the quantitative measurements were required to be contemporaneous to the accident and based on recent findings. This was the rationale of the Appellate Division determinations in *Perl* and *Adler.* The Court concurred with the dissenters in the Appellate Division to the effect that the requirement of creating a contemporaneous numerical measurement would have the perverse effect of eliminating legitimate claims because plaintiff sought out physicians who were primarily interested in treating their conditions, as opposed to creating a record for litigation.

Defendant in *Perl* also raised the issue of causation, pointing to plaintiff's radiologist who noted that Perl's injuries were "degenerative in etiology and longstanding in nature, preexisting the accident." This was insufficient to overcome plaintiff's submission of another radiologist's affidavit that while some of the injuries "are consistent with degenerative disease, a single MRI cannot rule out the possibility that the patient's soft tissue findings are . . . a result of a specific trauma." The conflicting statements of treating and examining physicians constituted a question of credibility, which is not capable of resolution by the Court.

The claim of Travis, however, did not survive. Travis relied upon the claim that she had a "medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence. The court determined that Travis' subjective description of her injuries, insufficient under *Toure* to defeat summary judgment, does not show that there were 90 of the 180 days after the injury in which she was disabled from "substantially all" of her usual activities. The reports of her doctor were silent on what activities she could and could not perform until, 111 days after the accident, she was found able "to perform the essential functions of her job," though with "restrictions." The record failed to reveal any "medically determined injury" that would bring Travis within the "90/180" provision of the statute.

Defendants had plaintiff examined by Jeffrey M. Shapiro, M.D., and submit his report of May 27, 2018 (Exh. "G"). He reviewed and summarize the records of Orlin and Cohen, Dynamic Core Physical Therapy, South Nassau Hospital emergency room, MRI results, Dr.

Barry Katzman, 1126 Hillside Surgicare, and South Nassau Diagnostic test reports.

From a physical examination on May 17, 2018, he noted that her gait pattern, when she walked down the hallway, was completely normal and she walked briskly to and from the front. Using a hand held goniometer, he found that the range of motion of the right knee is from full extension to 115° of flexion, an examination of the left knee is 0° to 95° flexion. Alignment was 6° of valgus on the right and 8° of valgus on the left. There was no evidence of contusion and no contractures of either knee. In examining her in the seated position, right knee was extended with great force, 5/5. On the left, however she does not be giving a collective and strength measurement is between 3-4/5. Likewise, flexion on the right is normal and strong, whereas flexion against resistance on the left is graded 3 1/2/5 and he did not feel that she was actually trying.

In *Cuevas v. Compote Cab Corp.,* 61 A.D.3d 812 (2d Dept. 2009) and *Delacruz v. Ostrich Cab Corp,* 66 A.D.3d 818 (2d Dept. 2009), the examining physicians on behalf of defendant found limitations of range of motion, but found that they were the result of self-restriction on the part of plaintiff. Because they failed to explain or substantiate with any objective medical evidence that the limitations were self-restricted, defendant failed to establish prima facie that plaintiff did not suffer any limitation of motion, as is their obligation under *Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345 (2002).

In this case, Dr. Shapiro did provide objective medical evidence that the limitation was self-restricted, finding that plaintiff's gait was completely normal, and that she walked briskly, with no limp, back and forth to the front desk. For this reason, the Court determines that defendant has met his prima facie burden of determining that plaintiff has not sustained a serious injury within the meaning of the Insurance Law.

To the extent that plaintiff claims that she has a permanent injury, the examination by Dr. Shapiro clearly reflects that the loss is not total, as required by (*Atkinson v. Oliver,* 36 A.D.3d 552 [1st Dept. 2007]). Nor has plaintiff established any basis for claiming inability to perform substantially all of her usual daily activities for 90 of the first 180 days subsequent to the accident. She claimed being confined to home for 6 days after the accident. In her deposition (Exh. "D" at p. 41 l. 9) she indicated that, by the end of April, she was able to get to work, but just not as quickly. Moreover, she has not proffered competent medical evidence that she sustained a medically-determined injury which prevented her from performing her usual and customary activities (*Kurin v. Zyuz,* 54 A.D.3d 902 [2d Dept. 2008]; *Hamilton v. Rouse,* 46

A.D.3d 514, 516 [2d Dept. 2007]).

In opposition to defendant's motion, plaintiff submits an Affirmation of Barry M. Katzman, M.D., dated January 9, 2019, who examined her on 7 occasions, between June 8, 2016 and January 9, 2019. He reports that using a goniometer, he found restricted left knee range of motion as detailed in his medical records, which are also provided. As of June 8, 2016, his examination of her left knee showed full extension of 0° (Normal 0°) and flexion to 120° (Normal 135°), for a loss of 11%. At ¶ 3 of his report, Dr. Katzman states that as of his last physical exam of plaintiff, January 9, 2019, using a goniometer, he found limited and restricted left knee range of motion, as detailed in his medical records. But a record of the January 9, 2019 examination is not included, and he makes no statement of the objective findings of that date.

In *Il Chung Lim v. Chragaszcz,* 95 A.D.3d 950 (2d Dept. 2012), the Court found that a 13% limitation in range of motion of the left knee noted by plaintiff's treating physician was insignificant within the meaning of the no-fault statute. Siminarly, in *Iovino v. Kaplan,* 145 A.D.3d 974 (2d Dept. 2016), the Court determined that a plaintiff who sustained mild bursitis in her left shoulder, and not a torn labrum, as claimed, and whose treating orthopedic surgeon testified that he found the abduction and forward flexion of the shoulder "in the 140 degree range" out of a normal of 180° (22%), would have been justified in concluding that the loss of range of motion in plaintiff's left shoulder was insignificant within the meaning of the statute.

In conformity with the finding of the Appellate Division in *Il Chang Lim,* supra, the Court here determines that plaintiff did not sustain a serious injury within any of the categories enumerated in the Insurance Law. Defendant's motion to dismiss the Complaint for failure of plaintiff to sustain a serious injury is granted.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 29, 2019

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.

ENTERED

APR 03 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE