Gomez v Galan
2019 NY Slip Op 34053(U)
November 12, 2019
Supreme Court, Nassau County
Docket Number: 608243/17
Judge: Jack L. Libert

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 23
NASSAU COUNTY

AIDA GOMEZ,

Plaintiff,

-against-

SANDOR A. GALAN, EL NOPAL RESTAURANT CORP., LESTER ALEXANDER RIVAS-GOMEZ and JOSE H. RIVAS,

Defendants.

MOTION # 03
INDEX # 608243/17
MOTION SUBMITTED: JUNE 3, 2019

Action No. 1

MG
XXX

LESTER RIVAS-GOMEZ,

Plaintiff,

-against-

SANDOR A. GALAN and EL NOPAL RESTAURANT CORP.,

Defendants.

INDEX # 601875/18

Action No. 2

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....
Reply Affidavits.....

Defendants, Sandor A. Galan, El Nopal Restaurant Corp. (Action No.1) move unopposed pursuant to CPLR 3212 for summary judgment and to dismiss the complaint on the grounds that the plaintiff, Aida Gomez failed to satisfy the no-fault threshold established by New York Insurance Law Sections 5102 and 5104.

This action arises out of a motor vehicle accident that occurred on December 10, 2015 on Fulton Avenue at the intersection with Clinton Street, Village of Hempstead, County of Nassau. By order dated June 4, 2018, this action was consolidated for joint trial and joint trial and discovery with Action No.2 *Lester Rivas-Gomez v. Sandor A. Galan and El Nopal Restaurant Corp.* (Index No. 601875/2018).

Serious Injury

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York,* 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Dugga, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Within the context of a summary judgment motion seeking dismissal of a personal injury action for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the defendant bears the burden of establishing a *prima facie* case that the plaintiff's injuries do not meet the threshold requirements of that statute (*Gaddy v. Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with

sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the issue (*Id.*). The court must then decide whether the plaintiff has established a *prima facie* case of sustaining a "serious injury" (*Licari v. Elliot*, 57 NY2d 230 [1983]).

Pursuant to Article 51 of the New York State Insurance Law serious injury as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury (*See McKinney's Consolidated Law of New York*, Insurance Law § 5102(d)). The defendant is not required to disprove any category of serious injury that has not been pled by the plaintiff (*Melino v. Lauster,* 82 NY2d 828 [1993]). Whether the plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity, and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]).

In order to satisfy the serious injury threshold, plaintiff must submit objective proof of serious injury. In *Toure v. Avis Rent-A-Car Systems*, 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence in admissible form, such as sworn MRI or CT scan tests. These sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Even when there is ample proof of plaintiff's injury, certain factors may override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, additional contributing factors such as

a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566 [2005]). A plaintiff is required to provide, inter alia, objective medical evidence which demonstrates the extent and degree of the alleged physical limitation resulting from disc injury and its duration (*Perl v. Meher*, 18 NY3d 208 [2011]; *Ifrach v. Neiman*, 306 AD2d 380 [2nd Dept. 2003]; *Jason v. Danar*, 1 AD3d 398 [2nd Dept. 2003]; *Felix v. New York City Tr. Auth.*, 32 AD3d 529 [2nd Dept. 2006]; *Garcia v. Sobles*, 41 AD3d 426 [2nd Dept. 2007]; *Bestman v. Seymour*, 41 AD3d 629 [2nd Dept. 2007]).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler, supra; Licari v. Elliot, supra*). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot, supra*). A claim raised under the permanent consequential limitation of use or a body organ or member" or "significant limitation of use of a body function or system" categorizes can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of physical limitation (*Toure v. Avis, supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose, and use of the affected body organ, member, function, or system (*Id.*).

Defendants proved *prima facie* that plaintiff's injuries do not satisfy the threshold requirements of Insurance Law §5102(d). On October 15, 2018, Dr. Stuart J. Hershon, M.D.

conducted an examination of the plaintiff. A copy of the report is attached as Exhibit K to the moving papers. Dr. Hershon noted that plaintiff was moving freely in and out of the examining room and was able to get up an down on the examining table without assistance. He found no erythema, induration, edema or ecchymosis. Plaintiff was described as being alert and well-oriented, with her gait stable and not antalgic and no assistive devices were used for ambulation. As to range of motion testing, Dr. Hershon affirms that the value were obtained with the use of a handheld goniometer. As to the cervical spine, range of motion was described as being within normal limits upon flexion 50/50); extension 60/60; lateral band 45/45; and lateral rotation 80/80. Range of motion of the left knee was described as being within normal limits, including extension of 0/0 and flexion at 150/150. Range of motion of the right knee was also described as being within normal limits, with no tenderness, effusion or crepitus, and tendons intact. Examinations of the left and right hip indicated range of motion to be within normal limits, with flexion 100/100; abduction 40/40; adduction 20/20; external rotation 50/50; and internal rotation 40/40.

Dr. Hershon provides an impression of status-post cervical sprain and lumbar sprain, both resolved, status-post contusion to the left knee and right knee, both resolved, and status-post contusion of the left hip, also resolved. Dr. Hershon also opines, to a reasonable degree of medical certainty, that there is no disability in reference to plaintiff's activities of daily living and her occupation.

Jonathan Lerner, M.D., Board Certified Radiologist, reviewed diagnostic testing films of plaintiff's cervical spine, left knee, right knee, bilateral knee and lumbar spine. Dr Lerner reports that the MRI reveals no casual relationship between the accident and the MRI.

In response to defendants' *prima facie* showing, plaintiff did not come forward with sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the

issue. In fact, plaintiff did not oppose this motion.

90/180

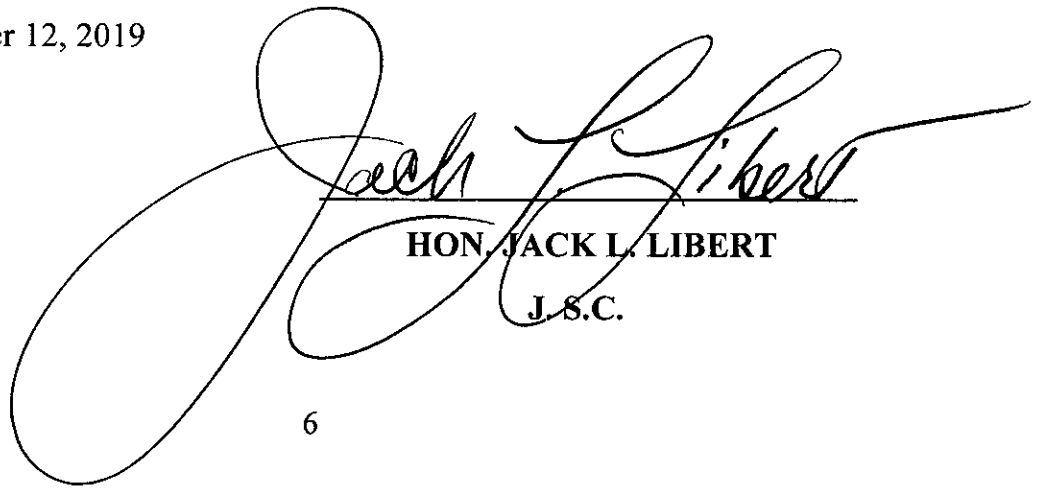
With regard to the 90/180-day category of serious injury, plaintiff has failed to submit sufficient evidence to demonstrate that the injuries he allegedly sustained rendered her unable to perform substantially all of his customary and usual daily activities for at least 90 of the 180 days following the accident. Plaintiff testified that she missed two to three days from work and there was no bed confinement (*Bleszcz v. Hiscock*, 69 AD3d 890, 891 [2d Dept. 2010]). Plaintiff attached an affidavit to her opposition papers which contradicts her deposition testimony. Plaintiff offered no proof to suggest that she has been prevented from performing all of the material acts which constitute her usual and customary activities. This is insufficient to raise a triable issue of fact under the 90/180-day category of serious injury.

Accordingly, it is hereby

ORDERED, that defendants Sandor A. Galan and El Nopal Restaurant's motion to dismiss the complaint on the grounds that the plaintiff did not sustain a serious injury as that term is defined in section 5102(d) of the Insurance Law is **granted** and the complaint and third party complaint are dismissed.

ENTER

DATED: November 12, 2019



HON. JACK L. LIBERT
J.S.C.