

Calviat v Adamowicz
2019 NY Slip Op 34062(U)
September 12, 2019
Supreme Court, Orange County
Docket Number: EF001795/2017
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

LATONYA CALVIAT,
Plaintiff,

-against -

EWA ADAMOWICZ,
Defendant.

-----X

SCIORTINO, J.

DECISION AND ORDER

INDEX NO.: EF001795/2017

Motion Date: 7/29/19

Sequence No. 1

The following sets of papers numbered 1 to 6 were considered on the defendants' motion to dismiss this action on the ground that the plaintiff did not suffer a "serious injury":

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Welch)/Exhibits A-I	1 - 3
Affirmation in Opposition (Campbell)/ Exhibits 1-2	4 - 5
Reply Affirmation/ Exhibit J	6

for the reasons set forth below, the Defendant's threshold motion dismissing the Complaint is denied.

Background and Procedural History

This personal injury action arises out of a three car rear-end motor vehicle accident that took place on February 23, 2016 on Schutt Road in Wallkill, New York. Plaintiff was the front-seated passenger in the middle vehicle being operated by non-party, Linda Siegel. The Defendant was the operator of the rear-most vehicle.

Plaintiff commenced this action by filing a Summons and Complaint (Exhibit B to moving papers) on or about March 6, 2017. Defendant served a Verified Answer with Affirmative Defenses,

together with discovery demands, on or about May 10, 2017. (Exhibit A) On or about June 2, 2017, plaintiff served a Verified Bill of Particulars. (Exhibit C) The Bill of Particulars alleged injuries to plaintiff's right shoulder, cervical and lumbar spine. Plaintiff claims she sustained a tear of the supraspinatus tendon requiring cortisone injections and suffers from decreased range of motion, stiffness and weakness. Said injury is asserted to be permanent, progressive and arthritic-producing, requiring future surgery. Plaintiff also claims an exacerbation of prior injuries to her cervical and lumbar spine resulting in disc herniations at C4-C5, C5-C6 and L5-S1.

The Examination Before ~~Plaintiff's Deposition~~ ~~Estimote~~ November 13, 2018. (Exhibit D)

On February 23, 2016, plaintiff was a front-seat passenger in the vehicle being driven by her mother's friend, Linda Siegel. They were coming from Middletown Medical where plaintiff had a doctor's appointment. They were stopped on Schutt Road in Wallkill waiting for a vehicle in front of them to make a left turn when they were struck in the rear by the vehicle being operated by the defendant. Plaintiff, who was wearing a seatbelt and shoulder harness, stated that no part of her body struck any part of the interior of the vehicle, she was not bleeding or bruised. (Exhibit D at 90-91) She described the force of the impact as between medium and heavy. She felt tightening in her abdomen and shoulder from the seat belt locking. She also felt dizzy and nauseous from the whiplash. (Exhibit D at 100)

Plaintiff was taken to Orange Regional Medical Center. She states that she complained of neck, shoulder and abdominal pain. It should be noted that a copy of her emergency room records have not been submitted with this motion. Dr. Hendler in his independent medical examination report specifically states that he reviewed the emergency room records from the date of the accident and at that time plaintiff complained of only low back pain, not of any neck or shoulder pain.

(Exhibit H) Plaintiff was evaluated and discharged.

Subsequent to the emergency room visit she went to Middletown Medical, plaintiff was seen by Dr. Gulati and complained of back pain and headaches. She later went to see Dr. Holst, a chiropractor and was then referred by her attorneys to Dolson Avenue Medical where she presented with complaints of right shoulder and neck pain. Plaintiff attended physical therapy and was sent for an MRI of her right shoulder (April 8, 2016), cervical (May 2, 2016) and lumbar spine (May 2, 2016) Plaintiff states that she was diagnosed with a torn rotator cuff of her right shoulder for which surgery was recommended.

Plaintiff admits she was involved in a prior motor vehicle accident on August 13, 2014 at which time she complained of neck and low back pain. Although the Court has not been provided with copies of any prior MRI's, Dr. Hendler states that he reviewed an MRI of plaintiff's cervical spine dated May 26, 2015 which showed bulging discs at C4-5, C5-6 and C6-7. He also reviewed an MRI of plaintiff's lumbar spine dated August 13, 2014 which showed mild degenerative joint disease indicative of a prior lower back problem. At the time of her deposition, plaintiff was not undergoing treatment with any medical provider. She also testified that she had trouble lifting and playing sports such as pool and bowling. (Exhibit D at 150)

Defendant now moves for summary judgment on the ground that Plaintiff failed to establish a serious personal injury in accordance with the threshold predicates of Insurance Law §5102.

Defendant's Argument

Defendant asserts that plaintiff did not sustain any permanent injury or disability as a result of the subject accident and that her complaints were the result of pre-existing degenerative conditions. In support of their motion, defendant offers the independent medical examination (IME)

report of Dr. Robert C. Hendler.

Plaintiff was examined by Dr. Hendler on January 9, 2019. (Exhibit H) Dr. Hendler's report is affirmed in compliance with Civil Practice Law & Rules §2106. His report states that he reviewed the legal and medical records including six (6) CDs containing diagnostic studies.

On the day of the examination, plaintiff complained of intermittent aches and pain in her neck with radiating pain into her right arm down to her hand along with numbness and parasthesias; a constant ache and pain in her lower back with radiating down her legs with numbness and parasthesias and constant ache and pain to her right shoulder with weakness. Dr. Hendler found full range of motion of her cervical spine, lumbar spine and both shoulders. X-rays taken showed only mild degenerative and arthritic changes.

In light of his examination and a review of plaintiff's medical records which included history of a prior injury to her lumbar and cervical spine, Dr. Hendler concluded that plaintiff did not sustain any significant injury at the time of the subject accident. He opines that plaintiff may have sustained a mild cervical and lumbosacral sprain with temporary exacerbation of pre-existing neck and lower back problems and a simple contusion to the right shoulder which has resolved. Dr. Hendler finds no present disability or permanent findings that is causally related to the subject accident.

Defendant argues that plaintiff has failed to establish a "serious injury" as that term is defined in Insurance Law §5102(d). Plaintiff's Bill of Particulars alleges injuries that resulted in a permanent, consequential limitation of use of a body organ, member, function or system; a significant limitation of use of a body function or system; and a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately

following the accident. Defendant asserts, however, that plaintiff's injuries were not causally related to the alleged accident. Where the evidence demonstrates plaintiff had pre-existing degenerative changes, and/or that there were no objective limitations or disability, defendant asserts that there was no orthopedic disability causally related to the subject accident.

Plaintiff's Opposition

Plaintiff's opposition makes clear that plaintiff is not pursuing the threshold predicates of: 1) significant disfigurement, 2) permanent loss of a body organ, member, function or system; or 3) the 90/180 claim. Plaintiff asserts that she sustained a permanent consequential limitation and/or significant limitation of use of her right shoulder as a result of a torn rotator cuff.

Plaintiff submits the records of Dr. John P. Handago, dated August 30, 2016 and October 17, 2016, who found limitation in range of motion in her right shoulder with a positive supraspinatus, impingement and rotator cuff sign. Dr. Handago diagnosed torn right shoulder rotator cuff tendon with adhesive capsulitis sustained as a result of the subject accident.

Plaintiff also submits the report of Dr. Gabriel L. Dassa, an orthopedic surgeon, who examined the Plaintiff on April 2, 2019. Dr. Dassa found limitation in range of motion in her cervical and lumbar spine as well as in her right shoulder. Range of motion was measured using a handheld goniometer. Based upon his examination and a review of the medical records including MRI reports, Dr. Dassa diagnosed partial right rotator cuff tear with impingement, lumbar disk herniation L5-S1 and cervical spinal stenosis with disk herniation C4-C5 and C5-C6 as a result of the subject accident.

Plaintiff argues that the defendant failed to meet her *prima facie* burden for summary judgment. Plaintiff asserts that Dr. Hendler's use of "visual measurement" to determine precise

angles of movement are incredible and cannot support summary judgment. Defendant is required to show a quantitative, comparative determination of restrictions or limitations. Instead, Dr. Hendler merely stated that there were no limitations in plaintiff's range of motion without the benefit of objective measurement. On that basis, defendant failed to meet her burden and the sufficiency of plaintiff's papers need not be considered. Further, even if the defendant had met her burden, the conflicting reports of the experts raise substantial issues of material fact rendering summary judgment inapplicable.

Discussion

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000])

However, summary judgment shall be granted where, upon all the papers and proofs

submitted, the cause of action or defense is sufficiently established to warrant the court as a matter of law, in directing judgment in favor of any party. (*Zuckerman v City of New York*, 49 NY2d 557 52 [1980])

Defendant moves for summary judgment claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102, because she has not provided proof that she sustained a serious injury as a result of the accident. Defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002])

It is well-established that proof under the significant limitation of use and permanent loss/permanent consequential limitation categories require “comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence.” (*Toure v Avis Rent A Car Sys.*, 98 NY2sd 345, 350-351 [2002]) The Court has examined the range of motion report of Dr. Hendler, which compares his findings, in each instance, to what is normal. (*Walker v Public Adm’r of Suffolk County*, 60 AD3d 757 [2d Dept 2009]) Contrary to plaintiff’s position, the report of Dr. Hendler sufficiently establishes that the actual range of motion fall within the normal range. Plaintiff argues that Dr. Hendler’s visual measurement is insufficient to comply with the “objective measurement” requirement yet offers no authority for such a position. The cases cited by plaintiff involve a report by Dr. Hendler in which he merely stated that plaintiff had full range of motion and failed to set forth the objective testing he performed in order to come to such a conclusion. Here, Dr. Hendler did provide the quantitative analysis necessary to compare plaintiff’s range of motion to “normal” ranges.

That being said, Dr. Hendler fails to address or explain the findings of plaintiff's right shoulder MRI which indicates a partial tear of the right rotator cuff. Dr. Hendler's finding of "no significant tearing" of the rotator cuff does not disprove the finding of a partial tear. Further, the narrative report of Dr. Dassa creates issues of fact as to whether plaintiff sustained a permanent consequential limitation and/or significant limitation of use her right shoulder. Dr. Dassa concluded that the plaintiff's injuries were caused by the subject accident based on the MRI reports, as well as, the objective clinical examination of plaintiff which revealed a painful and limited range of motion when compared to normal ranges. This submission which was based on objective findings by the doctor, as well as, plaintiff's subjective complaints, raise a triable issue of fact precluding summary judgment.

In light of the above, it is hereby

ORDERED that Defendant's threshold motion dismissing the Complaint is denied; and it is further

ORDERED that the parties shall appear for conference on October 23, 2019 at 9:15 a.m.

This decision shall constitute the order of the Court.

Dated: September 12, 2019
Goshen, New York

ENTER



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*