Shannon v Holland
2019 NY Slip Op 34073(U)
April 5, 2019
Supreme Court, Suffolk County
Docket Number: 01848/2016
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Linda Shannon,

Plaintiff,

-against-

Amy J. Holland,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 7/25/18
Submitted: 11/21/18

Index No.: 01848/2016

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers read on this motion for summary judgment: Notice of Motion and Affirmation in Support dated June 21, 2018 and Exhibits A through G annexed thereto; it is

ORDERED that the motion by defendant Amy J. Holland for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint against her is denied.

This action was commenced by plaintiff Linda Shannon to recover damages for injuries she allegedly sustained on July 1, 2014, when her motor vehicle was struck in the rear by a vehicle operated by defendant Amy J. Holland on Route 112 in Medford, New York. By her bill of particulars, plaintiff claims she suffered, among other things, herniated discs at levels C5-C6 and C6-C7, disc bulges at levels C4-C5, C5-C6, and C6-C7, and exacerbation of degenerative changes in her spine as a result of the accident.

Defendant now moves for summary judgment in her favor, arguing that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of her motion, defendant submits copies of the pleadings, orthopedic examination reports by Gary Kelman, M.D., independent radiological reviews by Sheldon P. Feit, M.D., and a transcript of plaintiff's deposition testimony.

Plaintiff testified that she refused medical attention at the scene of the accident, but presented to Stony Brook Hospital approximately 11 days later. Plaintiff indicated that upon her arrival at the hospital's emergency department, she complained of neck and back pain, hearing loss, "lumps on [her] head," and multiple abrasions. She stated that while she was at Stony Brook Hospital for six hours, she does not recall x-rays being taken, injections being given, or medications being prescribed. Rather, she testified that they only "looked at [her] ear and scraped, and scraped, and scraped." Plaintiff indicated that Stony Brook Hospital personnel advised her to see a chiropractor, a pain management physician, and "go to physical therapy." She stated that she began seeing a pain management doctor, Dr. Ricciardelli, approximately four days later, who "gave [her] physical therapy" and "packed [her] in ice." Plaintiff testified that she continued seeing Dr. Ricciardelli "every four weeks" for a year-and-a-half, and that she attended physical therapy sessions three times a week during such period. She indicated that Dr. Ricciardelli eventually changed his specialty, forcing her to begin seeing a Dr. Mayerberger.

Plaintiff testified that she saw Dr. Mayerberger once a month for approximately one year, during which time he ordered MRI tests, and gave her one epidural injection, which was ineffective. She stated that she then began seeing a doctor with the first name Christine, who ordered MRI testing and recommended that she have her right elbow surgically repaired. When asked to describe her current complaints, plaintiff testified that she is "in terrible, severe pain" and that she cannot dance, bend, ride a bicycle, throw a ball, lift a child, change a tire, or walk a straight line.

Regarding her work history, plaintiff stated that she was unemployed at the time of the accident in question, had been "on disability" for "mental anguish" since 2000, but that she worked as a deli clerk for approximately four months in 2016. She indicated that she continues to be "confined to bed," despite none of her physicians advising such confinement. Plaintiff stated that her treating physicians have told her not to work or to lift anything, and to "[j]ust try to rest."

In his affirmation, Dr. Gary Kelman states that he attempted to perform an independent orthopedic examination of plaintiff on October 27, 2017. Dr. Kelman indicated that prior to his examination of plaintiff, he reviewed, among other things, plaintiff's bill of particulars; MRI reports dated September 22, 2014 and December 15, 2014; an independent orthopedic evaluation report by Jonathan Klug, M.D., dated December 15, 2014; and hospital records dated July 14, 2014. He states, however, that he was unable to complete his examination of plaintiff due to her "crying during the entire examination" and her inability to comply "in any way."

In a second affirmation, Dr. Kelman avers that on December 6, 2017, he was able to re-examine plaintiff and complete his diagnosis. Dr. Kelman states that on this second occasion,

plaintiff reported differing initial injuries than those she reported during his first meeting with her. He indicates that her present complaints include "pain in the neck, mid-back, lower back, right elbow, right hip, and right knee," as well as headaches and that "she can barely bend or sit or do anything." He notes that plaintiff described her pain level as a "10" on a scale of 1 to 10.

Dr. Kelman states that he then used a handheld goniometer to measure plaintiff's ranges of motion, and compared those measurements to the ranges of normal values set forth by Workers' Compensation, and those in the 5th edition of the American Medical Association guidelines. As to plaintiff's cervical spine, Dr. Kelman avers that range of motion testing revealed the following measurements: flexion to 50 degrees, where the normal range of motion is 50 degrees; extension to 60 degrees, where normal is 60 degrees; left and right rotation to 80 degrees, where the normal range is 80 degrees; and left and right lateral flexion to 45 degrees, where normal is 45 degrees. As to plaintiff's thoracic spine, Dr. Kelman states range of motion testing revealed flexion to 45 degrees, where the normal range of motion is 45 degrees; extension to 0 degrees, where normal is 0 degrees; left and right rotation to 30 degrees, where the normal range is 30 degrees; and left and right lateral bending to 45 degrees, where normal is 45 degrees. As to plaintiff's lumbar spine, Dr. Kelman indicates range of motion testing revealed flexion to 60 degrees, where the normal range of motion is 60 degrees; extension to 25 degrees, where normal is 25 degrees; and left and right lateral bending to 25 degrees, where normal is 25 degrees. Testing of plaintiff's right and left shoulders revealed the following measurements: abduction to 180 degrees, where normal is 180 degrees; adduction to 30 degrees, where normal is 30 degrees; forward flexion to 180 degrees, where normal is 180 degrees; extension to 40 degrees, where normal is 40 degrees; internal rotation to 80 degrees, where normal is 80 degrees; and external rotation to 90 degrees, where normal is 90 degrees. Testing of plaintiff's right and left elbows revealed flexion to 150 degrees, where normal is 150 degrees; extension to 0 degrees, where normal is 0 degrees; pronation to 90 degrees, where normal is 90 degrees; and supination to 90 degrees, where normal is 90 degrees. Testing of plaintiff's right and left knees revealed flexion to 150 degrees, where normal is 150 degrees; and extension to 0 degrees, where normal is 0 degrees. Testing of plaintiff's right and left hips revealed forward flexion to 120 degrees, where normal is 120 degrees; extension to 30 degrees, where normal is 30 degrees; abduction to 45 degrees, where normal is 45 degrees; adduction to 35 degrees, where normal is 35 degrees; external rotation to 45 degrees, where normal is 45 degrees; and internal rotation to 45 degrees, where normal is 45 degrees. Dr. Kelman reports that plaintiff exhibited no tenderness upon palpation of any of the examined regions, and no muscle atrophy.

As a result of his examinations of plaintiff, Dr. Kelman diagnosed her with a resolved cervical spine sprain/strain, a resolved lumbar spine sprain/strain, a resolved right hip sprain/strain, and a resolved left knee sprain/strain. In conclusion, Dr. Kelman opines that plaintiff "is capable of performing all the tasks of daily living and maintaining employment without restrictions."

In an affirmation, Dr. Sheldon Feit states that he performed an independent review of plaintiff's radiological testing. Dr. Feit indicates that upon his review of the September 22, 2014 MRI of her cervical spine, he observed "[d]isc bulges at the C3-C4, C4-C5, C5-C6 and C6-C7 levels," "[d]egenerative spondylosis," and "[a]ssociated herniations at the C4-C5, C5-C6 and C6-C7

levels." However, Dr. Feit opines that the observed bulges and herniations are not post-traumatic or related to the accident in question, but are pre-existing degenerative changes. In a second affirmation, Dr. Sheldon Feit states that he performed an independent review of an MRI examination of plaintiff's lumbosacral spine performed on February 26, 2013, and compared those images to those obtained during the 2014 MRI. Dr. Feit indicates that the 2013 MRI examination, which pre-dates the accident in question, revealed "[d]isc bulges at the L3-L4 and L4-L5 levels," "[d]egenerative spondylosis," and "[n]o evidence of herniation." Turning to the later September 2014 MRI test, Dr. Feit found "[n]o appreciable change from the prior study," and opines that plaintiff's lumbosacral disc bulges "are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the

plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nuñez v Teel***, 162 AD3d 1058, 1059, 75 NYS3d 541 [2d Dept 2018], quoting ***Grossman v Wright***, 268 AD2d 79, 83-84, 707 NYS2d 233 [2d Dept 2000]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced 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." Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]).

Initially, as to plaintiff's claim under the 90/180 category of Insurance Law § 5102 (d), defendant has failed establish a prima facie case of entitlement to summary judgment (*see* ***Buchanan v Keller***, 169 AD3d 989, 2019 NY Slip Op 01385 [2d Dept 2019]; ***Chang Sun Ahn v Hyo Chung***, 169 AD3d 757, 91 NYS3d 898 [2d Dept 2019]; ***Aiken v Liotta***, 167 AD3d 826, 90 NYS3d 146 [2d Dept 2018]; ***Levitant v Beninati***, 167 AD3d 730, 87 NYS3d 504 [2d Dept 2018]). Plaintiff testified that, as of the time of her deposition in August 2017, she was "still confined to bed" (*see* ***Detoni v McMinkens***, 147 AD3d 1018, 48 NYS3d 208 [2d Dept 2017]; *cf.* ***Vasquez v Almanzar***, 107 AD3d 538, 967 NYS2d 361 [1st Dept 2013]). Plaintiff conceded that while no doctor had told her to remain in bed, she indicated that doctors had instructed her not to work, not to lift things, and "basically do not do nothing (sic)." Plaintiff stated that she drove her motor vehicle to doctors'

appointments in the months immediately following the accident, but there was no questioning of plaintiff's limitations and abilities during the relevant 180-day time period, and no submission of contemporaneous medical documentation refuting plaintiff's claims of a nonpermanent injury (*see* ***Cohen v Bayer***, 167 AD3d 1397, 91 NYS3d 300 [3d Dept 2018]; *cf.* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Marin v Ieni***, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; ***Bonilla v Locicero***, 87 AD3d 1047, 929 NYS2d 754 [2d Dept 2011]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (***Vega v Restani Constr. Corp.***, *supra* at 505). This being defendant's motion, she had the burden of demonstrating that plaintiff was not prevented from performing substantially all of the material acts which constitute her usual and customary daily activities (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; Insurance Law § 5102 [d]). A defendant cannot satisfy his or her burden "by merely pointing out gaps in the plaintiff's case" (***Bronstein v Benderson Dev. Co., LLC***, 167 AD3d 837, 91 NYS3d 142 [2d Dept 2018]).

Accordingly, the motion by defendant Amy J. Holland for summary judgment dismissing the complaint against her is denied.

Dated: 4/5/2019

HON. WILLIAM B. REBOLINI, J.S.C.

_______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION