

Hendricks v Uribe

2019 NY Slip Op 35116(U)

October 10, 2019

Supreme Court, Bronx County

Docket Number: Index No. 31971/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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TAMEIA HENDRICKS,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31971/2017E

ANGEL URIBE, ISSA SANA and OUANDAOGO WILY
CLAUDE,

Defendants.
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John R. Higgitt, J.

Upon defendant Uribe’s June 10, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s September 4, 2019 affirmation in opposition and the affidavit and exhibits submitted therewith; defendant Uribe’s October 1, 2019 affirmation in reply; and due deliberation; defendant Uribe’s motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject April 6, 2017 motor vehicle accident is granted in part.

Plaintiff claims injury to her right knee, right ankle/foot and the cervical and lumbar aspects of her spine, and alleges “serious injury” under the Insurance Law § 5102(d) categories of permanent consequential limitation, significant limitation and 90/180-day injury.¹

In support of the motion, defendant Uribe submits the affirmed reports of orthopedic surgeon Dr. Buckner, neurologist Dr. Carciente and radiologist Dr. Fitzpatrick, and the transcript of plaintiff’s July 11, 2018 deposition testimony.

Dr. Buckner examined plaintiff on September 17, 2018, approximately a year and a half after the accident. Plaintiff’s complaints were confined to pain in her back and right knee.

¹ Plaintiff also alleges a shoulder injury and post-concussion syndrome, but does not allege that these injuries constituted “serious injuries” under Insurance Law § 5102(d).

Although Dr. Buckner did not relate plaintiff's tested ranges of motion of her upper and lower extremities and spine to norms, his objective testing yielded negative results, without tenderness, spasm, deformity or asymmetry. His neurological examination yielded normal results, with symmetric deep tendon reflexes and full motor strength. Dr. Buckner concluded that there was no objective evidence of a causally-related cervical, lumbar, shoulder or knee injury, and that straight-leg raising was negative bilaterally to 90 degrees. Although he noted that plaintiff displayed "motion limitation" in her right knee, he concluded that the limitation was "disproportionate," in light of plaintiff's muscle tone and lack of atrophy. Although he concluded that plaintiff sustained a causally-related ankle/foot injury, he opined that neither the knee nor the ankle/foot injury was "serious," given the normal results of examination with respect to dependent functions of muscle strength, sensation and reflex and the absence of pathologic reflexes.

Dr. Carciente examined plaintiff on August 29, 2018. Plaintiff's complaints were confined to pain in her back and right knee. Dr. Carciente's neurological examination of plaintiff yielded normal results. There was no evidence of spasm, and straight-leg raising was "normal." Dr. Carciente found no evidence of ongoing neurological injury, disability or permanency, and concluded that there were no objective neurological findings correlating with any positive imaging results and no findings suggestive of radiculopathy.

Dr. Fitzpatrick reviewed the films from the April 28, 2017 MRIs of plaintiff's right knee and right foot, and the June 14, 2017 MRI of plaintiff's lumbar spine. Dr. Fitzpatrick found that the knee and foot studies were unremarkable, without evidence of traumatic injury. Dr. Fitzpatrick found that the lumbar study showed minimal asymmetric disc bulges without stenosis or foraminal narrowing, demonstrating mild degenerative disc disease not causally related to

acute traumatic injury.

Assuming defendant Uribe met his prima facie burden with respect to plaintiff's right knee injury, plaintiff raised an issue of fact as to whether she sustained a permanent consequential or significant limitation of use "by submitting the affirmed report of [her] orthopedic surgeon who, based on a recent evaluation, found persisting range of motion limitations and positive clinical test results, as well as MRI reports showing [knee tears]" (*Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]) that he observed during surgery (*see Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]) and causally related to the accident (*see Blake v Cadet*, 2019 NY Slip Op 06720 [1st Dept 2019]), given his observations, plaintiff's young age and the absence of symptoms prior to the accident (*see Santana v Centeno*, 140 AD3d 437 [1st Dept 2016]). Because defendant Uribe did not present evidence of preexisting injuries documented in plaintiff's own records, nothing further was required of plaintiff to raise an issue of fact (*see Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]). Dr. Buckner's reference to degeneration, based only upon his interpretation of an MRI report, rather than a review of the films themselves or other relevant records, was insufficient to shift the burden on the issue of causation (*see Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]).

In opposition, plaintiff abandoned all claimed injuries except for the right knee (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]), and the "serious injury" claims based on the abandoned injuries are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]). In any event, plaintiff's evidence was devoid of proof of any limitations in the abandoned body parts of such magnitude and duration as to constitute a "serious injury" (*see Vasquez v Almanzar*, 107 AD3d 538 [1st

Dept 2013]).²

With respect to plaintiff's 90/180-day injury claim, defendant Uribe failed to meet his prima facie burden. The deposition testimony to which defendant Uribe referred did not encompass the relevant statutory time period, and defendant Uribe did not point to any potentially fatal allegations in plaintiff's testimony or bill of particulars (plaintiff alleged that she was confined to home for five months following the accident) (*see Sampson v Vinlo Cab Corp.*, 70 AD3d 405 [1st Dept 2010]). The defense experts' examinations of plaintiff, occurring after the expiration of the statutory time period, were not probative on this claim (*see Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011]; *Manrique v Warsaw Woolen Assocs.*, 297 AD2d 519 [1st Dept 2002]).

Accordingly, it is


ORDERED, that the aspects of defendant Uribe's motion for summary judgment dismissing plaintiff's claims of "serious injury" premised on injuries to the cervical and lumbar aspects of plaintiff's spine and plaintiff's right ankle/foot, shoulder and head are granted, and those claims are dismissed; and it is further

ORDERED, that defendant Uribe's motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 9:30 a.m. on **November 18, 2019** for a pre-trial conference.

This constitutes the decision and order of the court.

Dated: October 10, 2019



John R. Higgitt, A.J.S.C.

² If it is found that plaintiff sustained a "serious injury" to her right knee, plaintiff is entitled to recover damages for any other injury causally related to the accident (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]; *see also Linton v Nawaz*, 14 NY3d 821 [2010]).