

Sanchez-Pena v Schweidel

2020 NY Slip Op 32043(U)

May 21, 2020

Supreme Court, Bronx County

Docket Number: 34320/2018E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 15

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Fanny Sanchez-Pena and Milagros Basora,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 34320/2018E

Alan H. Schweidel,

Defendant.

-----X

Mary Ann Brigantti, J.

Upon the foregoing papers, the defendant moves for summary judgment dismissing the complaint for plaintiffs’ failure to satisfy the “serious injury” threshold as defined by New York Insurance Law § 5102 (d). Plaintiffs oppose the motion.

On or about December 18, 2018, plaintiffs commenced this action for personal injuries allegedly sustained as a result of an August 9, 2018 motor vehicle accident that occurred on Broadway at its intersection with Mosholu Avenue in Bronx County.

Plaintiff Fanny Sanchez-Pena alleges that she sustained injuries to her lumbar spine, cervical spine, and right shoulder, and that these injuries constitute “serious injuries” under the categories of permanent loss of use, permanent consequential limitation, significant limitation, and 90/180-day injury. Plaintiff Milagros Basora alleges that she sustained injuries to her lumbar spine and cervical spine, and that these injuries constitute “serious injuries” under the categories of permanent loss of use, permanent consequential limitation, significant limitation, and 90/180-day injury.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 NY3d 536 [2003]). “Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). If the defendants fails to meet their prima facie burden, the burden does not shift to plaintiff and the motion for summary judgment can

be denied without the need to consider plaintiff's showing in opposition (*see Karounos v Doulalas*, 153 AD3d 1166, 1167 [1st Dept 2017]). However, once defendant's initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Plaintiff Fanny Sanchez-Pena

Dr. John H. Buckner performed an orthopedic examination on September 30, 2019. At that time plaintiff was 42, and had undergone surgery on her right shoulder and lower back post-accident. Examination of plaintiff's cervical spine range of motion revealed the absence of spasm or tenderness. "She turns her head left and right 30 degrees. She tilts her head backwards 30 degrees and forwards 30 degrees. With her head and neck extended, she tilts side to side 20 degrees without reported or indicated discomfort." Dr. Buckner made no comparison to normal ranges of motion as he stated that such norms are "medically meaningless." He concluded that there was no medical evidence of injury, and that the MRI's of this area of the body showed only normal, non-traumatic conditions.

As to her right shoulder, Dr. Buckner noted that there were healed incisions on the right shoulder. "Both elbows demonstrate full, symmetric extension with full flexion to forearms compressing biceps. She demonstrates full, symmetric, normal supination and pronation of 90 degrees."

As to her lumbar spine, Dr. Buckner found, "The muscles of her lumbar spine demonstrate normal reciprocating function with side bending, rotational movement and with gait. She bends to the left and right a measured 40 degrees. She does not report tenderness, and there is no palpable spasm, visible deformity or visible deformity of her lumbar spine. Straight leg raising is negative; Lasègue's sign negative; McNabb's test is negative and the FABER maneuver is negative."

Dr. Buckner's affirmation establishes a prima facie case despite the comparison of plaintiff's range of motion to stated norms. "While Dr. Buckner did not compare plaintiff's range of motion

values to normal values, he nevertheless examined Plaintiff's lumbar spine, left shoulder, and left knee, and opined that there was no objective evidence of injury after administering diagnostic tests resulting in negative findings." (*Ortega v Paramount Agami Trans. Corp.*, 2020 N.Y. Misc. LEXIS 1358, *2 [Sup Ct, Bronx Co. Brigantti, J.] [citing *Rodriguez v Konate*, 161 A.D.3d 565 [1st Dept 2018].)) Dr. Bucker further explained that the other conditions and the surgery undergone by plaintiff were unrelated to the accident and not traumatic in origin.

Defendant further relies on the report of radiologist Dr. Scott A. Springer, who reviewed plaintiff's cervical, lumbar and right shoulder MRI films. His review of the MRI films revealed preexistent conditions and degenerative changes prior to the accident.

The affirmations of defendant's experts raise a prima facie case.

In opposition, plaintiff's submissions are sufficient to raise triable issues of fact as to whether plaintiff sustained significant and permanent consequential limitations of use of her lumbar and cervical spine, and significant limitation of her right shoulder as a result of the subject accident (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]; *Munoz v Robinson*, 170 AD3d 414, 414 [1st Dept 2019]).

Plaintiff Sanchez-Pena submits the affirmed report of Dr. Allan Weisman, who first examined the plaintiff on August 16, 2018, a week after the accident. He documents contemporaneous, significant range of motion limitations of the plaintiff's cervical and lumbar, as compared to stated norms. With respect to the plaintiff's right shoulder, however, he states that "swelling over the Trapezius deltoid muscles. Tenderness present over deltoid coracoid. Crepitus absent over the AC joint. Decreased Range of Motion of the right shoulder." There was accordingly no finding of quantitative limitations as to the right shoulder on August 16, 2018. However, plaintiff's evidence that she sought medical treatment for her shoulder shortly after the accident, and that she received MRI testing on her right shoulder on September 4, 2018 (26 days following the accident), is sufficient to show contemporaneous treatment of the shoulder. (*Bonilla v Vargas-Nunez*, 147 A.D.3d 461 [1st Dept 2017].) Further, on November 12, 2018, plaintiff again

visited Dr. Weisman's office where significant right shoulder range of motion limitations were measured, as follows: flexion 120 (normal 180), abduction 120 (normal 180), adduction 25 (normal 45), external rotation 25 (normal 45), internal rotation 35 (normal 55), extension 25 (normal 45).

In a report dated May 7, 2019, Dr. Allan Weisman, M.D., found continuing diminished ranges of motion as follows: cervical range of motion was noted as follows: flexion 20 (normal 60), extension 10 (normal 50), left lateral 20 (normal 40), right lateral 20 (normal 40), left rotation 60 (normal 80), right rotation 60 (normal 80). Lumbar range of motion was noted as: flexion 30 (normal 90), extension 10 (normal 30), left lateral 10 (normal 20), right lateral 10 (normal 20), left rotation 10 (normal 25), right rotation 10 (normal 25). Further, Dr. Weismann found "decreased range of motion of the right shoulder."

The plaintiff has submitted results of a recent examination that details continuing significant range of motion limitations of the plaintiff's cervical and lumbar spine. (*See Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]). However, as to her right shoulder, plaintiff fails to provide proof of any recent range of motion limitations. Because she did not submit evidence of a recent examination finding limitations in range of motion, plaintiff failed to raise an issue of fact as to limitations of a permanent nature with respect to her right shoulder. (*De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019] [trial court dismissed significant limitation and consequential limitation claims; Appellate Division re-instated significant limitation claim]).

The conclusions of the plaintiff's experts are sufficient to rebut the defendant's showing of degenerative disease. Given the absence of any evidence of degeneration or prior treatment in plaintiffs' own medical records, the physicians' opinions sufficiently rejected the opinion of defendant's expert as to degeneration by attributing the injuries to the accident. (*Diaz v Almodovar*, 147 AD3d 654 [1st Dept 2017]; *see Gordon v Hernandez*, 2020 N.Y. App. Div. LEXIS 1483, *2-3 [1st Dept 2020] [given the absence of any evidence in plaintiff's own medical records that he had

prior injuries or pre-existing degeneration, plaintiff's experts' submissions were sufficient to raise an issue of fact as to causation]; *Jenkins v Livo Car Inc.*, 176 AD3d 568, 569 [1st Dept 2019] [plaintiff's own medical records did not reveal any degenerative conditions in her spine, and thus she was not required to submit evidence from a medical expert detailing why degenerative conditions were not the cause of her reported symptoms].)

With respect to plaintiff's claim of "serious injury" under the 90/180-day category, defendant failed to raise a prima facie case. Nor did a brief mention in passing of a gap in treatment, without any argument in support of that claim, properly raise the issue or establish a prima facie case.

Plaintiff Milagros Basora

Dr. John H. Buckner performed an orthopedic examination of plaintiff on September 30, 2019. At that time plaintiff was 54. Examination of plaintiff's cervical spine revealed, "She turns her head left and right 70 degrees. She tilts her head backwards 40 degrees and forwards 60 degrees. With her head and neck extended, she tilts side to side 20 degrees without reported or indicated discomfort. She does not report tenderness, and there is no palpable spasm, visible deformity or visible paraspinal muscle asymmetry in her cervical spine. There is no levator scapula, trapezial or periscapular spasm during head movements in any direction. Spurling's posture is negative and Lhermitte's phenomenon is negative. There is no lymphadenopathy or supraclavicular fossa fullness or tenderness."

As to her lumbar spine, Dr. Buckner found, "The muscles of her lumbar spine demonstrate normal reciprocating function with side bending, rotational movement and with gait. She bends to the left and right a measured 40 degrees. She does not report tenderness, and there is no palpable spasm, visible deformity or visible deformity of her lumbar spine. Straight leg raising (sitting - to 100 degrees of hip flexion) is negative; Lasegue's sign negative; McNabb's test is negative and the FABER maneuver is negative."

Dr. Bucker's affirmation establishes a prima facie case despite the lack of comparison of

plaintiff's range of motion to stated norms, as stated earlier. (*Ortega v Paramount Agami Trans. Corp.*, *supra*, 2020 N.Y. Misc. LEXIS 1358, *2 [Sup Ct, Bronx Co. Brigantti, J.] [citing *Rodriguez v Konate*, 161 A.D.3d 565 [1st Dept 2018].))

Defendants further rely on the report of radiologist Dr. Scott A. Springer, who reviewed plaintiff's cervical and lumbar MRI films. His review of the MRI films revealed preexisting disc bulges.

The affirmations of defendant's experts raise a prima facie case as to the foregoing.

In opposition, plaintiff Basora establishes contemporaneous range of motion limitations as to her lumbar and cervical spine as indicated in Dr. Allan Weisman's initial examination soon after the accident. In a report dated May 7, 2019, Dr. Weisman found continuing range of motion limitations as follows: cervical flexion 35 (normal 60), extension 30 (normal 50), left lateral 25 (normal 40), right lateral 35 (normal 40), left rotation 50 (normal 80), right rotation 60 (normal 80). Lumbar range of motion was noted as: flexion 45 (normal 90), extension 15 (normal 30), left lateral 15 (normal 20), right lateral 15 (normal 20), left rotation 10 (normal 25), right rotation 10 (normal 25). These submissions are sufficient to raise triable issues of fact as to whether plaintiff sustained significant and permanent consequential limitations of use of her lumbar and cervical spine as a result of the subject accident (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]; *Munoz v Robinson*, 170 AD3d 414, 414 [1st Dept 2019]).

The conclusions of the plaintiff's expert is sufficient to rebut the defendants showing of degenerative disease, as indicated with respect to the co-plaintiff above. Similarly, defendant failed to raise a prima facie case as to Basora's claim under the 90/180-day category, or a gap in treatment.

Permanent loss of use

To the extent that plaintiffs alleged permanent loss of use as a category of recovery in

plaintiff's bill of particulars, in order to prove a permanent loss of use of a body organ, member, function or system under the Insurance Law, the permanent loss of use "must be total." Plaintiff fails to establish any evidence of total loss of use (*Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

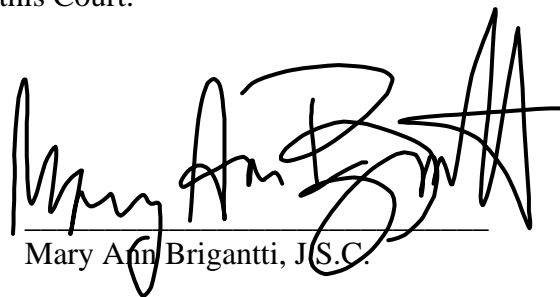
Conclusion

In view of the foregoing, it is hereby,

ORDERED, that the motion is granted to the extent of dismissing the claims of both plaintiffs under the permanent loss of use category of serious injury, and the claim of plaintiff Sanchez-Pena under the permanent consequential limitation category of serious injury, and is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: 5/21/20


Mary Ann Brigantti, J.S.C.