

Fernandez-Lopez v GEICO Fleet Trust

2020 NY Slip Op 33938(U)

October 27, 2020

Supreme Court, Bronx County

Docket Number: 34277/2018E

Judge: Veronica G. Hummel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 BRONX IAS PART 31**

-----X
JOEY FERNANDEZ-LOPEZ and ELISHA FERNANDEZ,

Plaintiffs,

-against -

GEICO FLEET TRUST and "JOHN DOE", a driver not yet identified,

Defendants.

-----X
VERONICA G. HUMMEL, A.S.C.J.

**Index No. 34277/2018E
DECISION/ORDER
Motion Seq. 1**

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendant GEICO FLEET TRUST (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ELISHA FERNANDEZ (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as a result of a March 23, 2018, motor vehicle accident ("the Accident"). Prior to the Accident, plaintiff was employed as a dental assistant. At the time of the Accident, she was out on maternity leave and scheduled to return to work in the summer of 2018.

Plaintiff was a front-seat passenger in plaintiff Joey Fernandez-Lopez's car when their car was struck by an NCR Corp. employee driving a vehicle owned by defendant and leased to NCR Corp. Plaintiff claims that she suffered injuries to the neck, back, and left shoulder. Specifically, she alleges a disc herniation at C3-C7, a disc herniation at L4-L5, a disc bulge at L5-S1, and left joint effusion. Plaintiff argues that the injuries satisfy the following Insurance Law 5102(d)

Fernandez-Lopez v GELCO 34277/2018E

threshold categories: permanent loss of use of a body part; permanent consequential limitation; significant limitation; and 90/180 days.

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) as a result of the accident. Defendant argues that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff's deposition transcript, the affirmed medical report of Dr. Rosen (orthopedic surgeon), and affirmed radiology reports from Lenox Hill Radiology and MRI of Manhattan. Dr. Rosen based his opinion on the details of a physical examination, plaintiff's treatment records, and the affirmed radiology reports.

The MRI report of the lumbar spine (taken April 2, 2018) reveals a herniation at L4-L5 and a bulging disc at L5-S1 ("the Lumbar MRI"). The cervical MRI taken the same day shows a herniation at C3-C4, C4-C5, and C6-C7 ("the Cervical MRI"). The MRI report dated April 30, 2018, of the left shoulder ("the Left Shoulder MRI") shows tendinosis/tendinopathy, bursitis, low lying position of the anterior acromion, and spur formation at the posterior humeral head margin.

Dr. Rosen examined plaintiff on March 4, 2020, approximately two years post-accident. In terms of the back, the doctor found that plaintiff expressed tenderness and pain from C-4-C-6, and L-2 and L-5. In contrast, there was no tenderness in the joints or shoulders. He found:

"patient will actively forward flex such that the chin comes to within 1 finger breadth of the sternum. She will extend the chin at least 30 degrees from the horizontal. She will right lateral rotate and left lateral rotate 70 degrees. She will right and left lateral flex 40 degrees...

With regards to the lower back, the doctor noted that the patient was able to forward flex such that her fingertips came to the proximal third of the tibia, she extended 10 degrees, reported discomfort, and rotated right and left 70 degrees with a right and left lateral bend of 30 degrees.

Fernandez-Lopez v GELCO 34277/2018E

As for the left shoulder, the doctor noted that plaintiff expressed no complaints. He found that:

“Evaluation of the shoulders reveals a full arc of motion. ... The patient has excellent strength across the shoulder on resistive forward flexion, abduction, as well as adduction and abduction”.

The expert’s impression was that, as a result of the Accident, plaintiff “reportedly sustained” a soft tissue strain to her neck and back, had fully recovered, and did not require any further treatment, and could continue with her routine work and leisure activities without restrictions.

Plaintiff opposes the motion, submitting her affidavit, and the affirmation and medical records of Dr. Albert Villafuerte (certified in Physical Medicine and Rehabilitation). Plaintiff also submits Columba University Medical Center Medical Records, an affirmation of Dr. Narayan Paruchuri (reviewing the MRI reports for the lumbar and cervical spine), an affirmation of Dr. Winter (reviewing the Shoulder MRI), and the certified Medical Records of Dr. Arden Kaisman.

In total, plaintiff’s evidence raises triable issues of fact as to her claims of “serious injury” as to the cervical spine, lumbar spine, and left shoulder injuries under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff’s evidence demonstrates that she received medical treatment for her claimed injuries back shortly after the Accident, and that she had substantial limitations in motion at the relevant body parts at a recent examination in August 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff’s expert diagnosed plaintiff with cervical disc herniation, lumbar myofascial derangement with disc bulge and herniation, and left shoulder derangement with tendinitis and bursitis. Villafuerte also opined that the decrease in range of motion of the cervical and lumbar spine (33%) was significant and that plaintiff suffered partial permanent injuries with a poor prognosis for recovery. The doctor reviewed the MRIs and found that the injuries were caused by the Accident, were not degenerative and were permanent, causing a significant loss of use and function in the cervical spine, lumbar spine, and left shoulder (*see Morales v Cabral*,

Fernandez-Lopez v GELCO 34277/2018E

supra). He opines that plaintiff may sustain a future loss of range of motion and that plaintiff may require surgery or rehabilitation in the future (see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]).

It is obvious, however, that plaintiff did not sustain a permanent loss of use (see *Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]; see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (see *Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Furthermore, in light of plaintiff's testimony that she returned to work as a dental assistant as scheduled in the summer following the Accident, and plaintiff's expert's failure to specifically address the issue, plaintiff fails to generate an issue of fact as to the category of 90/180 days (*Morales v Cabral, supra*; *Nunez v Motor Vehicle Accident Indemnification Corp.*, 96 AD3d 917 [2d Dept 2012]). Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant GEICO FLEET TRUST [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ELISHA FERNANDEZ has not sustained a "serious injury" as defined by Insurance Law 5102(d) is granted solely with respect to the claim of serious injury based upon permanent loss of use and 90/180 days categories and is otherwise denied, and it is further

Fernandez-Lopez v GELCO 34277/2018E

ORDERED that the name of the defendant GEICO FLEET TRUST is amended to be GELCO FLEET TRUST, as noted in the answer (NYSCEF Doc. # 8) and not disputed and the new caption shall read as follows:

-----X
JOEY FERNANDEZ-LOPEZ and ELISHA FERNANDEZ,

Index No. 34277/2018E

Plaintiffs,

-against -

GELCO FLEET TRUST and "JOHN DOE", a driver not yet identified,

Defendants.

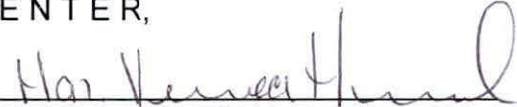
-----X

The parties are reminded that a compliance conference is scheduled in this matter on December 3, 2020. The attorneys are expected to review the revised Part 31 rules for compliance conferences (soon available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: October 27, 2020

ENTER,


Hon. Veronica G. Hummel