Jerome v Weiss
2020 NY Slip Op 34590(U)
April 28, 2020
Supreme Court, Rockland County
Docket Number: Index No. 33571/2017
Judge: Robert M. Berliner

To commence the statutory time period 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 ROCKLAND

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MARIE JEROME & DARILLE JEAN-BAPTISTE,

Plaintiffs,

-against-

ABRAHAM A. WEISS & ISRAEL M. WEISS,

Defendants.

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DECISION & ORDER

Index No. 33571/2017
Order Date Apr 28, 2020
Motion Seq. 2

BERLINER, J.

The following papers were read on this Notice of Motion by defendants for an Order pursuant to CPLR 3212 dismissing this action on grounds that plaintiff Darille Jean-Baptiste suffered no serious injury within the meaning of Insurance Law section 5102(d):

Notice of Motion, Aff. in Support, Exhs. A-G
Aff. in Opposition, Exhs. A-H
Aff. in Reply

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

This action arises from an alleged motor vehicle accident on March 29, 2016, in Spring Valley, New York. As relevant here, plaintiffs' papers allege that defendant driver Abraham Weiss, while driving a vehicle owned by defendant Israel Weiss, rear-ended the vehicle driven by plaintiff Darille Jean-Baptiste in which plaintiff Marie Jerome was a passenger, while plaintiffs' vehicle was stopped. Plaintiffs allege that both plaintiffs suffered injuries in the accident.

After defendants joined issue and the parties completed discovery, plaintiffs filed a Note of Issue and Certificate of Readiness, and defendants brought this timely CPLR 3212 motion to dismiss on grounds that plaintiff Jean-Baptiste suffered no serious injury within the meaning of

Insurance Law section 5102(d). During the pendency of this motion, the covid-19 pandemic required the issuance of emergency orders that delayed the determination of this motion. The motion now comes forwards for decision.

As a prefatory matter, all parties appear to overlook that the complaint asserted two separate causes of action – a First Cause of Action on behalf of plaintiff Jerome, and a Second Cause of Action on behalf of plaintiff Jean-Baptiste – each asserting that the accident caused each respective plaintiff to sustain personal injuries. Defendants' dismissal motion, however, proceeds only on grounds that Jean-Baptiste allegedly sustained no serious injury. Nothing in the parties' papers squarely address the First Cause of Action, and this Court's review of the record finds no basis to conclude that the First Cause of Action was discontinued. Plaintiffs' bill of particulars asserts numerous alleged serious injuries as to plaintiff Jerome, and defendants sought and apparently obtained extensive discovery as to those injuries. For these reasons, the Court construes this motion to seek dismissal of the Second Cause of Action only.

Party Contentions

In support of their motion, defendants rely on, among other things, the independent medical evaluation by orthopedic surgeon Dr. Jeffrey Salkin, whose report opined that certain of plaintiff Jean-Baptiste's injuries (*e.g.* carpal tunnel syndrome) were not proximately related to the accident, and that any others (*e.g.* cervical disc bulges) resulted in no clinically abnormal impacts. He did opine that Jean-Baptiste exhibited diminished range of motion and subjective exacerbation of pain, but diagnosed only sprains that had resolved. Defendants also point to review of Jean-Baptiste's 2016 post-accident spinal MRIs by independent radiologist Dr. Steven Paysner, who opined that any cervical spine changes at C4-5/C5-6 and L3-4/L4-5 were most consistent with pre-existing degenerative disc disease. As to any shoulder impingement, defendants point to review of Jean-Baptiste's 2016 post-accident right-shoulder MRI, which Dr. Payner diagnosed as reflecting pre-existing rotator cuff impingement. Based on the foregoing, defendants argue that Jean-Baptiste sustained no "significant limitation or permanent consequential loss" within the meaning of the No-Fault Law.

Defendants also point to Jean-Baptiste's own deposition testimony. Despite the claims of

plaintiffs' prior pleadings, Jean-Baptiste testified that she was confined to home for only one month and had no lasting difficulties bending or sitting as a result of the accident. Based on this assertion, defendants conclude that Jean-Baptiste also does not meet the 90/180-day threshold of Insurance Law section 5102(d).

Defendants further argue that Jean-Baptiste's testimony confirmed that she sustained a prior motor vehicle accident in 2014 and therefore such plaintiff must prove that the instant injuries are proximately related to the current subject accident. Plaintiff arguably having failed to do so, plaintiff's causation arguments are impermissibly speculative under *Joseph v A and H Livery* (58 AD3d 688 [2d Dept 2009]) and its progeny.

In opposition, plaintiff argues that she treated with Dr. Marc Rosenblatt, a physical medicine and rehabilitation specialist, who diagnosed significant range of motion diminution secondary to paraspinal spasm and L3-4 radiculopathy continuing months after the accident. Plaintiff points to Dr. Rosenblatt's electromyography (EMG) studies consistent with the foregoing, followed by two rounds of trigger point injections in late June 2016 and late July 2016, respectively. Jean-Baptiste testified that fully two years after the accident, she remained periodically in the back brace that Dr. Rosenblatt prescribed.

Plaintiff also submits Dr. Rosenblatt's treatment records reflecting the same. Plaintiff also points to diagnostic and treatment care with Dr. Queller and Dr. Fond of Northeast Orthopedics and Sports Medicine, who performed the shoulder MRI and diagnosed a rotator cuff impingement.

As to Dr. Salkin's independent examination, plaintiff recounts that she then rated her pain as a 10 on a 10-point scale, and that Dr. Salkin measured what plaintiff calls substantial range-of-motion diminutions in the cervical spine, lumbar spine and right shoulder. Coupled with Jean-Baptiste's affidavit that she was unable to perform usual housework for six months after the accident, and was unable to seek her usual nursing / nurse-assistant work for a year after the accident, plaintiffs conclude that Jean-Baptiste sustained a serious injury within the meaning of Insurance Law section 5102(d), and therefore this motion must be denied.

In reply, defendants principally argues that, based on Dr. Salkin's observation, Jean-Baptiste was deliberately limiting her range of motion during the independent medical

examination. Defendants also argue that nothing in plaintiffs' papers overcome defendants' showing that plaintiffs' pain was only subjective, that plaintiff was not substantially impaired from her usual daily activities, and that plaintiff failed to address the causation defense arising from the 2014 accident.

Analysis

Insurance Law section 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."

On a defense dismissal motion sounding under this statute, the movant bears the prima facie burden to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d) as a result of the accident (*see Toure v Avis Rent A Car System.*, 98 NY2d 345, 352 [2002]). If the movant makes that prima facie showing, the burden then shifts "to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law" (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992] [internal quotations omitted]).

"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. Issue finding, not issue determination, is the key to summary judgment" (*Anyanwu v Johnson*, 276 AD2d 572, 572-73 [2d Dept 2000] [internal citations omitted]). In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party (*see Kutkiewicz v Horton*, 83 AD3d 904, 904-905 [2d Dept 2011]). Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise a triable issue of fact as to whether the plaintiff

sustained a serious injury within the meaning of Insurance Law section 5102(d) (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] [internal citations omitted]).

While this Court agrees with defendants that slight diminution in range of motion is insufficient to establish serious injury within the meaning of Insurance Law section 5102, Dr. Salkin's own independent examination of Jean-Baptiste's shoulder clearly indicates that the measured diminution in range of motion was anything but slight. According to his report, right shoulder abduction and forward flexion were reduced from 180 degrees to 60 degrees, and that cervical spine rotation was diminished bilaterally from 80 degrees to 50 degrees. This Court notes that defendants' papers focus on other range-of-motion metrics that are substantially more slight in nature, but not these more substantial ones, and thus that defendants' cases purporting to establish the minimal or otherwise inadequate extent of such range-of-motion impacts for section 5102(d) purposes are unavailing on the instant facts.

This Court notes Dr. Salkin's and Dr. Payner's medical opinions as to the extent and likely causation of injury to Jean-Baptiste as of the time of their independent reviews. This Court also notes Dr. Salkin's opinion that Jean-Baptiste perhaps self limited the range of motion in the course of his evaluation. However, this Court also notes the clinical findings of Jean-Baptiste's treating orthopedist and the two rounds of trigger point injections months after the accident, as well as the parties' conflicting medical reports reaching somewhat diverging conclusions regarding the alleged injuries. As such, on this record, this Court cannot conclude as a matter of law that plaintiff sustained no serious injury as a result of the 2016 motor vehicle accident.

Moreover, while moving defendants posit that a 2014 motor vehicle accident or other workplace incident is causally responsible for these injuries, they fail to show that any such prior accident or incident implicated the same body part or parts at issue here or otherwise raise a sufficient factual predicate to require plaintiffs to prove that its causal allegations between the injuries and the presenting accident are not speculative under *Joseph*.

This Court has considered defendants' other arguments not explicitly addressed herein, and finds them to lack merit or to be moot based on the foregoing.

Accordingly it is hereby

ORDERED that this motion is denied; and it is further

ORDERED that within 10 days hereof, counsel for moving defendants shall serve this Decision and Order, with Notice of Entry hereof, on all parties via NYSCEF; and it is further

ORDERED that counsel for all parties will appear in the Trial Ready Part, Room 1 of this Courthouse, at 9:30 a.m. on June 8, 2020, for further proceedings.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
April 28, 2020

Robert M. Berliner
HON. ROBERT M. BERLINER, J.S.C.

To: All counsel via NYSCEF