

Laucer v Marroquin-Escobar
2020 NY Slip Op 34794(U)
September 4, 2020
Supreme Court, Orange County
Docket Number: Index No. EF001822-2019
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 4th day of Sept, 2020.

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 ORANGE

-----X

HAMIDE LAUCER,

Plaintiff,

DECISION AND ORDER

-against-

INDEX NO.: EF001822-2019

Motion Date: 7/14/2020

Sequence No.: 1

RUDY F. MARROQUIN-ESCOBAR and CHRISTINE
M. MARROQUIN,

Defendants.

-----X

VAZQUEZ-DOLES, J.

The following documents numbered 1 to 12 were read on this motion by Defendants Rudy F. Marroquin-Escobar and Christine M. Marroquin for an order, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff, Hamide Laucer, did not sustain a serious injury under the Insurance Law:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Scahill)/Exhibits A-F	1-8
Affirmation in Opposition (Cambareri)/Exhibits 1-3	9-11
Reply Affirmation (Scahill)	12

Background and Procedural History

This is an action for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on July 29, 2016 on Interstate 87 at the Newburgh toll interchange in Orange County, New York.

Plaintiff commenced this action by filing a Summons and Verified Complaint on October 27, 2017. Issue was joined by defendants with filing of a Verified Answer on March 12, 2018. Plaintiff served a Verified Bill of Particulars on May 21, 2019, in which she alleges injuries to her cervical and lumbar spine, as well as “post-traumatic functional impairment of the injured regions” and “inability to participate in normal physical and/or recreational activities for a prolonged period of time” (Ex. C). The examination before trial of plaintiff was held on September 13, 2019. On February 19, 2020, plaintiff was examined by orthopedist, Dr. Ronald L. Mann and neurologist, Dr. Debra Ann Pollack, at the request of defendants.

Following the completion of discovery, a Note of Issue was filed on February 28, 2020. Defendants’ motion for summary judgment is timely, as motion deadlines were tolled as a result of the COVID-19 public health emergency pursuant to New York Governor Cuomo’s Executive Order No. 202.8, issued March 20, 2020.

Defendants now move for summary judgment on the grounds that plaintiff has not sustained a serious injury within the meaning of the Insurance Law. In support of their motion, defendants submit the affirmed reports of Dr. Mann and Dr. Pollack (Exs. D and E, respectively).

Dr. Mann’s physical examination of plaintiff’s range of motion in her lumbar spine was within normal limits. Dr. Mann’s physical examination of plaintiff’s range of motion in her cervical spine showed:

- No muscle spasm upon palpation over the paracervical muscles
- Flexion at 50 degrees (50 degrees normal), Extension at 50 degrees (60 degrees normal), Right lateral flexion at 45 degrees (45 degrees normal), Left lateral flexion at 30 degrees (45 degrees normal), Right rotation at 80 degrees (80 degrees normal), and Left rotation at 60 degrees (80 degrees normal)
- Distraction and Compression negative
- Neurological examination of the bilateral upper extremities showed no atrophy; muscle strength at 5/5; Deep tendon reflexes at 2+; and sensation to light touch intact

Dr. Mann's impression was "Cervical spine sprain strain – resolved. Lumbar spine sprain/strain – resolved" (Ex. D). Dr. Mann noted that "[t]he examination of the cervical spine revealed a decrease in range of motion which is a subjective finding as testing is actively performed by the claimant at their own volition" (Ex. D). He further noted that there was "no objective evidence of cervical or lumbar radiculopathy" and that "the MRI reports of the cervical and lumbar spine revealed evidence of pre-existing degenerative changes" (Ex. D). He opined that "[t]here is no objective evidence of a causally related orthopedic disability" and that "[t]here is no objective evidence of any permanency or residuals as it relates to the accident of record" (Ex. D).

Dr. Pollack's physical examination of plaintiff's range of motion in her cervical spine was within normal limits; however, she noted that plaintiff's lateral flexion caused pain in the left shoulder. She further noted that plaintiff's Spurling's Test and Jackson Compression Test were negative; and that there was no percussion tenderness or muscle spasm. Dr. Pollack's physical examination of plaintiff's range of motion in her lumbar spine was within normal limits except that plaintiff exhibited 20 degrees lateral flexion on the left where 25 degrees is within normal limits. She also noted that "straight leg raising to 90 degrees on the left is associated with referred left buttock pain" (Ex. E). Dr. Pollack's impression was "Unremarkable Neurologic Examination; Cervical Sprain and Strain, Related, Resolved; Lumbar Sprain and Strain, Related, Resolved. Dr. Pollak opined that "from a neurologic perspective, there is no disability or permanency or residuals with regard to the accident of July 29, 2016." She opined that "the lumbar spine examination revealed a mild voluntary loss of left lateral flexion which is considered a subjective finding as the testing is done actively by the claimant and at their own volition" (Ex. F). Dr. Pollack further opined that there was "no objective evidence of cervical or

lumbar radiculopathy” (Ex. F). She further found no clinical correlation on examination to the MRI report findings of the cervical spine. Dr. Pollack also noted that “the MRI of the lumbar spine revealed evidence of pre-existing degenerative changes only with no acute pathology” (Ex. F).

Plaintiff concedes her claims with respect to both permanent loss of use categories and the 90/180 non-permanent injury category.

In opposition to the motion, plaintiff contends that the contradictory opinions of defendants’ experts fails to meet their *prima facie* burden with respect to plaintiff’s claim that she sustained a significant limitation of use of a major body function or system, i.e. to her cervical and lumbar spine. Plaintiff further contends that defendants failed to address her claim that she sustained economic loss in excess of basic economic loss, which does not require her to have sustained a serious injury; and therefore, are not entitled to summary judgment on this issue.

In addition, plaintiff submits the affirmed report of Dr. Gabriel L. Dassa, her treating orthopedic surgeon, who examined plaintiff on October 22, 2019 (Ex. 3). Dr. Dassa’s physical examination of plaintiff’s cervical spine showed:

- Mysospasm from C1 through C7
- Flexion at 50 degrees (60 degrees normal); Extension at 20 degrees (75 degrees normal); Lateral bending 25 degrees left and right (45 degrees normal); Lateral rotation at 20 degrees (80 degrees normal)
- Positive Spurling test on the right

Dr. Dassa’s physical examination of plaintiff’s lumbar spine showed:

- Muscle spasm from L1 through L5
- Flexion at 45 degrees (90 degrees normal); Extension at 25 degrees (30 degrees normal); Lateral Bending at 20 degrees left and right (40 degrees normal); Lateral Rotation 25 degrees left and right (30 degrees normal)
- Positive straight leg test on the right at 25 degrees

Dr. Dassa's impression was "Musculoligamentous injury to cervical and lumbar spine; Cervical and lumbar radiculopathy; and Cervical spine disk herniation C4-C5 and C5-C6. Plaintiff's examination "revealed findings of persistent cervical and lumbar nerve root compression as evidenced by positive straight leg raise test and positive Spurling test. He opined that plaintiff's evaluation and findings "resent objective evidence of persistent orthopedic impairment to the [plaintiff's] neck and back. He opined that plaintiff's injuries and orthopedic impairment were caused by plaintiff's July 29, 2016 accident; and that plaintiff's injuries were permanent. He further stated that "the assessments made were those of passive range of motion, which was recorded independent of the participation of the [plaintiff], which is truly an objective assessment. The [plaintiff] did not interfere with the proper performance of range of motion assessment" (Ex. 3).

Plaintiff also submitted certified copies of her MRIs of the cervical and lumbar spine dated March 16, 2017; as well as certified copies of her treatment records. The cervical spine MRI showed "reversal of the normal cervical lordosis that could be the result of muscle spasm [and] [d]isc herniations at the C4-5 and C5-6 levels resulting in deformity of the ventral aspect of the cord" (Ex. 1). The lumbar spine MRI showed "disc desiccation at the L3-4 and L4-5 levels" (Ex. 1). Chiropractic evaluation of plaintiff on August 22, 2016 revealed decreased range of motion at all aspects of the cervical and lumbar spine (Ex. 2).

Plaintiff contends that the submitted medical evidence raises a triable issue of fact as to plaintiff's alleged serious injury, i.e. significant limitation of use of a major body function or system – her cervical and lumbar spine – that were causally related to the accident.

In reply, defendants reiterate that their submissions are sufficient to meet their *prima facie* burden. Defendants further contend that they were not required to address plaintiff's

alleged claim of economic loss because she has failed to exchange any discovery to support such claim. Defendants also contend that plaintiff's opposition is insufficient to raise a triable issue of fact in that the MRI reports and medical records are not affirmed and are therefore, not evidentiary proof in admissible form. Lastly, defendants contend that the report of Dr. Dassa is without probative value because he relies upon the unaffirmed reports of others and his examination is not contemporaneous with plaintiff's alleged accident.

Discussion

The proponent of a motion for summary judgment must establish that the cause of action or defense has no merit sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (*see Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). The movant is required to make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case. Failure to make this showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Medical Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy only granted where this burden is met and then only if the opposition to the motion fails to establish the existence of a material issue of fact requiring a trial (*see Vega v Restani Construction. Corp.*, 18 NY3d 499 [2012], *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require the trial of a material question of fact on which she rests her claim or must demonstrate an acceptable excuse for her failure to meet the requirement (*see Zuckerman v New York*, 49 NY2d at 562). In deciding a motion for summary judgment, a Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding,

rather than issue-determination is required (*see Vega v Restani Construction. Corp.*, 18 NY3d at 505). Summary judgment should be granted where only one conclusion may be drawn from the established facts (*see Kriz v Schum*, 75 NY2d 25 [1989]). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

Defendants move for summary judgment claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102 because she has not provided proof that she sustained a serious injury that is causally related to the accident. It is well established that proof under the significant limitation of use category requires a comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 795, 798 [1995]). “[S]ubjective complaints alone are not sufficient” to meet the threshold (*Toure*, 98 NY2d at 350). Defendants bear the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury (*see Id.*).

The affirmed reports of defendants’ experts, Dr. Mann and Dr. Pollack, are sufficient to meet their *prima facie* burden that plaintiff did not sustain a serious injury; thus the burden shifts to plaintiff to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]).

Contrary to defendants’ contentions, the unsworn MRI reports and treatment records of plaintiff were referred to by the defendants’ examining physicians and therefore, are properly before the Court (*see Azam v New York City Health & Hosp. Corp.*, 98 AD3d 595, 596 [2d Dept 2012]; *Ayzen v Melendez*, 299 AD2d 381 [2d Dept 2002]). The Court finds that plaintiff’s

submissions are sufficient to raise a triable issue of fact as to whether she sustained a significant limitation of use of her cervical and lumbar spine as a result of the subject accident (*see Lim v Tiburzi*, 36 AD3d 671, 672 [2d Dept 2007]).

Conclusion

Upon review of the foregoing, it is hereby

ORDERED that the defendants' **motion is granted, in part**, with respect to plaintiff's claims of a medically determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for ninety days during the one hundred eighty days immediately following the accident and that she suffered a permanent consequential limitation of use of a body organ or member as **plaintiff concedes** such claims, and it is further

ORDERED that Defendants' **motion is denied** with respect to plaintiff's claim of a significant limitation of use of body function or system.


The parties are **directed to appear for a mandatory SKYPE settlement conference on October 27, 2020 at 10:30 a.m.**

Any matters not specifically addressed have been considered and denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 4th, 2020
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF