

Pacella v Kannan

2020 NY Slip Op 34798(U)

February 25, 2020

Supreme Court, Rockland County

Docket Number: Index No. 035379/2018

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ROSEMARIE PACELLA,

Plaintiff,

-against -

MURALIKRI KANNAN,

Defendants.

-----X

HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 035379/2018

(Motion #1)

The following papers, numbered 1- 4, were read in connection with Defendant Muralikri Kannan’s (“Defendant”) Notice of Motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS “A-H”	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS “A”	3
REPLY AFFIRMATION	4

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on April 26, 2018, on West Nyack Road near the intersection of Route 304, in the Town of Clarkstown, County of Rockland, in which she was a passenger. Plaintiff, an 88 year old woman, alleges that as a result of the accident, she sustained a closed head injury; concussion; post-concussive disorder, post-traumatic memory loss; post-raumatic slurred speech; cervical disc bulge at C5-6 with radiculopathy; and disc bulges at L3-4 and L5-S1. Defendant moves for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d).

In support of her summary judgment motion, Defendant annexes the Plaintiff’s

examination before trial transcript and the affirmed medical report of Rene Elkin, M.D., Defendant's examining neurologist. Additionally, Defendant submits Nyack Hospital Records; MRI reports from Hudson Valley Radiology and the medical records from Dr. Anita Shah, which pre-date the subject accident.

Defendant argues that Plaintiff's deposition testimony and medical records demonstrate that the injuries that she alleges arose out of the subject accident were actually pre-existing. Plaintiff testified that she was treated for vertigo in March of 2013. The Nyack Hospital records dated March 23, 2013 state that Plaintiff had an acute attack of loss of hearing and nauseousness, as well as vertigo. An MRI dated May 24, 2016 shows lumbar disc desiccation at L3-4 with mild facet arthritis and severe degenerative disc narrowing and type II discogenic sclerosis at L5-S1. Dr. Anita Shah's records from August 11, 2015, note that Plaintiff has dizziness and numbness in her lower extremities and fingertips for 3-4 months. Dr. Shah's records from February 25, 2016 reference back pain, numbness in the legs, possible spinal stenosis and recommendations for injections for the back pain.

Dr. Elkin's affirmed report from the defense neurological exam finds full range of motion in all areas measured, including the cervical and lumbar spine and negative objective tests. She also finds no objective findings of neurologic injury related to the accident; notes that the records reveal prior complaints of dizziness and numbness in the lower extremities; and no evidence for accident related cognitive impairment and the atrophy of the brain and microvascular ischemic changes predate the accident. Additionally, Dr. Elkin finds no objective findings for any structural neurological injuries resulting from the accident which would prevent her from functioning at her pre-accident level without restrictions and no evidence of causally related cognitive impairment.

In opposition thereto, Plaintiff argues that Dr. Elkin observed multiple positive findings and acknowledged that plaintiff still suffers from dizziness and cervicogenic headaches, which Dr. Elkin found to have a possible causal relationship to the subject accident. She also

submits the affirmed narrative report of Dr. Scott Gottlieb, Board Certified in Pain Medicine, dated September 4, 2019. Dr. Gottlieb notes a past medical history significant for hypertension, chronic obstructive pulmonary disease, breast cancer and hypercholesterolemia, but makes no mention of Plaintiff's prior documented symptoms of headaches, vertigo, back pain or numbness in her lower extremities. He also discusses the April 29, 2018 MRI reports but makes no references or comparison to the 2016 scans. On physical examination, Dr. Gottlieb does not note any restriction of motion in the cervical or lumbar spine but finds a positive Spurling sign on the left side for the cervical spine and a positive straight leg raise test bilaterally at 30 degrees for the lumbar spine. Dr. Gottlieb states a diagnosis of post-concussion syndrome, cervical facet arthropathy; cervical disc bulging, and lumbar radiculopathy, causally related to the subject accident.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept

1990). In the instant matter, Defendants' examining physicians found full range of motion in Plaintiff's cervical spine and lumbar spine. Additionally, she found no neurologically related injuries which would prevent Plaintiff from functioning at her pre-accident level without restrictions and no evidence of causally related cognitive impairment.

The cases relied upon by Plaintiff are distinguishable in that in each of those cases, defendant's examining doctors found restriction of motion, which is not the case in the matter at bar. Moreover, Plaintiff's argument that Defendant did not meet his burden because Dr. Elkin acknowledged that Plaintiff suffered from possibly related headaches is unpersuasive since subjective complaints of pain or headaches are insufficient to establish a "serious injury" within the meaning of no-fault law. Downie v. McDonough, 117 A.D.3d 1401, 984 N.Y.S.2d 710 (4th Dept. 2014); Zoldas v. Louise Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept. 1985). In the instant matter the Court finds that Defendant has met his burden on summary judgment and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id.

While the Court of Appeals held in Perl v. Meher, 28 N.Y.3d 208, 216, 936 N.Y.S.2d 655 (2011), that a plaintiff is not required to demonstrate contemporaneous numerical measurements of range of motion, the Court nonetheless noted that a contemporaneous

doctor's report is important to proof of causation since an examination by a doctor years later cannot reliably connect the symptoms with the accident. Id. See also Rosa v. Mejia, 95 A.D.3d 402, 943 N.Y.S.2d 470 (1st Dept. 2012)(Court of Appeals decision in Perl v. Meher did not abrogate the need for at least a qualitative assessment of injuries soon after an accident.) Certified medical records may be considered for the purpose of demonstrating that plaintiff sought medical treatment for his claimed injuries contemporaneously with the accident and continuing for a significant period of time thereafter. Vishevnik v. Bouna, 147 A.D.3d 657, 659, 48 N.Y.S.3d 93 (1st Dept. 2017).

In the instant matter, Plaintiff submits absolutely no medical records with respect to Plaintiff's medical treatment contemporaneous to the accident. Moreover, Plaintiff's proof fails to demonstrate a triable issue of fact. Dr. Gottlieb is not a treating physician, as he first examined Plaintiff on September 4, 2019, a year and a half after the accident. His affirmed report does not indicate that he reviewed or considered any of Plaintiff's medical records other than the MRI reports. It is clear from the narrative report that the history of Plaintiff's medical treatment is based upon Plaintiff's self-reporting. While Dr. Gottlieb does set forth some objective findings with respect to a positive Spurling sign and a positive straight leg raise test, his opinion that her pain is causally related to the motor vehicle accident that occurred on April 26, 2018, is speculative in light of the fact that it is not based upon review of any contemporaneous medical records and only upon Plaintiff's oral history and makes no mention of Plaintiff's pre-existing similar conditions which are medically documented in her records. Accordingly, Dr. Gottlieb's affirmed narrative report is insufficient to demonstrate a triable issue of fact. See Iovino v. Scholl, 69 A.D.3d 799, 893 N.Y.S.2d 230 (2d Dept. 2010)(Plaintiff did not raise triable issue of fact because the medical report of her doctor failed to acknowledge Plaintiff's prior injuries.); Luciano v. Luchsinger, 46 A.D.3d 634, 847 N.Y.S.2d 622 (2d Dept. 2007).

Lastly, plaintiff has failed to allege that she was disabled for the minimum

duration necessary to state a claim for serious injury under the 90/180 day category. Her allegation that she does not go to the gym or no longer goes for walks, coupled with her failure to submit medical evidence which documents that she was prevented from performing "substantially all" of her usual and customary activities for the requisite period, See Rubin v. SMS Taxi Corp., 71 A.d.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010), is insufficient to sustain her burden upon summary judgment.

Accordingly, it is hereby

ORDERED that Defendant Muralikri Kannan's summary judgment motion for failure to sustain a "serious injury" as defined in New York Insurance Law Sec. 5102(d), is GRANTED and the action is dismissed.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion

#1.

Dated: New City, New York
February 25, 2020


HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:

All Parties (by e-file)