

Candelario v Dolan

2020 NY Slip Op 34857(U)

May 4, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 608354/17

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

ORIGINAL

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

JEANINE CANDELARIO,

**Index No.
608354/17**

Plaintiff,

**Motion Seq:
001 MD**

-against-

Decision/Order

GAIL DOLAN,

Defendant.

x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	10-20
Answering Papers.....	24-38
Reply.....	40
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Responent's.....	

The defendant in this personal injury action arising from a motor vehicle accident makes the instant threshold motion seeking dismissal of the complaint on the ground that the plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102 (d). The plaintiff opposes the relief sought by the defendant.

Plaintiff asserts that she has suffered injuries to her left knee, cervical spine, lumbar spine, and thoracic spine areas, resulting in left knee surgery, trigger point injections, restricted ranges of motion in the affected areas, pain, tenderness and swelling, among other complaints. She claims that the injuries resulting from the subject motor vehicle accident fall under the following categories of injury specified in Insurance Law § 5102 (d): 1) significant limitation of use of a body function or system, and 2) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

As a proponent of the summary judgment motion, the defendant herein has the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*Little v. Locoh*, 71 AD3d 837 [2d Dept 2010]; *Furrs v. Griffith*, 43 AD3d 389 [2d Dept 2007]; *Mejia v. DeRose*, 35 Ad3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law.

In support of her motion, the defendant submits, *inter alia*, plaintiff's deposition transcript and the affirmed reports of defendant's examining orthopedic surgeon and radiologist.

Plaintiff testified that on October 24, 2016, at about 8:04 p.m., her vehicle was parked in the driveway of a private residence, with the rear tires still in the roadway, when defendant's vehicle hit the rear passenger side of the vehicle in which plaintiff was seated. Plaintiff had pulled into the driveway as far as she was able, but other cars were also in the driveway. Plaintiff was talking to one of the occupants of the residence when the impact occurred. As a result of the impact from defendant's vehicle, the plaintiff's knees hit the dashboard of her car. Plaintiff experienced neck, back and knee pain at the scene, but she refused medical attention at that time. Plaintiff drove to her home and sought medical attention at a hospital the next morning, where she was treated and released. The x-rays taken at the hospital did not show any evidence of fracture, and plaintiff was given some pain medication upon her release.

Approximately one week later, plaintiff sought treatment at a chiropractor. She treated with the chiropractor for over one year and was still treating at the time of her deposition in November 2018. The plaintiff also testified that the results of an MRI revealed that she had a torn meniscus in her left knee. The plaintiff subsequently underwent surgery in February 2017 to

repair her left knee. Following the left knee surgery, plaintiff received and uses crutches for approximately three weeks, and then a knee brace for a few months. According to her testimony, plaintiff was still experiencing intermittent knee pain at the time of her deposition, as well as frequent headaches, neck and back pain, and difficulty and pain when turning her neck completely to the left.

The plaintiff also testified that at the time of the subject accident, she was employed full-time as a licensed practical nurse at a rehabilitation facility. Immediately after the accident, she remained in bed, missing three days from work. She went back to work full-time after that, but on light duty, for a little more than three months pursuant to a doctor's note. After the few months of light duty, plaintiff returned to full duty until she underwent the knee surgery in February 2017. Following the left knee surgery, the plaintiff missed two weeks from work. When she returned to work after the surgery, she was on light duty for a few weeks. By that time, her position had changed to "charge nurse," which was a promotion that involved more desk duties. Her promotion to charge nurse did not have anything to do with the subject accident. Plaintiff was able to go on a cruise vacation to the Bahamas in July 2018 for six days.

Plaintiff also testified that the only things that she cannot do since the subject accident are taking her son to the park, running on the track, cleaning her ceiling fans and bringing laundry up and down stairs. Plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages/laundry is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his/her customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Ingram v. "Doe"*, 296 AD2d 530 [2d Dept 2002]; *Omar v. Goodman*, 295 AD2d 413 [2d Dept 2002]; *Lauretta v. County of Suffolk*, 273 AD2d 204 [2d Dept 2000]). Based upon her testimony, including that plaintiff missed only three days of work, the defendant has sustained her *prima facie* burden for summary judgment dismissal of the plaintiff's 90/180 claim. Upon review of the opposition papers, this Court notes that the plaintiff does not address the defendant's argument and evidence submitted in support of dismissal of her 90/180 claim. Accordingly, plaintiff's 90/180 claim is dismissed.

As it pertains to the plaintiff's significant limitation claim, the affirmed reports of defendant's examining radiologist, Sheldon P. Feit, M.D., state that the bulging discs in plaintiff's cervical and lumbar spine are not related to the subject accident but are degenerative in nature.

Dr. Feit also states that the MRI of plaintiff's left knee shows that there are no meniscal tears, ligamentous injury or fracture, but there are areas of meniscal degeneration; however, according to his report, "there are no abnormalities causally related to the accident of 10/24/2016."

Defendant's examining orthopedic surgeon, Gary Kelman, M.D., authored two independent orthopedic examination reports, one dated February 5, 2019 and the other dated March 11, 2019. The February report is based upon his physical examination of the plaintiff on January 23, 2019, and the March report was generated in response to Dr. Kelman being provided with the operative report concerning plaintiff's left knee.

Dr. Kelman reported normal ranges of motion and overall normal results upon examination of plaintiff's cervical, lumbar and thoracic spine areas, both knees and both hips. He opines in the February 5, 2019 report that all of plaintiff's sprains and strains are resolved and that her left knee is "post surgery, recovered." Dr. Kelman further eliminates as a cause of plaintiff's injuries, including her knee injury, a prior accident that occurred on February 3, 2015. In fact, Dr. Kelman noted that he reviewed an MRI report of plaintiff's left knee from that prior accident, which suggested a sprain but no meniscal tear. Furthermore, in his February 5, 2019 report, and in contradiction to Dr. Feit's radiological review discussed above, Dr. Kelman eliminates all chronic degenerative conditions and/or prior injuries as contributing factors to the injuries sustained as a result of the subject accident. Thus, it appears that defendant's own experts are in some disagreement as to causation of plaintiff's injuries.

It is undisputed that plaintiff underwent left knee surgery for a torn meniscus on February 21, 2017. Dr. Kelman's second report dated March 11, 2019 evidences the fact that he reviewed James Penna, M.D.'s operative report and that he was asked to "comment on whether the performed surgery was causally related to the motor vehicle accident of record (10/24/16)." Dr. Kelman's brief and conclusory statement as written in his report is that, "[b]ased on my examination of 1/23/19 and medical records reviewed, it is my opinion that the performed surgery was not causally related to the motor vehicle accident of 10/24/16." Dr. Kelman provides no factual basis or explanation for this opinion, which this Court views as deficient in light of his earlier report eliminating the prior accident and degenerative/chronic conditions as contributing factors to plaintiff's injuries: "Chronic degenerative conditions/prior injuries did not contribute to this alleged incident and treatment." Notably, the defendant has not annexed a copy of Dr. Penna's operative report to the moving papers.

Also, the fact that plaintiff underwent "[l]eft knee arthroscopically-assisted partial medial meniscectomy" as written in Dr. Kelman's synopsis of Dr. Penna's operative report is at odds with Dr. Feit's specific opinion that the radiological images of plaintiff's left knee do not show evidence of a meniscal tear.

Clearly, plaintiff underwent left knee surgery almost four months after the subject accident after having been restricted to light duty at work, but what is unclear is whether that injury and ensuing surgery can be attributed to the subject accident. This is sufficient for this Court to find that the defendant has failed to establish her *prima facie* burden as to the significant limitation category of injury.

Even if the defendant had sustained her burden, plaintiff's papers in opposition raise material questions of fact that would have been sufficient to defeat defendant's motion. Not only does Dr. Penna affirm that he performed the surgery on plaintiff's left knee and that it is his opinion that the meniscus tear was causally related to the subject accident, but he points out the fact that Dr. Kelman eliminated degenerative conditions and prior injuries as contributing to treatment for this accident. In fact, in Dr. Penna's operative report annexed to plaintiff's papers as Exhibit M, Dr. Penna wrote that, "[t]here was a complex tear of the posterior horn of the medial meniscus with a small flap component. . ." that "the knee was drained of all excess fluid," and that "[p]atellofemoral articulation did show some chondrosis with hypertrophy of the

surrounding synovium which was debrided. . . which could be related to a dashboard type of injury.” As noted herein, the plaintiff testified that she hit her knees on the dashboard when defendant’s vehicle impacted the rear passenger side of plaintiff’s vehicle.

The radiologist who interpreted plaintiff’s left knee MRI, Steven Winter, M.D., affirms that the MRI was taken on December 9, 2016 due to the patient complaining of left inner knee pain, fluid in the knee and difficulty walking. Dr. Winter specifically states that his impression as the interpreting radiologist was, and is, that there was “[f]ree edge truncation and radial tearing at the body and body/anterior horn junction of the medial meniscus. . .” He also saw strain of the medial collateral ligament and trace fluid in the knee. Dr. Winter also states that he reviewed Dr. Feit’s report concerning plaintiff’s left knee, and he disagrees with Dr. Feit’s findings that there is meniscal degeneration. Dr. Winter further opines that Dr. Feit “failed to identify and mention the free edge truncation and radial tearing.”

Dr. Winter causally relates the meniscal tear to the subject accident when he states that plaintiff has no prior history of cancer or medical condition, and that “[i]t is of particular note that the patient does not have any underlying findings of arthrosis in the knee as there are no osteophytes or chondral surface thinning and erosion that would indicate an underlying degenerative process in the knee. Therefore, this is a knee which was otherwise structurally unremarkable, which now demonstrates post traumatic medial collateral ligament and popliteus tendon as well as medial meniscal abnormalities as described above and as described in my original report at the time I rendered medical service on this patient.”

Accordingly, defendant’s summary judgment motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 4, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE *CG*

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]