

Barbieri v Beninati
2020 NY Slip Op 34874(U)
May 4, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53323/2018
Judge: Lawrence H. Ecker
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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 WESTCHESTER**

-----X
CLAUDIA BARBIERI and MOTAZ SADEK,

Plaintiffs,

-against-

LORETTA BENINATI,

Defendant.

-----X
ECKER, J.

INDEX NO. 53323/2018

DECISION/ORDER

Mot. Seq. 1

Submit Date: 3/11/2020

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed in NYSCEF as submitted by the parties, regarding defendant LORETTA BENINATI'S motion [Mot. Seq. 1], made pursuant to CPLR 3212, for dismissal of the complaint upon the ground that plaintiff CLAUDIA BARBIERI has not sustained a serious injury as defined in Insurance Law § 5102:

Upon the foregoing papers, the court determines as follows:

Plaintiff Claudia Barbieri and her husband suing derivatively (plaintiffs) allege that she sustained physical injuries while a belted driver that collided with the vehicle operated by defendant in Yonkers on May 22, 2017, at or around 1:30 p.m. Plaintiff claims she was moving in a travel lane when defendant's vehicle, exiting from a parking space to her right, entered into her lane of traffic, striking the right front of her vehicle, causing her vehicle to veer to the left. Plaintiff alleges that she sustained injuries to her lower back and neck. Plaintiff also testified that her right knee hit the gear shift in the console.

Plaintiff did not receive immediate medical treatment at the scene. Later that evening at about 11:00 p.m., plaintiff went to the St. Johns Hospital/Dobbs Ferry Pavilion complaining that she was experiencing continuing pain. The initial complaint at the hospital was "pain right side of back into buttocks." She was discharged at or about 11:33 p.m. with instructions to treat lower back pain by taking Naprosyn, a non-steroid pain relaxer and to follow up with her primary doctor.

In support of the motion, defendant submits the affirmation of Ronald Mann, M.D., dated October 25, 2018, a board certified orthopaedic surgeon. Mann performed a physical examination of plaintiff as to her complaint of lower back and right knee pain. He reviewed the documentation provided to him by plaintiff, and using a goniometer, measured her lumbar motion, conducted a straight-leg raising test and right and left knee flexion, noting no significant deficiencies. Mann diagnosed plaintiff with lumbar sprain/strain-resolved and right knee sprain/strain-resolved. He found no need for further treatment and opined that plaintiff has full ability to work.

Defendant also submits the affirmation of Lisa Nason, M.D., orthopedic surgeon. Nason saw plaintiff on August 19, 2019. Plaintiff described her pain level at 7/10, as sharp and stabbing, shooting to her legs, difficulty with stairs, pain after sitting too long, and worse when bending and walking, and weakness. The range of motion testing of the cervical spine, performed with the standard hand-held goniometer, was reported as normal, and there were no abnormalities found or pain described. The testing of the cervical spine showed two deficiencies, right rotation 80/75 and left rotation 80/75. The testing of the thoracic spine showed all aspects normal and no other deficiencies. The examination of the lumbar spine showed no abnormalities with plaintiff complaining of mild subjective low back pain. The testing of the lumbar spine showed no abnormality and one above normal range 60/90 at flexion. The testing of the right knee and left knee showed no abnormalities. Nason found no residuals/permanency, but did state that the above-diagnosed injuries are causally related to the accident, concluding that prognoses were good.

In opposition to the motion, plaintiffs submit medical reports from Richard A. Gasalberti, M.D., Gabriel Dassa, D.O., Derek Johnston, M.D., Gautam Khakhar, M.D., and Andrew Cordiale, M.D., physical therapy reports from Physical Medicine and Rehabilitation of New York, and MRI studies from Lenox Hill Radiology. Defendant argues that none of these reports are admissible inasmuch as they do not comply with the requirements of CPLR 2106, since they are not sworn to or affirmed.

The physical therapy notes associated with Physical Medicine and Rehabilitation of New York are not admissible due to lack of proper certification. For the same reason, the MRI reports from Lenox Hill Radiology are likewise inadmissible. The court finds that the Gasalberti report is also inadmissible as failing to bear the proper certification required pursuant to CPLR 2106 (see CPLR 2106).

The duly-affirmed reports of Gautam Khakhar, M.D., a physiatrist, demonstrate that he treated plaintiff on 11 separate occasions from May 31, 2017 to December 5, 2018, followed by a final visit on May 15, 2019. His report finds a causal relationship between plaintiff's physical condition and the accident. In each of these reports there are reported elevated pain levels, significant deficiencies noted in the range of motion in the lumbar spine upon physical examination and in the right hip flexor, ankle dorsiflexor and knee flexor. The May 2019 report states that there is a right knee derangement, with right SI

(sacroiliac) joint pain. In each of the reports, Khakar recommends various continuing conservative treatment alternatives, including recommended treatment for right knee pain.

Plaintiff saw Gabriel L. Dassa, D.O., F.A.A.O.S., a board certified orthopedic surgeon, on June 17, 2017. Dassa found range of motion deviations using a hand-held goniometer without patient interference in the motion assessment, directly caused by the accident requiring further treatment. He recommended physical therapy, chiropractic care, pain relief medications, a lumbar spine brace and consideration of MRI of lumbar spine if there was no improvement. At a July 2017 follow up, Dassa found deficiencies in range of motion testing with the impression of cervical spine disc herniation and clinical radiculopathy. At a February 2018 examination, Dassa again found that the range of motion tests showed deficiencies; swelling in the right knee; tenderness over the medial joint of medial meniscus and anterior aspect over the patella; impression lumbar spine disc herniation, right knee tear of medial meniscus and right knee traumatic chondromalacia patella. Treatment alternatives were addressed including continued physical therapy, pain medication and lumbar spine brace, cortisone injection in right knee, and arthroscopic surgery in the right knee. Finally, at the last examination on January 20, 2020, Dassa made findings consistent with the report dated February 12, 2018.

Plaintiff saw Derek Johnston, M.D., Physical Pain and Rehabilitation, on August 15, 2017, for an initial pain management evaluation. She described her pain levels as between 6/7 and 8-9/10, tingling into the toes in an S1 pattern, her limited physical activity, and her taking of NSAIDs. He noted range of motion deviations using a hand-held goniometer and diminished deep tendon reflex difference between her right ankle and left ankle. She was counseled to schedule an initial lumbar epidural injection at the L5-S1 interlaminar space followed by re-evaluation and re-assessment, and to continue on the NSAIDs or other pain medication, continue physical therapy as directed. Johnston opined that there is causality between the accident and his pathological findings.

In reply to plaintiffs' submissions, defendant argues that three 2017 Dassa reports are not admissible because as the "supervising physician," he affirmed the document signed by Gregory Itzhak, RPA-C under the word "affidavit," and the January 2020 report is the same as to Sovana Mey, P.A. Clearly, none of the three reports are affidavits. Dassa, admitted to practice in New York, is authorized to sign an affirmation, the court notes that his signature preceded his certification. Allowing for that error in form, the court must determine whether his statement in his affirmation "that the statements contained herein are true and accurate" allows for the admissibility of his reports.¹

The court finds that the reports are admissible for purposes of this motion in light of Dassa's affirmation that the statements are true and accurate. Should it be determined at trial that this is not true, then, in addition to the credibility issues raised, he bears the risk

¹ The February 2018 report appears that it may have lines crossing out the signature of Sovana Mey.

of civil or criminal penalties, as does any witness who affixes his oath to a document submitted to the court.

Defendant next argues as to the February 2018 Dassa report that it fails to relate the recommendation for surgery to the accident. The June 2017 report states that plaintiff complained of pain in the lumbar spine with persistent pain with burning, numbness and tingling radiating down her extremities with muscle spasming. There were no diagnostic tests performed for her right (or left) knee, and no recommended treatment for knee pain. The July 2017 report has no mention of knee pain, testing of the knee, or recommended treatment for the knee. The right knee tear is described for the first time in the January 2020 report with no causal relation back to the accident and there is no mention of a knee injury in the Bill of Particulars proximately caused by of the accident. The court finds that, for the purpose of this motion, it will not consider the right knee injury in terms of proving serious injury.²

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party “has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure (*Matter of Suffolk Co. Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Vumbico v Estate of Wiltse*, 156 AD3d 939 [2d Dept 2017]).

Importantly, it is not the court’s function on a motion for summary judgment to assess credibility (see *Rawls v Simon*, 157 AD3d 418 [2d Dept 2018]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). “Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact” (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]). Thus, a motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]). Here, defendant and plaintiffs rely on the various medical reports and affirmations to argue their respective positions.

Applying the legal principles governing motions for summary judgment to the evidence submitted here, the court finds that defendant met her *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) as a result of the subject accident by submitting the medical findings and opinions of experts (see *Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d

² There is reference to a knee flex abnormalities in Khakhar reports (at times 4/5 and 4+/5) with a reference in the report dated May 15, 2019 that there is right knee derangement.

345 [2002]). In opposition, plaintiffs submit competent medical expert evidence that generate triable issue of facts as to the same relevant medical issues (*see Karademir v D.A. Mirando-Jelinek*, 153 AD3d 509 [2d Dept 2017]; *Mulhern v Gregory*, 161 AD3d 881 [2d Dept 2018]). It is not for the court on a summary judgment motion to decide which expert or medical evidence is to be accepted over the other. That is the function of the trier of fact (*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]). Accordingly, the motion for summary judgment is therefore appropriately denied.

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 defendant LORETTA BENINATI'S motion [Mot. Seq. 1], made pursuant to CPLR 3212, for dismissal of the complaint upon the ground that plaintiff CLAUDIA BARBIERI has not sustained a serious injury as defined in Insurance Law 5102 is denied; and it is further

ORDERED the parties shall appear at the Settlement Part of the Court, Room 1600, on a date to be set hereafter by said Part.

The foregoing constitutes the Decision/Order of the court.

Dated: May 4, 2020
White Plains, New York

E N T E R:

1st Lawrence H. Ecker, J.S.C.

HON. LAWRENCE H. ECKER, J.S.C.

May 4, 2020, 11:48 p.m.

Appearances:

Parties appearing via NYSCEF.