Castro v Valenti
2020 NY Slip Op 34896(U)
September 28, 2020
Supreme Court, Westchester County
Docket Number: 54516/2018
Judge: Charles D. Wood

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 WESTCHESTER

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JEHINCY M. CASTRO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 54516/2018
Sequence No. 1

MITCHELL P. VALENTI and GREGORY VALENTI,

Defendants.

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MITCHELL P. VALENTI and GREGORY VALENTI,

Third-Party Plaintiffs,

-against-

GEFFRARD ST. LOUIS and DELLA FAMIGLIA, INC.,

Third-Party Defendants,

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 34-54, were read in connection with the motion by plaintiff for summary judgment on the issue of Serious Injury under Insurance Law §5104.

This is an action for alleged serious personal injuries arising out of a rear end automobile accident on October 10, 2015, on Route 146, in the Village of Harrison. Plaintiff was in a taxi and was hit from behind. As a result of the accident, plaintiff reported that she sustained a head injury, and injuries to her cervical, thoracic and lumber spine.

Now, upon the foregoing papers, the motion is decided as follows:

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of

Insurance Law §5104 (a) (Licari v Elliott, 57 NY2d 230 [1982]). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury." Pursuant to Insurance Law §5102(d), serious injury means: 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.

Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v Avis Rent-A-Car Systems, Inc., 98 NY2d 345, 350 [2002]).

To recover under the permanent loss of use category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance Inc., 96 NY2d 295, [2001]). For the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description

of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (98 NY2d 345). The consequential limitation of use category also requires that the limitation be permanent (Lopez v Senatore, 65 NY2d 1017 [1995]).

A plaintiff claiming a significant limitation of use of a body function must substantiate his or her complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). The Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well." Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" under the state (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]).

To prove the 90/180 day category, an injury must be (1) medically-determined injury or impairment of a nonpermanent nature (2) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment and (3) there must be curtailment of usual activities to a great extent,

rather than some slight curtailment (Damas v Valdes, 84 AD3d 87, 91 [2d Dept 2011]). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (98 NY2d 345). In order to establish serious injury here, the plaintiff must establish that he "has been curtailed from performing his [or her] usual activities to a great extent" (57 NY2d at 236; Lanzarone v Goldman, 80 AD3d 667, 669 [2d Dept 2011]).

To meet its burden of proof, a plaintiff is required to submit medical evidence based on an initial examination close to the date of the accident (Griffiths v Munoz, 98 AD3d 997, [2d Dept 2012]). Equally important, plaintiff must also establish through admissible medical evidence that the injuries sustained are causally related to the accident claimed (Pommells v Perez, 4 NY3d 566 [2005]). A plaintiff's submission must contain a competent statement under oath and must demonstrate that plaintiff sustained at least one of the categories of serious injury as enumerated in Insurance Law §5102(d). Where there has been a gap or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation (Neugebauer v Gill, 19 AD3d 567 [2d Dept. 2005]). While plaintiff is not required to submit contemporaneous range of motion testing, he or she is required to submit competent medical evidence demonstrating that he sustained range of motion limitations contemporaneously with the accident (Perl v Meher, 18 NY3d 208, 218 [2011]). The absence of a contemporaneous medical report invites speculation as to causation (Griffiths v Munoz, 98 AD3d at 999). Even if plaintiff's doctor does not specifically address the findings in the reports submitted by defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctor that the injuries were indeed traumatic and were causally related to the collision, is sufficient as it implicitly

addressed the defendants' contention that the injuries were degenerative (Fraser-Baptiste v New York City Transit Authority, 81 AD3d 878 [2d Dept 2011]). Finally, subjective complaints of pain, without more, are not sufficient to establish a serious injury (Scheer v Koubek, 70 NY2d 678 [1987]).

Here, plaintiff asserts as a matter of law that she qualifies under the "serious injury" threshold of Insurance Law §5102(d), from the categories of permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function, and the 90/180 day category.

Nearly four (4) years following the accident, plaintiff complains that her injuries from the subject motor vehicle accident continue to interfere with recreational activities, she has difficulty sleeping, sitting for long periods of time and, driving for long periods of time.

After the accident, plaintiff was treated in the emergency room at White Plains Hospital, where CTs of plaintiff's head , thoracic spine and cervical spine were found to be normal and the CT of the lumbar spine showed small central L5/511 herniation and mild L4/5 disc bulge. Plaintiff's treatment health providers, Drs. Rodriguez, Salzman, Cooper, Gaus and Guy, have directly opined that the motor vehicle accident of October 10, 2015, is the cause of her spinal injuries.

Nine days after the accident, plaintiff presented to Dr. Enrique Rodgriquez, in Florida, and the examination of her cervical spine revealed that flexion and extension was severely restricted with pain and the right and left lateral flexion and right and left rotation was moderately restricted with pain (NYSCEF #40).

These visits to Dr. Rodriguez continued to October 7, 2019, where misalignment was detected with concomitant muscular spasm and pain to palpation localized to the middle and lower cervical ranges on both sides. Cervical and sacral range, cervical and dorsolumbar ranges-of-motion are restricted with mild pain, corresponding with clinical presentation. (NYSCEF#40)

Plaintiff also presented at the Cleveland Clinic in Florida, where a CT scan of the brain was performed on October 24, 2015, with findings of no intracraniel abnormalities, and she was prescribed pain medication(NYSCEF#41). On or about November 17, 2015, plaintiff presented to Sunrise Medical Group, Inc. in Florida where the clinical indication was noted that plaintiff suffered from whiplash injuries, and initial encounters headaches..

Plaintiff also presented to Dr. Harry Cooper, an orthopaedist with Hallandale Beach Orthopedics. On or about December 14, 2015, Orthopedic records of Dr. Cooper shows a diagnosis of plaintiff as having C3-C4 disc herniation, C4-CS disc herniation, C5-C6 disc protrusion with an annular tear, C6-C7 disc herniation, left cervical radiculopathy, rule out lumbar disc herniation, radiculopathy, posttraumatic headaches. There were then follow-up visits for neck pain, but no mention made of headache or backpain.

Plaintiff was examined by Dr. Ali E. Guy, MD, of Gramercy Park Physical Medicine and Rehabilitation, P.C., who opines that the MRI report of lumbar spine taken on December 30, 2015, showed an L5-S1 disc herniation with impingement and an L4-L5 disc bulge with anterior impression on the thecal sac. According to the past medical records, plaintiff was status post cholecystectomy and left knee arthroscopic surgery. On July 30, 2018 , Dr. Guy performed range

of motion tests of the spine, which was done in the passive range of motion with the use of a goniometer. The top number indicates what was measured. The bottom number indicates the normal for that range.

Neck: Shows diffuse tenderness, diffuse moderate spasm, and multiple trigger points present. ROM: Lateral flexion is 30 degrees/45 degrees, lateral rotation is 50 degrees/80 degrees, and flexion and extension is 40 degrees/60 degrees.
Back: Shows diffuse tenderness, diffuse moderate spasm, and multiple trigger points present. ROM: Extension is 10 degrees/30 degrees, flexion is 60 degrees/90 degrees, bilateral lateral flexion and lateral rotation is 15 degrees/30 degrees. SLR is 60 degrees/90 degrees with bilateral tower back pain. Active range of motion is normal for all four extremities.

(NYSCEF#48)

At the request of defendants, an IME was conducted on May 16, 2016, by Dr. Michael Feanny, an orthopaedic physician. This doctor believes that the records he reviewed suggests that plaintiff has degenerative changes of her cervical and lumbar spine, which would be commonly associated with building and desiccation of her disc spaces. He noted that historically there seems to be a causal relationship of her complaints of pain to the subject motor vehicle accident, since her complaints of neck pain began on the date of the accident and have continued as of the date of the doctor's report. Plaintiff's degree of mobility is limited to do heavy lifting repetitive bending and stooping. She still works on a regular basis. He found no indication to suggest that further treatment was required from an orthopaedic standpoint as plaintiff has no neurological loss or evidence of significant joint dysfunction, and that she is at maximum medical improvement (NYSCEF#51).

On December 1, 2016, Dr. Evan A. Rosen, P.A., Chiropractic physician examined plaintiff, and found the range of motion of the cervical spine and thoracic spine were full in all directions.

No restriction was noted of the lumbosactal spine. From a chiropractic standpoint, plaintiff had attained a point of Maximum Medical improvement (NYSCEF#46).

On November 11, 2019, WestMed Medical Group, Dr. Ronald M. Silverman, examined plaintiff for purpose of an independent neurological examination, and reports that plaintiff claims she is having continued symptoms and in fact feels that she is getting worse. She has ongoing symptoms of anxiety and depression, and has daily constant headaches. Range of motion of the neck during direct examination was limited to approximately 10 degrees of flexion and extension, 10 degrees left and right rotation, however, when plaintiff was observed indirectly during the interview range of motion of the neck was normal; straight leg raising was negative. Range of motion of the back was limited to 25 degrees on direct examination, but the claimant was clearly able to flex forward normally from the waist when not directly examined. Geniometer was used for these measurements. Dr. Ronald M. Silverman, MD found that no objective evidence of any neurologic injury sustained by plaintiff, and he finds no objective evidence of any cervical, thoracic, lumbar or head injury (NYSCEF#52).

On that same date, Ronald L. Mann, orthopaedic surgeon examined plaintiff and revealed that the cervical spine forward flexion 20 degrees and extension 15 degrees. Normal is 45 degrees. Rotation was right 15 degrees and left 30 degrees, Normal is 80 degrees. Neurologically, plaintiff was intact to both upper extremities with motor strength, deep tendon reflexes, and sensation intact. Examination of her thoracolumber spine revealed forward flexion 55 degrees, Normal is 60 degrees. She laterally flexed 25 degrees right and 25 degrees left. Normal is 25 degrees. Neurologically, she is intact to both lower extremities with motor strength, deep tendon reflexes, and sensation intact. Ranges of motion were as demonstrated by the examinee under her control,

Ranges of motion are pursuant to AMA Guidelines. The diagnosis was. cervical sprain/strain, and thoracolumbar sprain/strain.

In light of the foregoing, plaintiff's summary judgment motion must be denied regarding the Permanent Consequential Limitation of Use/Significant Limitation of Use Categories. The conflicting affidavits and medical reports submitted present a credibility battle between the parties' experts regarding the extent of plaintiffs injury relating to her injuries, and issues of credibility are properly left to a jury for its resolution (Ain v Allstate Ins. Co., 181 AD3d 875, 878–79 [2d Dept 2020]).

Plaintiff also alleged that she sustained a serious injury under the 90/180-day category of Insurance Law §5102(d). Defendants claim that during the 180-day period immediately following the subject accident, plaintiff did not have an injury or impairment which, for more than 90 days, that prevented her from performing substantially all of the acts that constituted his usual and customary daily activities (Karpinos v Cora, 89 AD3d 994 [2d Dept 2011]). Her work involves event organizing. Through her deposition testimony, she claims that she was out of work for approximately eight months. (NYSCEF#38, pg 17).

The record shows that plaintiff has failed to establish her past and future lost earnings with any reasonable certainty, with relevant documentation showing a loss of earnings and income. Plaintiff's motion is devoid of any contemporaneous medical evidence to establish her entitlement to the 90/180 claim. For these reasons, plaintiff has failed to eliminate all issues of fact, and her motion for summary judgment is denied for this category.

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: September 28, 2020
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF