Warner v Adao
2020 NY Slip Op 34933(U)
October 27, 2020
Supreme Court, Westchester County
Docket Number: Index No. 64376/2018
Judge: Charles D. Wood
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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
---x
KIVA WARNER,

Plaintiff,

-against-

DECISION & ORDER
Index No. 64376/2018
Sequence No. 1

DIONE DALUZ ADAO and PATRICK HENRIQUES,

Defendants.
---x

WOOD, J.

The court read NYSCEF documents Numbers 20 through 58 , in connection with defendant Dione Daluz Adao's summary judgment motion (Seq 1), dismissing all claims asserted against her on the ground that she has no liability for the accident; and pursuant to Insurance Law §5104; and the cross-motion of defendant Patrick Henriques (Seq 2) on the basis that plaintiff has failed to satisfy the no-fault threshold set forth in §5102(d) and §5104 of the Insurance Law of the State of New York. This is an action for serious personal injuries arising out of an automobile accident that occurred on June 1, 2017, at the intersection of East Sidney Avenue and Rich Avenue, in Westchester County. At the time of the accident, plaintiff Warner was a passenger in co-defendant Henriques' Honda SUV. While the Henriques' vehicle was traveling northbound on Rich Avenue, the Daluz Adao's vehicle was traveling on East Sidney Avenue with the right of way when codefendant Henriques' vehicle impacted defendant Daluz Adao's vehicle on the passenger's side. Plaintiff's airbag did not deploy. After the accident, she was taken by ambulance to Mount Vernon

Hospital where she was evaluated and discharged. Plaintiff was diagnosed with muscle spasms and discharged with pain medication. She had follow-up care with a chiropractor and received therapy treatments for approximately 6 months for her neck and lower back. Currently, plaintiff is not receiving any treatment for the neck or lower back .

NOW, based upon the foregoing, the motions are decided as follows:

It is well settled that 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]). 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 (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]).

Plaintiff asserts as a matter of law that she qualifies under the "serious injury"threshold of New York State Insurance Law §5102(d), from the categories of permanent loss of use of a body,organ or member, 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.

The following injuries were purportedly sustained by plaintiff:

-Cervical Spine-Significant straightening of normal cervical lordosis; and decreased disc spacing at C3-C4, C4-C5, C5-C6, C6-C7 and C7-T1; and
-Lumbar Spine- Significant straightening of normal lumbosacral lordosis; and decreased dis spacing at L3-L4, L4-L5 and L5-S1.

As a preliminary mater, since plaintiff's medical records and bill of particulars document no total loss of use of any body organ or member, or point to the existence of any laceration or scarring, it is clear that plaintiff's injuries fail to satisfy the "permanent loss of use" category of Insurance Law § 5102(d) (Oberly v Bangs Ambulance, Inc., 96 NY2d 295 [2001]).

Turning next to Permanent Consequential Limitation of Use/Significant Limitation of Use of a Body Function, defendants offer an IME report conducted on September 25, 2019, of plaintiff performed by Michael E Elia, MD, an Orthopaedist.[1] Dr. Elia represents that all measurements were made with a goniometer. Examination of plaintiff's cervical spine, and lumber spine reveals

[1]Defendant Dione Daluz Adao offered the expert report, and defendant Henrique also relies on said expert report

normal range of motions. There is a negative straight leg raising test and a negative sitting root test. Dr. Elia concluded that based upon these examinations and the neurologic examination, including deep tendon reflexes and gross motor exam, to the upper and lower extremities, it was the doctor's impression that plaitniff sustained cervical and lumbar strains which have resolved. The doctor cannot explain plaintiff's subjective complaint of pain. The doctor finds no ongoing deficit or disability and does not foresee any long-term sequela, and he does not see the need for any further treatment to her cervical or lumbar spine.

From these submissions, defendants met their 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. Defendants submitted the affirmed report of an examining orthopedist, who concluded, based on objective range of motion tests, that the plaintiff had full range of motion in her cervical and lumbar spines.

In opposition, plaintiff submits the affirmed narrative of her treating chiropractor, Michael L. Taub, of Health First Medical and Rehabilitation Center (NYSCEF#52). Plaintiff's chiropractor initially examined plaintiff about a month after the accident on July 20, 2017, and found the following limitations in the range of motion of plaintiff's cervical spine and lumbar spine:

cervical spine: forward flexion 20 degrees (45 degrees normal); extension 20 degrees (45 degrees normal); right lateral flexion 15 degrees (45 degrees normal); left lateral flexion 15 degrees (45 degrees normal); right rotation 35 degrees (80 degrees normal); left rotation 40 degrees (80 degrees normal).

lumbar spine: forward flexion 40 degrees (90 degrees normal); extension 20 degrees (30 degrees normal); right lateral flexion 15 degrees (30 degrees normal); left lateral flexion 15 degrees (30 degrees normal); right rotation 15 degrees (30 degrees normal); left rotation 10 degrees (30 degrees normal).

Plaintiff's current limitations, as measured by plaintiff's chiropractor on July 22, 2020 were as follows:

cervical spine: forward flexion 35 degrees (45 degrees normal); extension 35 degrees (45 degrees normal); right lateral flexion 30 degrees (45 degrees normal); left lateral flexion 30 degrees (45 degrees normal); right rotation 60 degrees (80 degrees normal); left rotation 65 degrees (80 degrees normal).
lumbar spine: forward flexion 75 degrees (90 degrees normal); extension 25 degrees (30 degrees normal); right lateral flexion 25 degrees (30 degrees normal); left lateral flexion 20 degrees (30 degrees normal); right rotation 25 degrees (30 degrees normal); left rotation 20 degrees (30 degrees normal) (NYSCEF#47).

The chiropractor also found the following diagnosis at his July 22, 2020 evaluation of plaintiff: Decreased disc spacing at the level of C3-4, C4-5, C5-6, C6-7 and C7-T1; the MRI study performed on May 10, 2018 had an impression for C3-4 and C6-7 midline disc herniations which indent he ventral thecal sac. C4-5 and C5-6 reveal disc bulges that indent the ventral thecal sac. (NYSCEF #47 p. 5) Disc spacing is diminished posteriorly at the level of L3-4, L4-5 and L5-Sl; the MRI study performed on May 8, 2018 had an impression for L4-5 disc bulge, and a disc bulge at L5-S1 which indens the ventral thecal sac. (NYSCEF#47 at p. 5).

As a direct result of the traumatic injury sustained to plaintiff on June 1, 2017, the chiropractor claims that there were extremes of joint movement with concomitant overstretching and tearing of the supporting structures of the cervicothoracic and lumbosacral spine. It therefore appears that there will be significant and permanent limitations to these regions. The patient will be subject to frequent exacerbation of her symptom complex. To date, the patient remains mild to moderately disabled. (NYSCEF #52 at p. 8).

The competent medical evidence shows the existence of significant limitations in the spinal and lumbar regions that were contemporaneous with the subject accident, and the narrative reports by the chiropractor indicate that plaintiff continued to suffer from pain and range of motion restrictions as a result of the accident.

Nonetheless even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez,* 4 NY3d 566 (2005), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint, including, as pertinent here, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" Id.; *see also Neugebauer v Gill*, 19 AD3d 567 (2d Dept. 2005).

The record shows that plaintiff received physical therapy treatments inconsistently from July 20, 2017, through December 13, 2018, with gaps of four months, and with no future appointments scheduled to see any other doctors for this accident. Plaintiff testified she discontinued therapy because she claims that it wasn't helping her that much (NYSCEF #24 p. 64). She also claims that she has back pain only about three times a month (NYSCEF#24 p.69). She never saw an orthopedist or neurologist (NYSCEF#24 p.70).

A gap in treatment interrupts the chain of causation between the accident and the claimed injury (Pommells v Perez, 4 NY3d 566, [2005]). Any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (Grossman v Wright, 268 AD2d 79, 84, [2d Dept 2000]). As is the case here, plaintiff's unexplained cessation of medical treatment is fatal to plaintiff's claim of a significant or permanent consequential limitation.

Under the 90/180-day injury category, plaintiffs bill of particulars and deposition testimony established, as a matter of law, that plaintiff's injuries did not prevent her from performing substantially all of the material acts that constituted his usual and customary daily activities for at least 90 of the 180 days immediately following the accident (Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973, 974 [2d Dept 2010]). Plaintiff admits in her Bill of Particulars that she was confined to her bed and home for only one (1) week (NYSCEF#23). Plaintiff was able to attend a full eight (8) hour day of work the next day after the accident (NYSCEF#24) and continued to work after the accident until she quit her job and began another job (NYSCEF#24)). Plaintiff presently works at a nursing home as a housekeeper. Further, plaintiff is unable to provide any physician's directive confining her to home for such a period.

In light of this decision, all remaining issues raised by defendants are academic. This constitutes the Decision and Order of the court.

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that defendants' motions for summary judgment (Seqs 1 and 2) are granted, in that plaintiff has not sustained serious injury as defined by Insurance Law §5102[d], and the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

Dated: October 27, 2020
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF