

Brito v Grushko

2020 NY Slip Op 35393(U)

May 7, 2020

Supreme Court, Kings County

Docket Number: Index No. 503810/2018

Judge: Lorna J. McAllister

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 10**

ADALGISA BRITO,

Plaintiff(s),

-against-

VIKTOR GRUSHKO and EXCLUSIVE AMBULETTE,

Defendant(s).

Index No.: 503810/2018
Mot. Seq. # 3

DECISION / ORDER

Present:
Hon. Lorna J. McAllister
A.J.S.C.

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	_____
Other.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows

Defendants, Viktor Grushko [“Grushko”] and Exclusive Ambulette [“Exclusive”], have moved, pursuant to CPLR § 3212, for an Order awarding summary judgment to the defendants and a dismissal of plaintiff’s Adalgisa Brito (“Brito”) complaint, upon the grounds that the plaintiff did not satisfy the “serious injury” threshold requirements of Section § 5102(d) of the New York Insurance Law, and as a result, the claim for non-economic loss is barred by Section § 5104(a) of the statute. The plaintiff has opposed defendants’ motion and maintains that there is a material issue of fact regarding whether the plaintiff sustained a serious injury.

Background

This is an action for personal injuries allegedly sustained by the plaintiff on September 3, 2017. At the time of the alleged incident, the plaintiff was a pedestrian crossing 6th Avenue near its intersection with 53rd Street, Brooklyn, New York. The vehicle that was involved in the accident was owned by co-defendant Exclusive and driven by co-defendant Grushko.

Thereafter, on or about February 23, 2018, counsel on behalf of the plaintiff, filed a summons and complaint in the office of the County Clerk of Kings County. Issue was joined by the service of defendants' verified answer on May 21, 2018 which answer contained a Demand for a Bill of Particulars. Plaintiff served a response to the Bill of Particulars on July 13, 2018 which Bill of Particulars was later supplemented.

A deposition of the plaintiff was conducted on April 8, 2019.¹ The deposition of defendant Grushko was held on September 30, 2019. The plaintiff also underwent an independent medical examination (IME) with Jeffrey Klein, MD, a board-certified orthopedist and spine surgeon and an IME with Donald Rose, M.D., a board certified orthopedist and shoulder surgeon.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on October 29, 2019.

Discussion

It is well settled that the moving party in a motion for summary judgment bears the initial burden of demonstrating a prima facie case of entitlement to judgment as a matter of law by

¹ Defendants allege that the plaintiff failed to return an executed copy of the transcript to the defendant.

submitting evidence to demonstrate the absence of a material issue of fact (*Drago v. King*, 283 A.D.2d 603, 725 NYS2d 859 [2nd Dept. 2001]).

In an action based upon Insurance Law § 5102, the defendant (the moving party) in a motion for summary judgment bears the burden to establish by the submission of evidentiary proof in admissible form that the plaintiff has not sustained a “serious injury” (*Lowe v. Bennett*, 122 AD2d 728, 511 NYS2d 603 [1st Dept. 1986]).

Section 5104 of the Insurance Law precludes recovery for non-economic loss in actions arising from automobile accidents unless a plaintiff has sustained a “serious injury”. The relevant portion of Insurance Law section 5102(d) to this case defines a serious injury as a (i) permanent consequential limitation of the use of a body organ or member; (ii) significant limitation of use of a body function or system; or (iii) 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 or customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The Courts in this Department have recognized that in order for defendant to meet its initial burden of proof in a summary judgment motion on the grounds that the plaintiff did not sustain a serious injury, the doctor whose report upon which the defendant must rely, must perform the following procedures: 1) The doctor must set forth the objective tests performed on the plaintiff (see *Mosheyev v. Pilevsky*, 3 AD3d 523, 771 NYS2d 150 [2nd Dept. 2004]); 2) The doctor must make a comparison of their findings of the plaintiff’s ranges of motion to the normal ranges of motion (see *Meiheng Qu v. Soshna*, 12 AD3d 578, 785 NYS2d 112 [2nd Dept. 2004]); *Aronov v. Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2nd Dept. 2004]); 3) The doctor must then

show that the plaintiff's injuries were not causally related to the subject accident (see *Asta v. Eivers*, 280 AD2d 565, 720 NYS2d 563 [2nd Dept. 2001]).

The defendants, in moving to dismiss plaintiff's complaint, maintain that the plaintiff did not establish that she incurred a serious injury as a result of the alleged incident. The defendants assert that based upon the independent medical examination of its doctors, the plaintiff did not sustain a serious injury, as required by Section 5102(d) of the Insurance Law and that the injuries allegedly sustained by the plaintiff were not causally related to the incident of September 3, 2017.

It appears to be undisputed that following the incident, plaintiff was taken by ambulance to the emergency room at Lutheran Medical Center where she was given stiches on her left elbow and had a CT scan taken of her head. Plaintiff was allegedly advised that she sustained bruises, but no broken bones, and was discharged from the hospital the same day and given Tylenol. In the ensuing period, the plaintiff underwent physical therapy to treat both her lumbar spine and left shoulder. The defendants maintain that as to the cervical spine, the plaintiff did not undergo either physical therapy or any other conservative treatment, nor was an MRI taken.

The plaintiff submitted to an IME by Dr. Klein on July 12, 2019. The examination of plaintiff's cervical spine revealed a slight decrease in range of motion (ROM). As to the lumbar spine, except for a mild decrease in extension and flexion, Dr. Klein found normal range of motion. The MRI film of the lumbar spine revealed multilevel disc degeneration and disc bulges/herniations as well as facet degeneration and hypertrophy throughout. Dr. Klein opined that those MRI readings were indicative of one with pre-existing conditions which condition was present prior to the accident of September 3, 2017. In addition, based upon EMG studies, there was no objective electrical evidence of lumbar nerve root dysfunction. Dr. Klein noted that

plaintiff stated that the pain in her lower back and left buttock had improved and was now only intermittent since the accident.

The report of Dr. Rose indicates that the IME was performed primarily to examine the left shoulder of the plaintiff, as the plaintiff complained of limitation of motion, persistent pain and weakness. Upon exam, the patient exhibited acromioclavicular joint tenderness. She had no evidence of anterior or posterior laxity. The patient had both a positive Hawkins sign, as well as a positive impingement test. She exhibited full strength in testing of her supraspinatus, external rotation of the shoulder with minimal discomfort upon internal rotation. Dr. Rose's impression was that the plaintiff had residual mild biceps tenosynovitis and rotator cuff tendinopathy.

Defendants assert that as to plaintiff's physical limitations, she reported only that she had difficulty carrying her cart when washing clothes and shopping for groceries. In addition, the plaintiff stated that she was unable to lift heavy objects (15-20 pounds). (See Brito EBT p. 82-83). The plaintiff reported missing only one week of work as the result of the accident where she was employed as a paraprofessional working at a school with children.

As a result of the findings of these two doctors, and the testimony adduced from the plaintiff, the defendants maintain that the plaintiff did not sustain a serious injury as defined by Insurance Law Section 5102(d) that is causally related to the accident of September 3, 2017. Specifically, defendants assert that the plaintiff did not sustain a permanent consequential limitation as there is nothing in plaintiff's testimony which established that the injuries resulted in this limitation. As to significant limitation, the defendants contend that plaintiff's subjective statement that she feels pain and is prevented from lifting heavy objects is insufficient to establish this limitation. As to a medically determined injury or impairment of a non-permanent nature, plaintiff's testimony clearly and unequivocally demonstrates that she was not prevented

from performing substantially all of her usual tasks in 90 out of the 180 days following the accident. In plaintiff's last supplemental Bill of Particulars, plaintiff affirmed that she was only continuously confined to her bed and home for one week following the accident.

Once a defendant establishes a prima facie case that a plaintiff's injuries are not serious, the burden shifts to the plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the insurance law. (see *Gorbas v. Dowgiallo*, 287 AD2d 690, 732 NYS2d 80 92nd Dept. 2001]; *Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1982]).

The plaintiff, in opposing the defendants' motion for summary judgment, relies upon the medical reports of several medical experts which included Dr. Ramy Hanna an orthopedist, Dr. Steven Winter, a radiologist, Dr. Hank Ross, a physician, Dr. Robert Waxman, a radiologist, Dr. Robert Haar, an orthopedist, Dr. Aron Rovner and Dr. Timothy Canty, licensed physicians and Dr. Goldman, an orthopedist, as well as the deposition testimony of the plaintiff.

The plaintiff initially sought medical treatment on September 11, 2017 with Dr. Hanna of Bay Medical PC. At the time, the plaintiff complained of pain to her left shoulder, elbow, arm and thigh as well as her back. The pain to plaintiff's left shoulder had prevented her from sleeping. During the orthopedic exam of the plaintiff, Dr. Hanna performed range of motion testing which included testing of plaintiff's left shoulder that showed a reduction in flexion, extension and abduction. Range of motion testing of the cervical spine revealed a reduction in flexion, extension and left rotation. As to the lumbar spine, there was reduced range of motion in flexion, extension, as well as left and right rotation. A follow up orthopedic exam on November 13, 2017 with Dr. Hanna revealed reduced range of motion in flexion, extension, and abduction of the shoulder, reduced range of motion in flexion, extension and left and right rotation of the

lumbar spine. When the plaintiff advised Dr. Hanna that she continued to have pain in her left shoulder, pain and stiffness in her left back and numbness in her left thigh, it was recommended that physical therapy be increased. Follow up ROM testing with Dr. Hanna revealed reduced ROM in the lumbar spine (flexion and extension); upper shoulders (right and left flexion) and the lumbar spine (extension and flexion).

Following an MRI scan of the plaintiff's left shoulder conducted on October 10, 2017 at Stand-Up MRI of Brooklyn, Dr. Winter issued his findings in a report as follows: "supraspinatus tendon is inhomogeneous extending towards its antolateral attachment on the humerus, representing tendinosis/tendinopathy; ... 3 mm bursal tear at the anterior; fluid accumulating in the subacromial/subdeltoid burse, representing bursitis.

On November 8, 2017, the plaintiff presented to Dr. Ross for an orthopedic evaluation. Plaintiff's chief complaint at the time was persistent pain, weakness and limitation in her left arm that awoke her night. Upon physical examination of the cervical spine, Dr. Ross found tenderness in the paraspinal and trapezial muscle. Range of motion testing revealed a reduction in flexion, extension, right and left rotation. The exam of the left shoulder found tender anterior acromion, positive impingement and positive O'Brien sign and weakness on abduction, as well as reduced range of motion for forward flexion and internal and external rotation. A corticosteroid injection was administered to the left shoulder. As to the lumbar spine, Dr. Ross found paraspinal muscle tenderness and trigger point tenderness and reduced range of motion in extension and flexion. As to the left knee, Dr. Ross found suprapatellar effusion, positive medial and lateral joint line tenderness and a positive McMurray test. Range of motion testing for flexion was reduced. Dr. Ross's impression of the plaintiff was that she sustained cervical and

lumbar sprain/strain syndrome; partial rotator cuff tear of the left shoulder and internal derangement of left knee.

Thereafter, on December 12, 2017, the plaintiff underwent an MRI of the lumbar spine at Stand Up MRI of Brooklyn. Dr. Waxman's impression was that at L3/4, there is a broad based disc herniation; at L4/5, there is a disc bulge with facet arthropathy; at L5/S1, there is a left paracentral disc herniation with impingement upon the descending left S1 nerve root and S2 nerve root.

On March 23, 2018, the plaintiff presented to Dr. Robert Haar of Haar Orthopedics and Sports Medicine, P.C. for an orthopedics consult with regard to the pain in her left shoulder. The patient upon exam was found to have positive findings on the Neer impingement, O'Brien and Hawkins test. Dr. Haar opined that plaintiff's current symptoms of having pain in her left shoulder is the direct result of the accident of September 3, 2017. The patient was afforded the option of continuing conservative treatment as opposed to surgical management and the plaintiff chose the latter option. In so doing, the plaintiff was advised and prescribed to continue attending physical therapy three to four times per week.

On August 27, 2018, the plaintiff presented to Dr. Rovner of Brooklyn Medical & Surgical, complaining of back pain radiating down her left leg with numbness, paresthesia and weakness. The examination of the lumbar spine revealed a reduction in range of motion in flexion, extension as well as left and right bending. There was positive tenderness to palpation, positive straight leg raise as well as spasming. Dr. Rovner stated that he personally reviewed the MRI which revealed disc herniation at L3/L4, L4/L5 and L5/S1. The doctor recommended lumbar epidural steroid injections and stated with a reasonable degree of medical certainty that the patient's symptoms and diagnosis are directly causally related to the accident.

On April 8, 2019, the plaintiff presented to Dr. Timothy Canty of Comprehensive Spine and Pain Center of New York. The plaintiff had complaints of significant lower back pain which pain was described as intermittent and sharp, shooting, dull and achy. The patient stated that the pain radiated to the left posterior leg which was occasionally associated with numbness and tingling in the left leg. The patient further stated her condition was aggravated by prolonged sitting, standing, bending forward and walking. An exam of the lower back revealed tenderness and a muscle spasm. There was reduced range of motion in flexion, extension and left and right rotation of the lumbar spine. The examination of the cervical spine revealed tenderness and reduced range of motion in flexion, extension, and left and right rotation. Dr. Canty's diagnosis included acute lumbar radiculopathy, displacement of lumbar intervertebral disc without myelopathy; cervical and lumbar facet arthropathy as well as disorder of rotator cuff syndrome.

The plaintiff also presented to Dr. Goldman for an orthopedic surgical consultation on February 3, 2020. The exam of the left shoulder revealed pain in the vicinity of the acromioclavicular joint and rotator cuff. In examining the lumbar spine, the plaintiff was in pain upon left and right rotation and straight leg raising. The exam of the left quadriceps revealed tenderness and swelling along the anterior and anterolateral thigh. There was reduced range of motion in both the left shoulder and lumbar spine. Dr. Goldman opined that his findings of left shoulder acromioclavicular joint impingement syndrome with bursal tear with a supraspinatus tendonitis; lumbar herniated discs at multiple levels and a severe contusion/hematoma of the left thigh were causally related to the accident of September 3, 2017 and should be considered permanent.

The plaintiff testified at her deposition, which was conducted nineteen months after the accident that she experienced back pain on a daily basis and an inability to sit for prolonged

periods of time. She stated that she is unable to cook or lift heavy objects in excess of 15-20 pounds and has trouble shopping and washing clothes. The plaintiff further testified that over a period of time she underwent chiropractic and acupuncture therapy and received an injection to the left shoulder.

In further support of their argument that there is a triable issue of fact as to the issue of serious injury, the plaintiff maintains that their position is further substantiated by the findings of Dr. Klein (defendants' IME doctor), who in his examination of the plaintiff, found reduced range of motion in the cervical and lumbar spine.

The Court finds that the plaintiff has satisfied the criteria as set forth in *Toure v. Avis Rent a Car Systems, Inc.*, 746 NYS2d 865, 98 NY2d 345 [2002] for opposing a summary judgment motion, by submitting sworn testimony which details the physical limitations of the plaintiff's back, shoulder and thigh, as well as affirmed medical reports of several medical doctors, which confirms the extent or degree of the physical limitation resulting from the alleged injury through the expert's comparison of range of motion and through a qualitative assessment of plaintiff's condition. 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.

The Court finds that the plaintiff has provided objective evidence of her injury and medical experts affirmations confirming the extent or degree of the physical limitation resulting from the alleged injuries to raise an issue of fact as to whether the plaintiff sustained a serious injury. "Where the treating physician, in an affidavit supported by exhibits, has set forth the injuries and course of treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a

significant limitation of use of a body function or system, such evidence was sufficient to deny defendants' summary judgment motion" (*Lopez v. Senatore*, 65 NY2d 1017, 494 NYS2d 101[1985]).

In reaching this determination, this Court has considered the argument of defendants' counsel that they presented evidence of a degenerative condition which may be the cause of the problems that the plaintiff has experienced. However, plaintiff has submitted the reports of several doctors who have unequivocally stated that the resulting injuries are directly attributable to the occurrence of September 3, 2007. In addition, the plaintiff has exhibited that she continued to seek the advice and assistance of medical professionals since she allegedly continues to have pain and discomfort in her shoulder, back and thigh, and as a result, has difficulty performing her daily tasks.

Here, the findings and opinions of the physicians for the plaintiff and defendants are in complete opposition to each other. The conflicting findings and opinions of physicians are sufficient to create a triable issue of fact and an award of summary judgment is therefore precluded (see *Pagano v. Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept. 1992]). Opposing affidavits give rise to questions of credibility which cannot be decided on a motion for summary judgment (see *Robbie v. Schweers*, 146 AD2d 764, 537 NYS2d 72 [2nd Dept. 1989]).

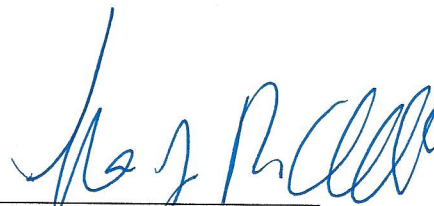
Conclusion

The motion by defendants Viktor Grushko and Exclusive Ambulette, for an Order awarding summary judgment to the defendants and a dismissal of plaintiff's Adalgisa Brito complaint, pursuant to CPLR § 3212, on the grounds that the plaintiff did not satisfy the "serious injury" threshold requirement of § 5102(d) of the New York Insurance Law, is denied.

Plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on defendant's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

Dated: May 7, 2020



HON. Lorna J. McAllister
A.J.S.C.