

Woods v Lojas
2020 NY Slip Op 35395(U)
December 10, 2020
Supreme Court, Kings County
Docket Number: Index No. 523227/2016
Judge: Reginald A. Boddie
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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 10th day of December 2020.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
Yvette Woods,

Plaintiff,

Index No. 523227/2016

Cal. No. 35 MS 2,

-against-

DECISION AND ORDER

Juan Carlos Cabos Lojas and Zombra Limo Inc.,

Defendants.

-----X
Juan Carlos Cabos Lojas and Zombra Limo Inc.,

Third-Party Plaintiffs,

-against-

Harryl Rhodes,

Third-Party Defendant.

-----X

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

Papers

MS 2

Numbered

Docs. # 32-41,75; 85-98

Upon the foregoing cited papers, defendants' motion for summary judgment on the issue of serious injury threshold, pursuant to CPLR 3212 and Insurance Law 5104 (a) and 5102 (d), is decided as follows:

Plaintiff commenced this action as the result of an automobile accident that occurred on January 16, 2016, approximately 3:15 pm, on Washington Avenue at or near its intersection with

Atlantic Avenue in Brooklyn, New York. Plaintiff was a passenger in one of the vehicles. Plaintiff alleged she suffered serious injuries, including injuries of the cervical, lumbar and thoracic spine and her right shoulder. Specifically, plaintiff alleged she had an C6-7 anterior cervical discectomy fusion (surgery) on December 8, 2016, C6-7 herniation with impingement, C4, C5 and C6 spondylosis, T5-6 and T7-8 disc bulges with thecal sac impingement, L4-5 broad disc based central disc herniation with tear and impingement, S1 radiculopathy and right shoulder tendinosis and small joint effusion. Plaintiff alleged as a result of these injuries, she continued to suffer radiating pain, weakness, tenderness, restrictions of range of motion, and difficulty lifting, carrying and sleeping.

Defendants moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

In a “serious injury threshold” motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see Insurance Law 5102 [d]*; *see*

Kelly v Ghee, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). “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 (Insurance Law § 5102 [d]). The issue is not whether plaintiff can ultimately establish a “serious injury,” but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

Here, defendants proffered the affirmed radiological report of Dr. Mark J. Decker, dated October 29, 2018, who reviewed MRI films of plaintiff’s lumbar and cervical spine and right shoulder and noted there is a bulge at L5-S1 and facet hypertrophy at L4-5. His impression indicated degenerative disc disease at L5-S1 with degenerative central herniation and facet hypertrophy, and mild stenosis; facet hypertrophy at L3-4 and L4-5 and cyst posterior to right facet joint at L2-3. He stated, “these findings are longstanding. No evidence to suggest that an acute traumatic injury was sustained.” Regarding his review of the cervical spine, he opined plaintiff has broad bulges at C2 through C7 and prior disc herniation at C6-7 indicative of stable diffuse degenerative disc disease with no evidence to suggest acute traumatic injury was sustained. He opined the MRI of her shoulder revealed fluid in joint, bursitis, and AC joint hypertrophy with bursal fraying of the bursal supraspinatus, which is degenerative, longstanding and not causally related to the accident.

Defendants also proffered the orthopedic report of Dr. Lisa Nason, dated September 26, 2019, a board certified orthopedic surgeon. Dr. Nason indicated she conducted an examination of the plaintiff on September 26, 2019. In the history, Dr. Nason noted,

She started treatments "a few days" after her injury. She does not feel better now, compared to when she started treatments. Her relief "varied" after her treatments. On a pain scale from 1 to 10 (10 being the worst) her pain is 9/10. She indicated she used pain medication today (ibuprofen) which did "not really" help with pain. She described the pain as burning, pulling and "squeezing." She has shooting pain from the neck to buttocks. She can walk maybe "1½ to 2" city blocks before being in too much pain. She has difficulty with stairs. She can sit for "about 60 minutes" before being in too much pain. Reaching overhead, bending, walking and "sitting" make the pain worse. She also experiences locking, buckling and weakness.

Dr. Nason also observed, plaintiff was using a straight cane and lumbar support. Dr. Nason determined plaintiff has significantly limited ranges of motion in the lumbar, thoracic and cervical spine and right shoulder abduction forward flexion. Nevertheless, she concluded there was evidence of symptom magnification, exaggerated complaints of pain and no signs of traumatic injury related to the accident, and in an unusual move, offered her availability to testify.

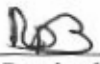
Co-defendant proffered the affirmation of Dr. Stephen Brenner, a board certified orthopedic surgeon, who examined plaintiff on June 5, 2019. He indicated he reviewed the bill of particulars and plaintiff's medical records. He also determined she had limited ranges of motion in her cervical, thoracic and lumbar spine. He concluded plaintiff's post spine surgery resolved with residuals, thoracic, lumbar, and bilateral shoulder sprain/strain resolved, and her prognosis was fair.

The court notes, defendants' medical experts failed to relate their findings to plaintiff's 90/180 claim and both Dr. Nason and Dr. Brenner examined plaintiff more than three years after the accident (*see Taylor v Taylor*, 87 AD3d 1129 [2d Dept 2011]). Further, Dr. Nason

completely ignored plaintiff's cervical fusion surgery, while Dr. Brenner acknowledged she suffers residuals from the surgery and her prognosis was fair. Accordingly, defendants failed to meet their prima facie burden of proof of establishing plaintiff did not suffer a serious injury (*see Asta v Eivers*, 280 AD2d 565, 566 [2d Dept 2001]). Denial of summary judgment is therefore warranted regardless of the sufficiency of plaintiff's opposition (*see Winegrad*, 64 NY2d at 853).

Therefore, the motion for summary judgment is denied.

ENTER:

 **HON. REGINALD A. BODDIE**
J.S.C.
Hon. Reginald A. Boddie
Justice, Supreme Court

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