Peerzada v Adnan
2020 NY Slip Op 35451(U)
September 30, 2020
Supreme Court, Queens County
Docket Number: Index No. 713894/2018
Judge: Lourdes M. Ventura
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SHORT FORM ORDER

FILED
10/5/2020
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COUNTY CLERK
QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

--X

SOMA PEERZADA,

Plaintiff,

-against-

SYED T. ADNAN,

Defendant.

--X

Index Number: 713894/2018

Motion Date: August 10, 2020

Motion Seq. No.: 2

The following electronically filed (EF) papers read on this Motion by Defendant Syed T. Adnan for an Order: pursuant to CPLR 3212 granting defendant's summary judgment and dismissing the complaint of the plaintiff on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d); and granting such other further relief as the court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF19-28
Opposition to Motion - Affirmation - Exhibits	EF30-56
Affirmation in Reply	EF57

Upon the foregoing papers, it is Ordered that defendant's Motion is determined as follows:

Plaintiff commenced the instant action to recover for damages allegedly sustained in a two-car collision which occurred on April 26, 2017 on or about the intersection of Melbourne Avenue and 152nd Street in the County of Queens. Plaintiff alleges that as a result of the collision plaintiff suffered serious injuries as defined by New York State Insurance Law Section 5102(d).

Defendant filed the instant motion, seeking an Order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of the plaintiff on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d). Defendant *inter alia* avers plaintiff did not sustain a serious injury.

Plaintiff opposes defendant's motion and *inter alia* avers that plaintiff's extensive medical treatment and the Exhibits submitted in opposition to defendant's motion contained thereto raise a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of the Insurance Law.

Pursuant to New York 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."

In order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot*, 57 NY2d 230 [1982]; *Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]).

However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. The findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d

708[3d Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364 [1st Dept 1998]). "A physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." *Tompkins v. Burtnick*, 236 A.D.2d 708, 652 N.Y.S.2d 911 (1997). Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Defendant avers that plaintiff did not sustain a serious injury and submits an independent medical evaluation report affirmed by Doctor Joseph C. Elfenbein, M.D., (hereinafter "Dr. Elfenbein") who performed an orthopedic examination of plaintiff on August 15, 2019 in support of its moving papers. The medical evaluation report from Dr. Elfenbein is dated August 5, 2019 and in pertinent part states:

"ORTHOPEDIC EXAMINATION:

Cervical Spine: There is no muscle spasm upon palpation over the paracervical muscles. There is no complaint of tenderness upon palpation over the paracervical muscles. Range of motion reveals flexion at 50 degrees (50 degrees normal), extension at 60 degrees (80 degrees normal), right lateral flexion at 45 degrees (45 degrees normal), left lateral flexion at 45 degrees (45 degrees normal), right rotation at 80 degrees (80 degrees normal), and left rotation at 80 degrees (80 degrees normal).

- Distraction - negative.
- Compression - negative.
- Jackson's - negative.
- Soto-Hall - negative.

Lumber Spine: There is no muscle spasm upon palpation over the paralumbar muscles. There is no complaint of tenderness upon palpation over the paralumbar muscles. Range of motion reveals flexion at 60 degrees (60 degrees normal), extension at 25 degrees (25 degrees normal), right lateral flexion at 25 degrees (25 degrees normal), and left lateral flexion at 25 degrees (25 degrees normal).

Left Shoulder: There are healed portals noted. There is no muscle atrophy, hypertrophy, effusion, asymmetry, swelling, or crepitus appreciated.

There is no complaint of tenderness upon palpation.

Active range of motion:

> Forward flexion at 80 degrees (180 degrees normal)
> Extension at 40 degrees (40 degrees normal)

> Abduction at 180 degrees (180 degrees normal)
> Adduction at 30 degrees (30 degrees normal)
> External rotation at 90 degrees (90 degrees normal)
> Internal rotation at 80 degrees (80 degrees normal)

OPINION:

The examinee presents with· a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties. Upon completion of the examination, Ms. Soma Peerzada offers no complaints as a result of this examination arid left the examining area stable and unchanged."

In opposition plaintiff submits an affirmation from Doctor Laxmidhar Diwan, M.D., (hereinafter "Dr. Diwan") dated April 3, 2020, which in pertinent part states:

"Due to continuing pain in her left shoulder, on March 10, 2020, Ms. Peerzada sought additional medical treatment from my office. During my most recent examination of Ms. Peerzada. on March 10, 2020 Ms. Peerzada continued to complain of left shoulder pain. The pain. is aggravated by excessive amount of physical activity and inclement weather. She has difficulty in lifting any heavy objects and is unable to do overhead activities. Impingement sign was positive.

Left shoulder range of motion studies (measured with a goniometer) conducted on March 10, 2020 revealed the following: plaintiff's maximum range of left shoulder flexion was 125 degrees (normal being 170 degrees) with a 26% deficit; plaintiffs maximum range of left shoulder abduction was 120 degrees (normal being 180 degrees) with a 33% deficit; plaintiff s maximum range of left shoulder extension was 35 degrees (normal being 60 degrees) with a 42% deficit; plaintiff's maximum range of left shoulder adduction was 10 degrees.(normal being 20 degrees) with a 50% deficit; plaintiff's maximum range of left shoulder external rotation was 60 degrees (normal being 100 degrees) with a 40% deficit; and plaintiffs maximum range of left shoulder internal rotation was 35 degrees (normal being 70 degrees) with a 50% deficit.

The aforesaid chronic pain, irritation and limitation of motion constitute a permanent consequential limitation of the left shoulder.

Additionally, after examining and treating this patient and after reviewing the relevant medical records, I can state to this court with a reasonable degree of medical certainty that plaintiff's left shoulder range of motion deficits set forth in paragraph thirteen (13) of my affirmation are causally related to the motor vehicle accident of April 26, 2017.

Further, I can state to this court with a reasonable degree of medical certainty that the plaintiff's accident of April 26, 2017 was and is the competent producing cause of Ms. Peerzada's permanent consequential limitation relative to her left shoulder. It is also my medical opinion that the plaintiff's injuries are permanent and result in restriction of use and activity of the left shoulder. In addition, it is my medical that the plaintiff's injuries result in permanent of her left shoulder."

In addition, Plaintiff also submits an affirmation from Doctor Lam Quan, M.D., (hereinafter "Dr. Quan") dated July 15, 2020,which in pertinent part states:

"In November of 2017 Ms. Peerzada advised me that her complaints and conditions related to the April 26, 2017 motor vehicle accident were persistent. At that point in time, it was clear that further therapy was only palliative in nature. As such, in November of 2017 I instructed Ms. Peerzada to continue to perform exercises at home and in November of 2017 the plaintiff discontinued her treatment with my office.

Due to worsening pain in her neck and back, on March 10, 2020. Ms. Peerzada sought additional medical treatment from my office. During my most recent examination of Ms. Peerzada on March 10, 2020 Ms. Peerzada continued to complain of pain in her neck, back and left shoulder. My most recent examination of Ms. Peerzada's cervical spine, conducted on March 10, 2020, revealed tenderness, trigger points at paraspinals, trapezii. Spurling's/Jackson's test was positive to the right. My examination of Ms. Peerzada's lumbar spine conducted on March 10, 2020 showed tenderness, trigger points at paraspinals. Straight leg raising test was positive to the right. Valsalva test was positive.

Cervical spine range of motion studies (measured with a goniometer) conducted on March 10, 2020 revealed the following: plaintiff's maximum range of cervical flexion was measured to be 40 degrees (normal being 50 degrees) with a 20% deficit; plaintiff's maximum range of cervical extension was measured to be 45 degrees (normal being 60 degrees) with a 25% deficit; plaintiffs maximum range of cervical right bending was measured to be 35 degrees (normal being 45 degrees) with a 22% deficit; and plaintiffs maximum range of cervical left bending was measured to be 40 degrees (normal being 45 degrees) with a 11% deficit.

Lumbar spine range of motion studies (measured with a goniometer) conducted on March 10, 2020 revealed the following: plaintiffs maximum range of lumbar flexion was measured to be 65 degrees (normal being 90 degrees) with a 28% deficit; plaintiff's maximum range of lumbar extension was measured to be 15 degrees (normal being 25 degrees) with a 40% deficit; plaintiffs maximum range of lumbar right bending was measured to be 20 degrees (normal being 25 degrees) with a 20% deficit; and plaintiffs maximum range of lumbar left bending was measured to be 25 degrees (normal being 25 degrees)

Further, I can state to this court with a reasonable degree of medical certainty that plaintiff's accident of April 26, 2017 was and is the competent producing cause of Ms. Peerzada's permanent consequential limitation relative to her cervical and lumbar region. It is also my medical opinion that the plaintiff's injuries are permanent and result in restriction of use and activity of the injured areas. In addition, it is my medical opinion that the plaintiff's injuries result in permanent limitation of her cervical spine, lumbar spine and peripheral nervous system.

Given the ongoing chronic nature of Ms. Peerzada's consequential limitations, the prognosis regarding SOMA PEERZADA is guarded, particularly in view of the fact that she has had pain with restriction of motion in the cervical spine and lumbar spine for nearly three years. The injuries to plaintiff's cervical spine and lumbar spine should be considered permanent."

Here, Dr. Elfenbein examined the plaintiff on August 15, 2019, almost seven (7) months before Dr. Diwan and Dr. Quan both conducted their respective examinations of plaintiff on March 10, 2020. Notably, Dr. Elfenbein concluded that plaintiff's cervical spine, lumber spine, and left shoulder did not have any range of motion deficits. In addition, Dr. Elfenbein further concluded that plaintiff presented "a normal orthopedic examination on all objective testing" and that the orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined." Dr. Elfenbein, further concluded that the plaintiff was "capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties."

In stark contrast, Dr. Diwan concluded range of motion deficits in plaintiff's left shoulder as outlined in Dr. Diwan affirmation cited above. Most significant, Dr. Diwan concluded in his opinion "that the plaintiff's injuries are permanent and result in restriction of use and activity of the left shoulder" and that "with a reasonable degree of medical certainty that the plaintiff's accident of April 26, 2017 was and is the competent producing cause of Ms. Peerzada's permanent consequential limitation relative to her left shoulder."

Similarly, Dr. Quan also concluded findings in stark contrast to those reported by Dr. Elfenbein. Dr. Quan reported range of motion deficits in plaintiff's cervical and lumbar spine as outlined in Dr. Quan affirmation cited above. In addition, Dr. Quan concluded in his opinion that

with "a reasonable degree of medical certainty that plaintiff's accident of April 26, 2017 was and is the competent producing cause of Ms. Peerzada's permanent consequential limitation relative to her cervical and lumbar region" and that "plaintiff's injuries result in permanent limitation of her cervical spine, lumbar spine and peripheral nervous system."

The Court finds that the conflicting medical reports submitted by the parties raises triable issues of fact as to whether plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Kraemer v Henning,* 237 AD2d 492 [1997])". *Garcia v. Long sland MTA,* 2 AD3d 675 [2d Dept 2003]; *Wilcoxen v. Palladino,* 122 AD3d 727, 728 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]. See also Cariddi *v. Hassan*, 45 A.D.3d 516, 517, 845 N.Y.S.2d 426, 427 (2007); *Gaviria v. Alvardo*, 65 A.D.3d 567, 568, 884 N.Y.S.2d 134, 136 (2009).

Accordingly, Defendant's motion for an Order pursuant to CPLR 3212 is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: September 30, 2020

HON. LOURDES M. VENTURA, J.S.C.

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