

Minh-Ngoc T. Nguyen v Zebrowski
2021 NY Slip Op 30792(U)
March 11, 2021
Supreme Court, Kings County
Docket Number: 504595/2019
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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MINH-NGOC T. NGUYEN,

Plaintiff,

– against –

Index No.: 504595/2019
Motion Date: 03/10/2021
Motion Seq.: 03

DECISION AND ORDER

WOJCIECH ZEBROWSKI, VLAD RESTORATION
LTD and LUAN VAN TRAN,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 53-63 and 69-74 were read on this motion for summary judgment.

In this action to recover damages for personal injuries, remaining defendants Wojciech Zebrowski and Vlad Restoration LTD move for an Order pursuant to CPLR § 3212 on the ground that plaintiff did not suffer a serious injury pursuant to Insurance Law § 5102(d). The plaintiff filed an opposition. For the reasons set forth below, the motion is denied.

This action arises out of a motor vehicle accident that occurred on Meeker Avenue at the intersecting street of Morgan Avenue in Brooklyn, New York on April 17, 2017. Ms. Nguyen claims in her verified bill of particulars that, as a result of this accident, she suffered injuries to her left shoulder and lumbar and cervical spine, including severe post traumatic tendinosis of anterior fibers of the supraspinatus in the left shoulder; severe post traumatic disc herniation at L5-S1 with impingement in the ventral epidural space causing severe foraminal stenosis in the lumbar spine; severe post traumatic disc herniation at C4-C5 and C5-C6 with impingement on the thecal sac in the cervical spine; and other miscellaneous injuries such as neck and hip pain. Plaintiff further alleges that these injuries are permanent in nature and that she was confined to bed and home following the accident.

In support of their motion, the defendants offer the pleadings, the bill of particulars, the deposition transcript of the plaintiff, and IME reports by Drs. Earl Faierman and Paul Lerner. Dr. Faierman, a board certified orthopedist, examined the plaintiff on August 18, 2020, over three years after the accident. Dr. Faierman states that he reviewed, inter alia, the bill of particulars, acupuncture notes, medical records, and MRI reports. In a report dated November 5, 2020, Dr. Faierman stated that he performed range of motion testing with the use of a goniometer and found limited ranges of motion in the cervical spine: right and left lateral flexion of 20 degrees (normal 45 degrees); right lateral rotation of 10 degrees and left lateral rotation of 30 degrees (normal 80 degrees for each); extension of 10 degrees (normal 60 degrees), and flexion of 10 degrees (normal 50 degrees). However, Dr. Faierman found full ranges of motion in the lumbar spine: 60 degrees of flexion (normal 60 degrees); 30 degrees of right and left rotation (normal 30 degrees for each); 25 degrees of lateral flexion (normal 25 degrees); and 25 degrees

of extension (normal 25 degrees). Dr. Faierman also found full ranges of motion in the shoulder: 180 degrees flexion (normal 180 degrees); 180 degrees of abduction (normal 180 degrees); internal rotation of 80 degrees (normal 80 degrees); and external rotation of 90 degrees (normal 90 degrees). Dr. Faierman also noted that testing the plaintiff's extremes of range of motion in her shoulders caused pain in her cervical spine. Dr. Faierman opined that the losses in range of motion in the cervical spine are "suggesting a degenerative component" but also stated that he had not reviewed the MRI films. In conclusion, Dr. Faierman opined that there was no objective evidence of a disability, permanency, or residuals.

Dr. Paul Lerner also examined the plaintiff. In a report dated July 21, 2020, Dr. Lerner stated that he measured the plaintiff's range of motion with inclinometers and an arthroidal protractor and compared these values with those published in the American Medical Association "Guides To The Evaluation of Permanent Impairment." Dr. Lerner noted that subjective cervical range of motion tests showed 15 degrees of flexion (50 degrees normal); 5 degrees of extension (60 degrees normal); 15 degrees of left rotation (80 degrees normal); and 15 degrees of right rotation (80 degrees normal). Dr. Lerner further stated that the subjective lumbar range of motion test showed 15 degrees of flexion (60 degrees normal) and 5 degrees of extension (25 degrees normal). Dr. Lerner concluded that this neurologic examination failed to reveal objective abnormalities that would support plaintiff's complaints, and that the examination revealed "poor effort suggesting embellishment" on the part of the plaintiff.

The defendants also submit the deposition testimony of the plaintiff, in which she states that the accident caused pain to her back and neck, and that she felt that her neck was swollen when she was at home following the accident. *See* NYSCEF Doc. No. 60, pg. 30. Plaintiff also testified that, since the accident, she mostly stays home and chooses not to go out because of her back pain. *Id.* at pg. 45. The plaintiff further testified that the pain she experiences radiates throughout her body. *Id.* at pg. 48-49. The plaintiff also stated that she continues to wear a neck support for several hours per day, four to five days per week. *Id.* at pgs. 64-65. Plaintiff further testified that she was not experiencing any back pain in the ten years prior to the accident, and that the pain only came about after the accident. *Id.* at pgs. 79-80. The plaintiff further states that she did not have limitations before the accident but now cannot lift supermarket bags heavier than five pounds, bend down, use a vacuum, or sweep the floor. *Id.* at pgs. 87-89.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendant has the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of the defendant's examining physician(s), or plaintiff's sworn testimony, or by the affirmed reports of the plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendant's medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Here, the defendants failed to meet their prima facie burden as to the category of a significant limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a serious injury. *Partlow v Meehan*, 155 AD2d 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). “[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation.” *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); see *Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648.

Using objective testing, the defendants’ own medical experts, Drs. Faierman and Lerner, both recorded a decreased range of motion of the plaintiff’s cervical spine. In addition, Dr. Lerner found a limited range of motion in the plaintiff’s lumbar spine. Considering the reports of the defendants’ own doctors, which find decreased range of motion in the plaintiff’s spine, in tandem with the plaintiff’s testimony, in which she states that she has difficulty performing everyday activities such as lifting supermarket bags heavier than five pounds, bending, using a vacuum, or sweeping the floor, the Court cannot conclude that the defendant is entitled to judgment as a matter of law under the Insurance Law. See *Holtz v Y. Derek Taxi*, 12 AD3d 486 (2d Dept 2004) (defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within Insurance Law § 5102(d) where one of the defendant’s examining physicians reported finding limitations of range of motion of plaintiff’s cervical spine); see also *Servones v Toribio*, 20 AD3d 330 (1st Dept 2005); *Meyer v Gallardo*, 260 AD2d 556 (2d Dept 1999). Moreover, neither doctor asserted with any certainty that injuries to the plaintiff’s cervical spine were degenerative in nature, as Dr. Faierman, who did not review the MRI films, merely stated that degeneration was “suggested” by the results.

Furthermore, since the defendants failed to meet their prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff’s opposing papers in this regard. See *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 (1985); *Fils-Aime v Colombo*, 152 AD3d 493 (2d Dept 2017); *Scinto v Hoyte*, 57 AD3d 646 (2d Dept 2008).

Finally, regarding the defendants’ argument that there has been a gap in treatment, plaintiff testified that she was forced to stop treating at her physical therapy office because her insurance would no longer pay for treatment, and that she would like to continue receiving treatment but can no longer afford it. See NYSCEF Doc. No. 60, pgs. 49-50. This constitutes a sufficient explanation for the plaintiff’s gap in treatment. *Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2d Dept 2007); *Black v Robinson*, 305 AD2d 438 (2d Dept 2003).

In light of the foregoing, the defendants’ motion for summary judgment is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) is **DENIED**.

This constitutes the decision and order of the Court.

DATED: March 11, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.