

Scala v Nadler

2021 NY Slip Op 33412(U)

October 29, 2021

Supreme Court, Westchester County

Docket Number: Index No. 69464/2017

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
FANNY E. SCALA,

Plaintiff,

-against-

DECISION & ORDER

Index No. 69464/2017

Seq. # 3 & 4

MARIA NADLER, Executor of the Estate of SAVINO A,
NAPOLITANO and SOFIA C. CASROSCALA,

Defendants.
-----X

The following papers were read and considered in deciding the present motion:

- Notice of Motion/Statement of Material Facts/Affirmation/Exhibits A-G
- Affirmations in Opposition/Exhibits A-M
- Memorandum of Law in Opposition
- Reply Affirmation
- Notice of Motion/Affirmation/Exhibits A-C
- Affirmations in Opposition/Exhibits A-M
- Memorandum of Law in Opposition

Upon the foregoing papers it is ordered that the motions are

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Fanny E. Scala ("Scala/plaintiff"), commenced this action on November 27, 2017, to recover monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on November 29, 2014, while she was a passenger in a vehicle owned and operated by Sofia C. Castroscala ("Castroscala") and that vehicle collided with another vehicle owned and operated by Savino A. Napolitano, now deceased and substituted by Maria Nadler, Executor of the Estate of Savino A.

Napolitano (the "Estate").

The defendants now file the separate motions for summary judgment pursuant to CPLR 3212, seeking dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d).

In support of the motion, the Estate relies upon, *inter alia*, the plaintiff's deposition testimony, an independent medical examination ("IME") report, medical records, an attorney's affirmation, copies of the pleadings and other Court documents. Castroscala adopts, incorporates, and relies upon the legal arguments, supporting case law and statutes, the medical records and reports and supporting documentation and exhibits of the Estate.

The Estate, by its attorney, argues that Scala's injuries do not constitute a serious injury under Insurance Law § 5102(d). She argues that, according to the medical records, the plaintiff only sustained sprains, strains, disc bulging, disc herniation, neck/back pain and she did not suffer any fractures or dislocations. Further, the attorney alleges that Scala was confined to her home, bed and incapacitated from her employment for two weeks and partially/intermittently thereafter to date, but has not provided any physician notes stating that she is unable to work or if such confinement was necessary. The attorney asserts that the plaintiff is currently working on a part-time basis as a housekeeper, performing duties without any limitations and she testified to going on vacation to Peru for 20 days in 2018. The attorney further asserts that the plaintiff has not received any chiropractic treatment since January 9, 2015 and no surgeries nor injections. Castroscala's attorney adopts all arguments.

The plaintiff, by her attorney, opposes the motion arguing that the defendants have not met their prima facie burden with respect to the plaintiff's lack of a serious injury and even if they have met their burden, there are issues of fact raised by the medical submissions, requiring a jury's determination. The attorney asserts that both of the defendants' doctors' reports attest to significant range of motion deficiencies in the cervical, thoracic and lumbar spines, and causally relate the injuries to the accident. The attorney contends that the medical submissions show that Scala's injuries have resulted in both permanent consequential limitations and significant limitations of the use of her back, as well as a drop foot and impaired proprioception, causing a tripping hazard.

Further, the plaintiff asserts that her daily activities were substantially curtailed for over ninety of the first one hundred eighty days following the occurrence and continues to be curtailed. The plaintiff's attorney also argues that the defendant's doctors did not review all of the plaintiff's medical records and the doctors omit any discussion of the plaintiff's disabilities and limitations in daily activities during the first 180 day following the accident. The attorney next argues that the doctors fail to discuss or establish causation of the abnormalities and injuries suffered by the plaintiff, other than the subject accident.

In reply, the Estate's attorney states that the plaintiff's counsel's argument that the doctors failed to review the records in its entirety, has no leverage and the independent examination reports are based on both the plaintiff's medical records provided and the physical examinations of the plaintiff. The attorney further argues that, notwithstanding the doctors stating that the plaintiff's injuries are causally related to the subject accident, they relied on the plaintiff's subjective complaints and were not

present on the date of the accident, nor could they ascertain the force of the impact.

The attorney argues that the ultimate prognosis of cervicogenic headaches, cervical and lumbar sprains/strains, clearly do not rise to the level of a serious injury.

The plaintiff's bill of particulars alleges the following injuries:

C40-5 broad-based contral disc herniation; L5-S1 broad-based disc bulge; L3-4 broad-based contral disc bulge that encroaches upon the left neural foramen; straightening of the lumbar lordosis; C6-7 central disc herniation; C3-4 disc bulge; C4-5 disc bulge; C5-6 disc bulge; C7-11 disc bulge; limitation of range of motion to cervical spine; limitation of range of motion to lumbar spine; weakness to cervical spine; weakness to lumbar spine; tingling to upper extremities; numbness to upper extremities; numbness to lower extremities; severe pain and tenderness to neck; severe pain and tenderness to lower back; mid-sternal chest pain; mid-lower C-spine tenderness; headaches; limitation of range of motion to affected body parts; soft tissue injuries to affected areas.'

All of the above associated with further soft tissue injury to the areas traumatically affected, including tearing, derangement and damage to the associated muscle groups, ligaments, tendons, blood vessels and blood supplies, nerves and nerve tissues, with resultant pain, deformity and disability, stiffness, tenderness, weakness, restriction and limitation of motion, pain on motion, loss of use of the parts, shock to the body and nervous system, arthritis and atrophy. Plaintiff may require future surgery, and all of the injuries and sequella are permanent.

Plaintiff was principally confined to her bed and/or home for a period of approximately two weeks, excluding any visits to her healthcare providers and then partially and intermittently thereafter. Plaintiff was totally and partially disabled for a period of 90 days from the date of the accident and partially and intermittently thereafter to date.

Discussion

"[T]he 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" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the

denial of the motion regardless of the sufficiency of the opposing papers, (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

“Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (*see Mgrditchian v Donato* , 141 AD2d 513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

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 of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines “serious injury” as

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. (McKinney's Insurance Law §5102[d])

“The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury.” (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). “[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law” (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition...provided that 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 (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, a fracture, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiff alleges that she sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent

nature which prevented her from performing substantially all of the material acts which constitute her 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.

The defendants argue that the plaintiff did not sustain any injuries corresponding to those categories and submitted the affirmed report of Vikas Agrawal, M.D., a Board Certified Neurologist, who performed an independent examination on the plaintiff on January 27, 2021, and John R. Denton, M.D., a Board Certified Orthopedist, who performed an independent examination on the plaintiff on February 8, 2021.

Dr. Agrawal examined Scala using a goniometer and recorded range of motion of the cervical spine flexion at 35 degrees (50 normal), extension 40 degrees (60 normal), right and left lateral flexion 35 degrees (45 normal) and right and left lateral rotation 60 degrees (80 normal). Dr. Agrawal further recorded range of motion of the thoracic spine of 35 degrees (45 normal), extension 0 (0 normal), right and left lateral rotation 20 degrees (30 normal). Dr. Agrawal recorded range of motion of the lumbar spine of 40 degrees (60 normal), extension 20 degrees (25 normal), right and left lateral flexion 20 degrees (25 normal). Supine straight leg raising test and sitting straight leg raising test were both normal and the Lesegue's test was negative. All other tests were recorded as normal. Dr. Agrawal's impression for Scala was cervicogenic headaches, cervical spine sprain and strain, lumbar spine sprain and strain.

Dr. Agrawal concluded that there are no objective findings on the neurological physical examination, no objective findings for cervical or lumbar radiculopathy or cauda equina syndrome, a normal neurological examination, mild restriction of range of motion

of the spine, due to age-related degenerative disc disease. Dr. Agrawal opined that, taking into consideration the history, a review of the medical records and the physical examination, the diagnoses are causally related to the accident on November 29, 2014, but there is no medical necessity for additional neurological treatment or diagnostic testing for the alleged injuries sustained on November 29, 2014. Dr. Agrawal further opined that Scala has no neurological disability and is not disabled from working or from activities of daily living.

Dr. Denton also examined the plaintiff with a goniometer/inclinometer and recorded range of motion for the cervical spine of 45 degrees (50 normal, extension 45 degrees (60 normal), right lateral flexion 25 degrees (45 normal), left lateral flexion 25 degrees (45 normal), right rotation 80 degrees (80 normal) and left rotation 80 degrees (80 normal). Dr. Denton reported no atrophy; muscle strength of the biceps, triceps, finger flexors and wrist extensors 5/5 bilaterally; deep tendon reflexes at 2+; and sensation to light touch intact. Dr. Denton recorded a complaint of mild tenderness of the right ribs upon palpation, with no respiratory difficulty, no crepitus of the ribs and no crepitus in the sternum/sternoclavicular junctions.

Dr. Denton's impression is that Scala's cervical spine sprain/strain is resolved; and her chest/ribs contusion is resolved. Dr. Denton concluded that, based upon the history provided and findings on examination, there is a causal relationship between the accident of record and Scala's reported injuries. Dr. Denton concluded that there is no evidence of causally related orthopedic disability and is capable of working without restrictions. He further concluded that Scala can perform her activities of daily living as she was doing prior to the accident, but consistent with age and there were no objective

findings to support Scala's subjective complaints of pain.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a 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.

The plaintiff's IME by Dr. Agrawal revealed range of motion deficiencies in the plaintiff's cervical, thoracic and lumbar spine and the plaintiff's IME by Dr. Denton revealed range of motion deficiencies in the plaintiff's cervical spine and mild tenderness of the right ribs upon palpation. The Estate's physicians failed to address the range of motion deficiencies, except Dr. Agrawal stated, in a conclusory manner, that the decreased range of motion was mild and due to age-related degenerative disc disease. Dr/ Agrawal failed to note the limp in the plaintiff's gait, but Dr. Denton noted it, which confirms the plaintiff's contention that she has a ankle drop, which has manifested itself in a limp. The physicians did not review all of the plaintiff's records and the Estate's attorney failed to address this in the reply papers.

The physicians stated that the plaintiff's injuries have been resolved, but they both stated that the plaintiff's injuries were causally related to the subject accident. The

conclusion of the defendants' examining physicians were belied by the findings of limitations in range of motion in the plaintiff's cervical, thoracic and lumbar spine, existing more than six years after the subject accident (*Jenkins v Miled Hacking Corp.*, 43 AD3d 393 [2d Dept 2007]). Further, since the Estate's own experts conceded that, based on the physical examination and the medical records reviewed, that the resolved injuries were causally related to the subject accident, the burden does not shift to Scala to raise a triable issue of fact regarding causation or to explain any gaps in treatment (*Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept 2019]). Since, the defendants did not meet their burden, there is no need to address the sufficiency of the plaintiff's papers in opposition with regard to these categories.

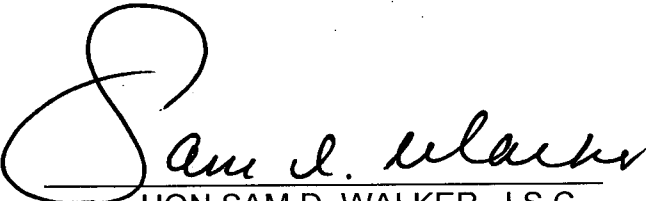
Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion for summary judgment is DENIED.

The parties are directed to appear before the Settlement Conference Part on a date to be scheduled in the future.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
October 29, 2021



HON SAM D. WALKER, J.S.C.