

Meade v Holahan

2021 NY Slip Op 33451(U)

May 20, 2021

Supreme Court, Westchester County

Docket Number: Index No. 52533/2019

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
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
KENNETH C. MEADE and
STACY DETHOMASIS-MEADE,

Plaintiff,

DECISION and ORDER
Index No. 52533/2019
Seq # 3 & 4

-against-

CINDY A. HOLAHAN, JOSE GUAMAN MORA, and
GUAMAN MORA GENERAL SERVICES, LLC,

Defendants.

-----X
JOSE E. GUAMAN and MAGDALENA CHUQUI,
Plaintiff,

Index No. 60075/2019

-against-

CINDY A. HOLAHAN,

Defendant.

-----X
The following papers were read on the motions (Sequence# 3 & 4) for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment in favor of the defendants, General Services LLC, Jose Guaman and Cindy Holahan, dismissing the verified complaint against them:

- Notice of Motion/Affirmation in Support/Exhibits A-I
- Affirmation in Opposition/Exhibits A-M
- Reply Affirmation

Factual and Procedural Background

This action arises out of a motor vehicle accident, which occurred on December 15, 2018, on the Interstate 95, at or near the 5 mile marker in the City of New Rochelle, Westchester County, New York State. The plaintiffs commenced the action on February 13, 2019, by filing a summons and verified complaint. By Order dated November 26, 2019, this Court granted a motion to consolidate this action with Index No. 60075/2019 (Guaman

v Holahan) for the purpose of a joint trial.

The plaintiffs' bill of particulars alleges the following serious injuries:
Kenneth Meade - severe right knee injury; posterior horn medial meniscus tear; posterior horn lateral meniscus tear; tri compartmental chondromalacia right knee; extreme swelling right knee; debilitating pain right knee; surgical procedures, including a right total knee replacement; surgical scarring; limitation of motion; difficulty in ambulation; extensive period of rehabilitation will be required; cervical spine sprain and strain; left shoulder sprain and strain; and restriction of motion cervical spine.
Stacy Dethomasis-Meade - right shoulder injury; labral tear right shoulder; teninosis right shoulder; thoracic outlet syndrome; herniated cervical disc; tremors in hands; persistent numbness into left arm with cold feeling and shaking of hand more than right hand; brachial plexus stretch injury; dropping objects due to uncontrollable shaking of left hand; fine motor issues with left hand and arm; constant numbness and tingling into left hand; and extensive physical therapy and medication required.

The defendants, General Services LLC and Jose Guaman, now file the instant motion pursuant to CPLR 3212 granting summary judgment in their favor, dismissing the complaint, arguing that the injuries claimed by the plaintiffs do not satisfy the serious injury threshold requirement of the Insurance Law § 5102(d) and even if the plaintiffs' injuries were to be objectively proven, overriding factors demonstrate that the plaintiffs have not sustained a serious injury as a result of the subject accident. The defendant, Cindy Holahan, also files a motion for summary judgment pursuant to CPLR 3212, dismissing the complaint and all cross-claims against her, on the grounds that there are no triable issues of fact as to the claims against her and the plaintiffs do not meet the serious injury threshold of the Insurance Law, as defined in Section 5202.

In opposition, the plaintiffs argue that the medical evidence submitted on behalf of the plaintiffs, establishes that they have sustained causally related serious injuries, as defined in Section 5102(d) of the Insurance Law and triable issues of fact exists. All defendants submit a reply, further arguing for dismissal of the complaint and cross-claims.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also*, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

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....(NY 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. (NY 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 plaintiffs did not suffer death, dismemberment, significant

disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiffs would be claiming 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; significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constitute their 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 plaintiffs had pre-existing injuries not causally related to the incident.

In support of the motion, the defendants submit the reports Richard D. Semble, M.D., an orthopedic surgeon who conducted an independent orthopedic surgery examination of Kenneth Meade ("Mr. Meade") on July 23, 2020 and an independent orthopedic evaluation of Stacey Meade ("Ms. Meade") also on July 23, 2020.

Dr. Semble states that Mr. Meade reports injuring his right knee, neck and left shoulder. He reports having had prior right knee complaints and a prior cortisone injection a year before the accident and has undergone physical therapy and a right total knee replacement in May 2019. Dr. Semble reports that Mr. Meade has no complaints to the knee, neck or left shoulder and takes no pain medications. Dr. Semble's examination showed normal range of motion in the cervical spine, shoulders and the right knee demonstrates a well-healed midline incision with 0° to 120° of motion, normal extensor strength and no instability.

Dr. Semble diagnosed that Mr. Meade sustained a cervical sprain, which is resolved with no subjective or objective residual; a left should sprain, that has resolved, both from an objective and subjective point of view and is causally related; and a contusion of the right knee, with a well-documented history of pre-existing osteoarthritis, which was symptomatic for a year prior to the accident. Dr. Semble states that he does not believe the contusion plays any role in Mr. Meade's need for a knee replacement with an arthritic knee, as demonstrated on the x-ray and MRI scan and that a knee replacement would have been required irrespective of the knee contusion. Dr. Semble states that Mr. Meade is not in need of any further treatment with regard to his right knee and there is no disability attributable to the accident and would characterized the right knee as a temporary aggravation to an underlying osteoarthritic knee.

Turning to Ms. Meade, Dr. Semble states that Ms. Meade had complaints of the neck, right shoulder and left arm pain and a low back pain, which resolved. She has no lower extremity complaints and had a laceration on her right shin, but did not require any treatment for any lower extremity injuries. Ms. Meade has been receiving physical therapy because of the accident, except most recently, due to Covid-19. She has had diagnostic studies for the right shoulder and left arm, takes ibuprofen and had some prior visits to the chiropractor. She also had pain in her right shoulder and a cortisone injection administered prior to the accident.

Dr. Semble's examination of Ms. Meade shows normal range of motion in her lumbar and cervical spine, with mild tenderness on the left side in her cervical spine. Her right shoulder demonstrates tenderness with abduction 90/180°, forward flexion 120/180°, internal rotation 60/70°, external rotation 80/80° and has 5/5 strength within the limitations of range of motion. He reports full right elbow and wrist motion, with normal grip strength and no sensory deficit in the right arm. Ms. Meade's left shoulder demonstrates full physiologic range of motion. She has a feeling of coldness in the left arm and drop signs of the left arm. The left arm numbness and heaviness and coldness is triggered when she drives and she has swelling in her fingers. She has 5/5 strength of shoulder, elbow and wrist, there is no sensory deficit, no swelling, deformity, discoloration or temperature asymmetry, no hypersensitivity in the left arm with negative Tinel's and Phalen's Sign.

Dr. Semble diagnosed Ms. Meade with evidence of tendonitis of the right shoulder, but evidence of a right shoulder injury immediately pre-dating the accident of record, requiring a cortisone shot just three months prior to the date of the accident. Dr. Semble opines that her ongoing limitations may very well be on the basis of a pre-existing condition to the right shoulder and that based on the proximity of the previous treatment to the date of the accident, it is likely that any residuals she is experiencing at this point are due to the pre-existing condition. He opines that no further physical therapy is warranted for the right shoulder.

Dr. Semble also reports that Ms. Meade had a cervical and lumbar sprain, which have resolved, has ongoing subjective complaints consistent with neurologic issue to the left arm. He states that, from an orthopedic point of view, she is not in need of any treatment for the right shoulder, neck or back and the ongoing issues with regard to the left arm are neurogenic in origin and the specifics for any ongoing need for treatment can be addressed by the appropriate specialty. Dr. Semble opines that there is no orthopedic treatment required for the left arm. Dr. Semble opines that the lumbar and cervical injury are solely related to the subject accident and the preexisting condition is not related to the accident.

In opposition, the plaintiffs submit the report of Dr. Jason Hochfelder, who states that he first saw Mr. Meade on January 4, 2019, approximately three weeks after the motor vehicle accident. He states that Mr. Meade reports occasional on and off knee pain prior to the accident, but most days the pain was a 0 out of 10 and after the accident, it was an 8 out of 10 in severity. Dr. Hochfelder reports that Mr. Meade began taking an anti-inflammatory medication almost every day and when he examined Mr. Meade, he had severely limited range of motion with knee flexion only to 100°, pain on forced flexion of the knee and medial and lateral joint line tenderness. Dr. Hochfelder states that the x-rays taken on that date revealed severe arthritis in the patellofemoral compartment of the right knee, as well as mild arthritis in the medial and lateral compartments of the right knee. The doctor performed a cortisone injection into his right knee and referred him for a course of physical therapy.

Dr. Hochfelder states that Mr. Meade reported that he was able to return to work

when he saw him on February 7, 2019, but it was extremely difficult and painful and they decided to continue physical therapy to avoid knee replacement surgery. Dr. Hochfelder next saw Kenneth on April 1, 2019, at which point Mr. Meade reported to continuing to take anti-inflammatory medication on most days and his range of motion had not improved, continuing to have crepitus and pain on forced flexion on exam. At that point Mr. Meade decided to proceed with a right total knee replacement.

Dr. Hochfelder states that while Mr. Meade had some pre-existing arthritis in his right knee, he is not aware of any indication that he was anywhere close to needing a total knee replacement prior to the accident on December 15, 2018. He states that many patients who have severe arthritis in their knees do not have symptoms severe enough to warrant undergoing a knee replacement and many patients are able to manage their symptoms conservatively without surgery. Dr. Hochfelder states that Kenneth had well-controlled manageable arthritis in his right knee that may never have led to the need for a total knee replacement and the car accident led to a severe exacerbation of symptoms, which ultimately led to the need for a total right knee replacement. Dr. Hochfelder opines with a reasonable degree of medical certainty, that the need for a total right knee replacement, is directly causally related to the accident of December 15, 2018.

Gabriel L. Dassa, D.O., F.A.A.O.S, a board certified Orthopedic Surgeon, examined Ms. Meade and found restricted range of motion in her cervical spine and right shoulder, measured with a handled goniometer. Dr. Dassa states that his examination revealed findings of cervical nerve root irritation, as evidenced by positive Spurling test; fasciculations to the left hand, consistent with brachial plexus injury; and findings of persistent adhesive capsulitis. Dr Dassa opines with a reasonable degree of medical certainty, that the findings represent objective evidence of persistent orthopedic impairment to Ms. Meade's neck, left arm, left hand, and right shoulder. Dr. Dassa states that if the history provided in the medical record is accurate, that the accident on December 15, 2018, is a competent cause of Ms. Meade's injuries and orthopedic impairments. Dr. Dassa further opines that, given the nature of the injuries with continued subjective pain and abnormal physical findings, the impairments remain significant and are permanent.

Upon review and viewing the facts in the light most favorable to the plaintiffs, 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 plaintiffs 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; and significant limitation of use of a body function or system.

Although, Dr. Semble states that there is a well-documented history of pre-existing osteoarthritis, he does not state with a reasonable degree of certainty that the contusion played a role in the claimant's need for a knee replacement. Instead, Dr. Semble states that he does not believe that it played a role. His opinion is not definite and there is an issue of fact as to whether Mr. Meade would have required surgery even without the

accident. The range of motion is resolved because Mr. Meade had a knee replacement and it is for a finder of fact to determine the issue of whether the plaintiff's injury was exacerbated by the accident. Dr. Semble does not provide any documentary evidence nor reasoning or basis for his opinion, but simply states in a conclusory manner that he does not believe the knee replacement would have been necessary.

With regard to Ms. Meade, Dr. Semble's own examination, using a goniometer, revealed significant decreased range of motion in cervical spine and right shoulder. Further, Dr. Semble states that there are ongoing issues with regard to the left arm, which are neurogenic in origin and need to be addressed by the appropriate specialty. No such specialty report was provided. Dr. Semble also states that Ms. Meade had electrodiagnostic testing on February 19, 2019, which showed no evidence of radiculopathy or neuropathy, but that such testing is not sensitive for brachial plexus injury, which is a complaint of Ms. Meade. Dr. Semble also clearly state that the lumbar and cervical injury are solely related to the accident of December 15, 2018. The doctor simply states in a conclusory manner that the post accident MRI of the left shoulder revealed preexisting chronic changes and in his opinion the left shoulder surgery was not related to the accident of December 6, 2016.

The issues presented are to be decided by the trier of fact and are not questions of law. Additionally, the plaintiffs' bill of particulars states that their injuries aggravated prior underlying conditions. Therefore, the plaintiffs claiming an exacerbation or aggravation of their prior conditions, which the defendants have failed to establish did not occur as a matter of law. Since, the defendants have failed to make a prima facie showing, the Court need not address the adequacy of the plaintiffs' opposition.

However, with regard to any claims of alleged injuries that prevented the plaintiffs from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following their alleged injuries, such is denied.

To sustain impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constitute their 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, plaintiffs must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiffs did not offer any medical evidence to support a claim that they were unable to perform substantially all of their usual and customary activities under this category and his bill of particulars states that neither were confined to bed as a result of the accident, but both were confined to home for a period of approximately three weeks. Such does not meet the requirement for this category. Therefore, there is no evidence to show that the plaintiffs sustained an injury in

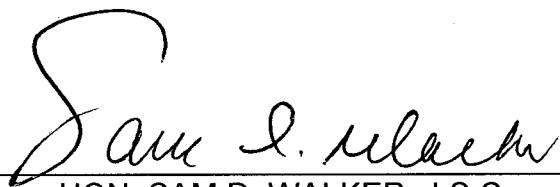
this category.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the motion for summary judgment is denied in part and granted in part.

The parties are directed to appear before the Settlement Conference Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
May 20, 2021


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