Genao v Jetter
2021 NY Slip Op 34019(U)
April 19, 2021
Supreme Court, Bronx County
Docket Number: Index No. 24039/2019E
Judge: Veronica G. Hummel
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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 BRONX IAS PART 31

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DIANA GENAO,

Plaintiff,

-against -

JONATHAN J. JETTER, MICHAEL MARTINEZ, ABDELADIM NOURIA and CITY LIVERY,

Defendant.

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Index No. 24039/2019E
DECISION/ORDER

Motion Seqs 1, 2

VERONICA G. HUMMEL, A.J.S.C.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motions by defendants ABDELADIM NOURIA and CITY LIVERY [Mot. Seq. 1], and defendants MICHAEL MARTINEZ and JONATHAN JETTER [Mot. Seq. 2], both made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff DIANA GENAO ("plaintiff") has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This action is for alleged serious personal injuries arising from a car accident that occurred on September 19, 2018, at the intersection of Lafayette Avenue and South Portland Avenue, in Kings County ("the Accident"). Plaintiff alleges that she was a front-seat passenger in a motor vehicle owned by defendant Martinez and driven by defendant Jetter ("the Martinez Vehicle") when the Martinez Vehicle was hit in the front by a car driven by defendant Nouria and owned by defendant City Livery ("the City Livery Vehicle").

In the bills of particulars, in relevant part, plaintiff alleges that as the result of the Accident she suffered injuries to the cervical and lumbar spines, and the right shoulder. Plaintiff alleges that she was prevented from performing all usual and customary activities not less than 90 days during the 180 days immediately following the Accident. Plaintiff argues that these injuries satisfy the following Insurance Law 5102(d) threshold

categories: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiff fails to address the ground of permanent loss of use on this motion, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not allege a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

While plaintiff has the burden of establishing a *prima facie* case of "serious injury" at trial (*Licari v Elliott*, 57 NY2d 230 [1982]), defendants on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a "serious injury" as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Brown v Mat Enterprises of N.Y. Inc.*, 97 AD3d 401 [1st Dept 2012]). Defendants bear the initial burden of establishing the absence of a "serious injury" as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*McElroy v Sivasubramaniam*, 305 AD2d 944 [3d Dept 2003]). If defendants meet this burden, defendants have established *prima facie* entitlement to summary judgment.

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a "serious injury" (*Franchini v Palmieri*, *supra*; *Shinn v Catanzaro,* 1 AD3d 195 [1st Dept. 2003]; *see Cabrera v Ahmed*, 189 AD3d 403 [1st Dept 2020]). Specifically, plaintiff must demonstrate that there is a "serious injury" under the Insurance Law, that summary judgment is not warranted, and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed (*see Pommells v Perez*,4 NY3d 566 (2005); *Tusu v Leone*, 187 AD3d 655 [1st Dept 2020]).

Defendants, joined together on the motions, seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) as a result of the Accident. Defendants argue that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motions are supported by the pleadings,

the bill of particulars, deposition transcripts, and the medical reports of Dr. John R. Denton (orthopedic surgeon) (dated 01/15/2020), and Dr. Jessica F. Berkowitz (radiologist) (dated 08/16/2019).

Dr. Denton bases his opinion on the details of a physical examination conducted on January 15, 2020, approximately two years post-Accident, and the plaintiff's bill of particulars. He avers that there were no legally authenticated medical records available for his review. In terms of the cervical spine, the doctor finds that plaintiff has decreased extension, right lateral flexion, left lateral flexion, right rotation and left rotation at various levels from 5-10 degrees. The results of all of the objective tests were negative.

As for the lumbar spine, the expert finds a no complaint of tenderness and pain. The range of motion examine reveals a decrease in extension of 10 degrees. The objective tests and the neurological examination of the bilateral lower extremities are negative.

In terms of the right shoulder, plaintiff underwent right shoulder surgery on October 24, 2018. The expert finds a decrease in flexion, abduction at 150 and 15 degrees, and internal rotation of 10-30 degrees.

In the "impression" section of the report, the expert finds that: the cervical spine and lumbar sprain are resolved; and the status post-right shoulder arthroscopic surgery is "healed'. He finds no evidence of orthopedic disability, permanency or residuals, and concludes that plaintiff can perform her activities of daily living as she was doing before the Accident. He opines that "decreased ranges of motion are as allowed by the claimant".

In her report dated August 16, 2019, Dr. Berkowitz reviews plaintiff's MRI studies of the lumbar spine (dated 11/5/2018), and thoracic/cervical spine (dated 03/21/2014). In terms of the lumbar spine, she opines that the study shows a minimal disc bulge at L5-S1 with no other disc bulges or herniations. The disc bulge is chronic and degenerative in nature and there is no evidence of acute traumatic injury to the lumbar spine. She

concludes that the evaluation of the MRI examination reveals no causal relationship between the findings on the MRI and the Accident.

As for the thoracic/cervical MRI, it was taken on March 21, 2014, years before the Accident. The expert finds disc bulges in the cervical spine from C3-C4 through C6-C7. No disc herniations are noted in the thoracic spine, and a minimal disc bulge is detected at T10-T11. The impression is that there is a straightening of the normal cervical lordosis and there appear to be at least disc bulges from C3-C4 through C6-C7.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; *see Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

In opposition, plaintiff submits photographs and the expert report of Dr. Richard E. Pearl (orthopedic surgeon), dated June 9, 2020, and argues that the evidence constitutes proof of a permanent consequential limitation related to the Accident as to the right shoulder. Plaintiff also contends that she was unable to perform the functions of daily living for 90 out of the first 180 days after the Accident as proven by her continued treatment of two years.

Based on the medical evidence, plaintiff's evidence raises triable issues of fact as to her claims of "serious injury" only as to the right shoulder (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's expert shows that plaintiff received medical treatment for the claimed injury after the Accident, and that she had substantial limitations in motion to the shoulder after the Accident and at the recent examination by plaintiff's expert in May 2020, and that future surgery may be required (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert specifically finds that the right shoulder injury was produced by the Accident, resulting in a decreased range of motion. The expert finds that the right shoulder injury is significant and causally related to the Accident and permanent in nature, and that the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances,

plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury based on the right shoulder under threshold category of permanent consequential limitation. Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]).

In contrast, defendants establishes *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony that she was confined to a bed for 45 days post-Accident. Plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra).*

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motions by defendants ABDELADIM NOURIA and CITY LIVERY [Mot. Seq. 1] and defendants MICHAEL MARTINEZ and JONATHAN JETTER [Mot. Seq. 2], both made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff DIANA GENAO did not sustained a "serious injury" as defined by Insurance Law 5102(d) are denied except as to the 90/180 claim.

Dated: April 19, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 04/19/2021
Hon. Veronica Hummel. A.J.S.C.