

Lugo v Alam
2022 NY Slip Op 32793(U)
August 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 521296/2019
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

ILIANA LUGO,

Plaintiff,

DECISION/ORDER

-against-

MOHAMMED N. ALAM, KYLE PETTONI,
and MELANIE L. HODGE,

Index No. 521296/2019

Motion Seq. No. 2 & 3

Date Submitted: 5/20/2022

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motions for summary judgment.

Papers	NYSCEF Doc.
Notices of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>41-49; 50-57</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>61-66, 73</u>
	<u>67-72, 74</u>
Reply Affirmations.....	<u>75, 76</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising from an automobile accident that occurred on March 7, 2017, on Morgan Avenue, at or near the intersection with Maujer Street in Brooklyn, New York. At the time of the accident, plaintiff was driving her vehicle on Morgan Avenue. Plaintiff testified that she was stopped at a red light when she experienced two impacts to the rear of her vehicle, which caused the front of her vehicle to strike the vehicle in front of her, operated by defendant Alam, twice. The plaintiff alleges that the vehicle that struck her from behind was owned and operated by defendants Pettoni and Hodge. The plaintiff testified that as a result of the first impact, the front of her car "tapped" the rear of the car in front of her, and she further testified that as a result of a second, very strong impact to the rear of her vehicle, the front of her car was pushed

under the rear of the vehicle in front of her. Plaintiff did not request an ambulance and her son picked her up from the scene of the accident. She testified that the following morning she sought treatment at Beth Israel Hospital. She subsequently sought medical treatment with her primary care physician and received physical therapy and chiropractic care.

In her bill of particulars, the plaintiff claims that, as a result of the accident, she injured her neck, back and right shoulder.¹ At the time of the accident, the plaintiff was 45 years old. At her deposition, she testified that she was not employed at the time of the accident, as she was disabled as a result of prior medical issues regarding one of her lungs and chronic asthma [Doc 47, p. 9-10; 30-13].

Defendant Alam moves for summary judgment dismissing the complaint [MS #2]. Co-defendants Pettoni and Hodge also move the court, in a motion which is incorrectly designated as a cross-motion (the motion is not made against the moving party), for an order also granting them summary judgment and dismissing the complaint [MS #3]. In both motions, the defendants contend that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d).

In support of his motion, defendant Alam submits an attorney’s affirmation, copies of the pleadings, the plaintiff’s bills of particulars, the plaintiff’s deposition transcript, an affirmed report from Dr. Dana Mannor, an orthopedist, who examined the plaintiff on behalf of defendant Alam, and an affirmed report from Dr. Darren Fitzpatrick, a radiologist, who reviewed the MRI of the plaintiff’s right shoulder, but not the MRIs of her cervical spine, lumbar spine, or her left shoulder.

¹ There appears to be some confusion regarding the plaintiff’s shoulder injury claims. There are references in her papers and medical records to injuries to both shoulders, and plaintiff clearly had MRIs of both shoulders. Although her bill of particulars only mentions the right shoulder, she testified that it was her left shoulder that she complained about in the emergency room and Dr. Ross, her examining physician, only discusses her left shoulder.

Defendants Pettoni and Hodge join in co-defendant Alam's application, essentially adopting and repeating what was presented and argued in Alam's motion. In support of their motion, in addition to what they adopt from the co-defendant's motion, defendants Pettoni and Hodge offer an attorney's affirmation, a copy of the summons and complaint, the plaintiff's bills of particulars, and an affirmed report from Dr. Howard Kiernan, an orthopedist, who examined the plaintiff on behalf of defendants Pettoni and Hodge.

Dr. Mannor examined the plaintiff on March 3, 2021, almost exactly four years after the accident. He tested the range of motion in the plaintiff's right shoulder, but not her left shoulder, and her cervical and lumbar spine, and reports completely normal results. In his report, he states that the only document he reviewed was the plaintiff's bill of particulars, but none of her medical records. His impression was that the plaintiff sustained a cervical spine sprain/strain, a lumbar spine/sprain, and a right shoulder sprain/strain, all of which have resolved. He opines that "[t]here is no evidence of orthopedic disability, permanency or residuals" and that the plaintiff "can perform her activities of daily living as she was doing prior to the accident." However, although he opines that the plaintiff sustained cervical and lumbar sprains and strains, he fails to mention, comment, or opine on the plaintiff's specific claims of cervical and lumbar disc herniations and bulges, which plaintiff claims were caused by the accident. The court notes that Dr. Mannor's report is silent on the issue of whether the plaintiff's injuries are causally related to the accident.

The defendant's radiologist, Dr. Fitzpatrick, did not examine the plaintiff. He only reviewed the MRI film of the plaintiff's right shoulder, but not the MRIs of the plaintiff's cervical or lumbar spine [Doc 49] or her left shoulder. He concluded that the right shoulder MRI demonstrated "[r]otator cuff tendinosis with findings of subacromial impingement," which he opines "is a non-traumatic entity that is the result of chronic overuse, resulting in

protracted tendon degeneration over the course of months to years” and is “an acquired degenerative condition with no traumatic basis.” Inexplicably, Dr. Fitzpatrick did not review the MRIs of the plaintiff’s cervical or lumbar spine or of her left shoulder. As such, the plaintiff’s claims of disc herniations at the C4-5, C5-6 and L5-S1 levels, as well as bulging discs at the C3-4, T12-L1, L1-2, L2-3, and L3-4 levels, were not addressed by defendant Alam’s radiologist or his orthopedist. Nor were her claims of injuries to her left shoulder.

Dr. Kiernan, the orthopedist who examined the plaintiff on behalf of defendants Pettoni and Hodge, examined the plaintiff on May 13, 2021, more than four years after the accident. He tested the range of motion in the plaintiff’s right shoulder, cervical spine, and lumbar spine, and reports completely normal results. In his report, he states that, in addition to the plaintiff’s bill of particulars, he reviewed other orthopedic evaluations that were conducted by him on 09/12/2017, 12/19/2017 and 03/27/2018, the results of which are not mentioned, and none of which are provided for the court to review. Perhaps this is an error. He states that he also reviewed plaintiff’s medical records, including neurological studies/testing, reports/records from Dr. Pernier, the plaintiff’s primary care physician, ultrasound test results, and the reports from the MRIs of the plaintiff’s left and right shoulders, her cervical spine, and her lumbar spine. Dr. Kiernan’s impression was that the plaintiff sustained a cervical spine sprain/strain, a thoracic sprain/strain, a lumbar spine/sprain, and a right shoulder sprain/strain, all of which have resolved. He opines that “[t]here were no positive objective findings noted on today’s examination to support subjective complaints of pain. Based on today’s findings, further orthopedic care including physical therapy is not appropriate or medically necessary as the claimant’s injuries have resolved without any objective evidence of orthopedic residuals.” Although he opines that the plaintiff’s sprains and strains have resolved, he fails to comment or opine on the plaintiff’s

specific claims of cervical and lumbar disc herniations and bulges, which plaintiff claims were caused by the accident. The court notes that Dr. Kiernan does causally relate the plaintiff's injuries to the subject accident, and also notes that the plaintiff had no pre-existing conditions that would have contributed to her injuries. "Within reasonable medical probability, the proximate cause of the diagnosed injuries was as a result of the motor vehicle accident. The mechanism of injuries supports the diagnosis based on both subjective and objective complaints. There is no evidence of any contributing pre-existing conditions, prior injuries that impact on the current injuries."

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's bill of particulars and her deposition testimony are clear that she was not employed on the date of the accident. At the plaintiff's deposition, which was taken more than four years after the subject accident occurred, the attorney for defendant Alam asked the plaintiff if her day-to-day activities were limited in any way, referring to the time of the deposition, but he failed to inquire if or how the plaintiff's usual and customary daily activities were affected during the first six months following the accident. Counsel for defendants Pettoni and Hodge asked no questions regarding whether the plaintiff's injuries interfered with her usual and customary daily activities. "The plaintiff's deposition testimony, which was also annexed to the defendants' summary judgment motion, was insufficient to establish the defendants' burden of proof that the plaintiff had no injury in the 90/180 category" (*Scinto v Hoyte*, 57 AD3d 646 [2d Dept 2008]).

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, Dr. Fitzpatrick only reviewed the MRI of the plaintiff's right shoulder, despite the fact that she also had MRIs of her left shoulder, cervical spine, and lumbar spine, and claims she sustained injuries to those parts of her body. As he did not review the MRIs of the plaintiff's cervical or lumbar spine, and Dr. Mannor did not review the plaintiff's medical records at all, the plaintiff's claims of disc herniations at the C4-5, C5-6 and L5-S1 levels, as well as bulging discs at the C3-4, T12-L1, L1-2, L2-3 and L3-4 levels were not addressed by defendant Alam's radiologist or his orthopedist. Although co-defendants' orthopedist, Dr. Kiernan, refers to the cervical and lumbar MRIs, and repeats the MRI findings in his report, he fails to address the plaintiff's claims that as a result of this accident, she sustained disc herniations and bulges.

As such, the court finds that the reports of Dr. Mannor, Dr. Fitzpatrick and Dr. Kiernan are insufficient to establish that the plaintiff did not sustain a serious injury to her cervical and lumbar spine and to her left shoulder as defined in Insurance Law § 5102(d). Neither orthopedist tested the range of motion in plaintiff's left shoulder, it is noted.

When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if the defendants had met their prima facie burden for summary judgment, plaintiff would have been found to have overcome the motions, as there are triable issues of fact raised by her submissions in opposition to the motions. There are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion. In particular, Dr. Ross, an orthopedic surgeon who examined the plaintiff in January of 2022, and reviewed the plaintiff's MRI films in April of 2022, notes in his affirmed report that, when compared to "normal," the plaintiff's range of motion in her neck, back and left shoulder were all restricted, with the most significant reduction in her lower back. Dr. Ross opines that the injuries to the plaintiff's neck and back are "permanent in nature and that she is likely to continue to suffer these symptoms as well as exacerbations of variable intensity and severity." Regarding the plaintiff's left shoulder, Dr. Ross states that the plaintiff is "suffering from impingement upon the rotator cuff and that she has a partial tear of the supraspinatus tendon," and opines that "this condition is permanent in nature, and that she is likely to continue to suffer these symptoms and require further treatment."

In his report, Dr. Ross also states that he disagrees with the findings of defendant Alam's radiologist, Dr. Fitzpatrick, who attributed the plaintiff's MRI findings and injuries to degeneration, stating "I disagree with the findings of Dr. Fitzpatrick that the injuries of Ms. Lugo are due to degeneration. In my opinion, to a reasonable degree of medical certainty, these films show tendinopathy, subscapularis, supraspinatus tendons, intrasubstance cyst infrapinatus, subacromial bursitis and impingement in the left shoulder, herniated disc at C4-C5 in the cervical spine and herniated disc at L5-S1 in the lumbar spine that are causally related to her motor vehicle accident of 3/7/17 and not due to degeneration or a pre-existing condition." Finally, Dr. Ross concludes his report by opining that "following my review of the medical records and physical examination of the patient, I do believe that these injuries are

causally related to the motor vehicle accident described above and that they are permanent in nature.”

Accordingly, it is **ORDERED** that the defendants’ motions are both denied.

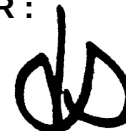
The court must note that the papers indicate confusion as to whether the plaintiff injured her left shoulder, her right shoulder, or both. It seems the confusion started when the plaintiff’s attorney served plaintiff’s bill of particulars, which only reflects an injury to her right shoulder. She had MRIs of both shoulders but testified at her EBT that it was her left shoulder which was injured. As a result of this error, neither of defendants’ orthopedists examined her left shoulder.

The court has determined that it would be unjust to make this comment and then do nothing about it, as this case is ready for trial. So that the plaintiff will not suffer as a result of her attorney’s failure to supplement the bill of particulars to correct it to reflect a claim of injury to the left shoulder, the court hereby grants the plaintiff permission, if she wishes to, to supplement her bill of particulars to substitute the left shoulder injury for the right shoulder injury, provided it is filed in NYCEF on or before September 22, 2022, and the defendants are granted permission to conduct an additional independent medical exam of plaintiff, limited to the plaintiff’s left shoulder.

This constitutes the decision and order of the court.

Dated: August 18, 2022

ENTER :



Hon. Debra Silber, J.S.C.