

Leardi v Munoz

2022 NY Slip Op 33762(U)

October 31, 2022

Supreme Court, New York County

Docket Number: Index No. 153395/2020

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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AMANDA COUSO LEARDI, MATTHEW LEARDI,

Plaintiff,

- v -

IRENE G MUNOZ, RASIER-NY, LLC, UBER
TECHNOLOGIES, INC.

Defendant.

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INDEX NO. 153395/2020

MOTION DATE 06/24/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by the sole remaining defendant Irene G Munoz’s (Munoz) motion for summary judgment and dismissal of the complaint against her pursuant to CPLR 3212 on the grounds that plaintiff Amanda Couso Leardi (Plaintiff) did not sustain a serious injury as defined by Insurance Law 5102 (d) is granted.¹ Plaintiff did not file written opposition.

Plaintiff commenced this action alleging she sustained serious injuries to her neck, back, and left rotator cuff as defined by Insurance Law 5102 (d) as a result of a motor vehicle accident on August 14, 2019, caused by defendants’ negligence. Following the accident, Plaintiff sought treatment for her injuries from chiropractors Drs. Abrams, Piazza, and Julewicz. Plaintiff underwent arthroscopic surgery with orthopedic surgeon Dr. Gregory Montalbano on November 13, 2019. Plaintiff also underwent an MRI examination at Radiology Services of New York with her chiropractor, Dr. Julewicz.

Plaintiff’s bill of particulars alleges injuries to her left shoulder, lumbar spine and cervical spine. Plaintiff avers that these injuries meet the following Insurance Law 5102 (d) criteria:

¹ A stipulation of discontinuance against co-defendants Rasier-NY, LLC and Uber Technologies, Inc., was filed on November 4, 2021 (NYSCEF DOC. NO.: 24).

permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day categories.

Munoz submits her motion for summary judgment asserting that Plaintiff did not sustain serious injuries within Insurance Law 5102 (d). Munoz alleges that the injuries for which Plaintiff is seeking relief are not causally related to the underlying accident. In support of her motion, Munoz proffers the affirmed medical reports of orthopedist Dr. Arnold Berman who examined Plaintiff on December 16, 2021 and neurologist Dr. Robert April who examined Plaintiff on December 15, 2021. Munoz also attached Plaintiff's medical records from her chiropractors, Drs. Abrams, Piazza, and Julewicz, who Plaintiff saw in relation to her injuries after the accident.

The 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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). In order to satisfy their burden under Insurance Law 5102 (d), plaintiffs must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002] where the court found that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"). Insurance Law 5102 (d) outlines the serious injury threshold:

a personal injury which results in ... 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 nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Under the no-fault law, a plaintiff can maintain an action for non-economic loss, including pain and suffering, arising from a motor vehicle accident only if the accident caused a serious injury (*Licari v Elliott*, 57 NY2d 230 [1982]).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of

serious injury (*see Licari, supra*, and *Lopez v Senatore*, 65 NY2d 1017 [1985]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

When a claim is raised under the permanent loss or limitation of use of a body organ or member, significant limitation of use of a body function or system, or the 90/180 category, it can be substantiated by a medical expert's assigned numeric percentage of the loss of range of motion showing the extent or degree of the plaintiff's physical limitation. An expert may also offer a qualitative assessment, upon an objective basis, of a plaintiff's condition compared to the normal function, purpose and use of the affected body organ, member, function or system (*Toure* at 352; *Lopez*, 65 NY2d 1017; *Ramos v Dekhtyar*, 301 AD2d 428 [1st Dept 2003]). The expert must indicate what objective medical tests s/he performed to measure the range of motion restrictions (*Lloyd v Green*, 45 AD3d 373 [1st Dept 2007]).

In this case, Munoz has established that Plaintiff has not sustained a serious injury. The physicians' affirmations detail the objective measures used in reaching their conclusions.

Defendant's orthopedist, Dr. Arnold T Berman, reviewed the bill of particulars, Drs. Abrams, Piazza and Julewicz's report, Dr. Gregory Montalbano's general and operative report, MRI scans taken of Plaintiff's C spine, L shoulder and L spine, EMG report, ultrasound of Plaintiff's neck, an X-ray of Plaintiff's left shoulder, and conducted an independent medical examination (IME) of Plaintiff on December 16, 2021. In examining Plaintiff, Dr. Berman found that Plaintiff had normal range of motion in her cervical spine, lumbar spine, right and left shoulders, right and left hands, and right and left wrists. The range of motion measurements that he performed were done with a handheld goniometer as recommended by the American Academy of Orthopedic Surgeons. Dr. Berman noted that the MRI of Plaintiff's left shoulder, dated August 23, 2019, showed a low-grade partial tear of the rotator cuff, which was resolved clinically with the normal exam. There was no aggravation to MRI findings of multilevel, preexisting degenerative disc disease, osteoarthritis, foraminal stenosis, discogenic disease, bulging discs, spinal canal stenosis seen at lumbar L4-5 and L5-S1 on MRI dated 08/23/19 and cervical C4-C7 seen on the MRI dated 08/23/19. Dr. Berman concluded that there were no objective findings to substantiate Plaintiff's subjective complaints of pain and that Plaintiff "did not sustain any permanent injury and has no disability as a result of the accident of 08/14/19."

Defendant's neurologist, Dr. Robert S April, reviewed the bill of particulars, chiropractic progress notes and initial evaluation from Drs. Abrams, Piazza and Julewicz, diagnostic reports and CD images from Radiology Services of New York, procedure report from Regional Orthopedics, Dr. Montalbano's report, and conducted an independent medical exam of Plaintiff on December 15, 2021. Dr. April concluded that any back strain or sprain Plaintiff may have experienced is resolved. Dr. April noted that the mild protrusion found in the cervical spine was degenerative, as was the minimal desiccation in the lumbar spine. Plaintiff's neurological, cranial nerve, motor and mechanical examinations all reported within normal range. All range of motion measurements were done with reference to an orthopedic goniometer pursuant to the 6th Edition of the AMA Guidelines. Dr. April also noted that although Plaintiff denied preexisting medical conditions, his review of the records provided found preexisting low back pain for which she received chiropractic treatment in July 2017, which could have been exacerbated by the accident. Dr. April's exam found no objective evidence to support an injury to the cervical and lumbar spine, showed full range of motion of the left shoulder and no residual pain. Dr. April concluded that Plaintiff is "independent in (her) activities of daily living and works full time without any restrictions." Dr. April's IME revealed evidence of a preexisting lower back condition which is a degenerative condition. However, plaintiff offers no rebuttal evidence.

As Plaintiff did not submit an opposition to this motion, there is no triable issue of fact as to whether Plaintiff sustained a serious injury to her left shoulder, and lumbar and cervical spine that was causally related to the accident (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). Munoz has met the prima facie burden through the affirmations of Dr. April, who found that the injuries to the spine were degenerative and Dr. Berman, as well as Dr. April, who found that there was no causality between the injuries to the spine, neck and shoulder and the August 14, 2019 accident under the categories of permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day (*Rabb v Mohammad*, 132 AD3d 527 [1st Dept 2015]) [holding defendants met their prima facie burden by submitting a radiologist's affirmation who opined that the MRI of the plaintiff's spine showed disc bulge of degenerative origin]; *Kendig v Kendig*, 115 AD3d 438 [1st Dept 2014] [plaintiff could not produce prima facie evidence because he failed to show causality of the injuries to the accident at issue].

As such summary judgment is granted in favor of the sole remaining defendant Munoz and Plaintiff's complaint against Munoz is hereby dismissed.

Accordingly, it is hereby

ORDERED that Munoz's summary judgment motion is granted as to Plaintiff's claim of serious injury to her left shoulder, lumbar and cervical spine under the permanent loss or limitation of use of a body organ or member, significant limitation of use of a body function or system, or the 90/180 categories of Insurance Law 5102 (d); and it is further

ORDERED that the complaint against Munoz is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Irene G Munoz dismissing the complaint against her in this action; and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this decision and order upon all parties with notice of entry.

This constitutes the Decision and Order of the Court.

10/31/2022

DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE