

Allen v Lopez

2022 NY Slip Op 34030(U)

November 15, 2022

Supreme Court, New York County

Docket Number: Index No. 158938/2019

Judge: James G. Clynnes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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SERENE BROWN ALLEN

Plaintiff,

- v -

NOE LOPEZ,

Defendant.

INDEX NO. 158938/2019

MOTION DATE 02/10/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, it is ordered that the motion by defendant, Noe Lopez (Defendant), for summary judgment and dismissal of the complaint based on the grounds that Plaintiff has failed to satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) on the issue of serious injury to dismiss Plaintiff's complaint is denied, except as to the 90/180-day category under Insurance Law 5102 (d). Plaintiff opposes the motion.

Plaintiff commenced this action alleging she sustained serious injuries within the meaning of Insurance Law 5102 (d) as a result of an October 27, 2018 motor vehicle accident between Plaintiff's vehicle and a vehicle operated by Defendant.

Plaintiff's Bill of Particulars alleges she sustained the following injuries: C3/4 through C5/6, posterior annular disc bulges deform the ventral thecal sac and posteriorly there are ligamentous hypertrophic changes contributing to mild central stenosis; bilateral foraminal narrowing at C5/6; L1/2 through L4/5 posterior annular disc bulges flattening the ventral thecal sac and proximal right foraminal extension of the disc bulge at L4/5 below the level of the exiting nerve root; posterior central disc herniation at L5-S1 and S2 deforming the ventral thecal sac and extending peripherally with abutment of the traversing SI nerve roots. Plaintiff avers that her injuries meet the serious injury threshold under Insurance Law 5102 (d).

Defendant submits her motion for summary judgment asserting that Plaintiff did not sustain serious injuries within Insurance Law 5102 (d). Defendant alleges that the injuries for which Plaintiff is seeking relief are not causally related to the underlying accident. In support of her motion, Defendant proffers the affirmed medical report of neurologist, Dr. Roger A Bonomo, who examined Plaintiff on September 13, 2021.

On a motion for summary judgment, the defendant bears the initial burden of establishing, through competent medical evidence, that the plaintiff did not sustain a serious injury as a result of the subject accident (*see Antepara v Garcia*, 194 AD3d 513 [1st Dept 2021]). If this threshold burden is met, the plaintiff must bring forth objective medical evidence sufficient to raise a triable issue of fact regarding the existence of a serious injury (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]; *Cortez v Bray*, 192 AD3d 451 [1st Dept 2021]). When a “serious injury” claim is raised under Insurance Law 5102 (d), 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; *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 (*Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520 [1st Dept 2007]).

Defendant has met her prima facie burden demonstrating that Plaintiff’s injuries failed to meet the serious injury threshold under the 90/180 category of Insurance Law 5102 (d) by annexing Plaintiff’s deposition testimony wherein she states that she returned to work on the third day following her accident and that she experiences no difficulty caring for her newborn child, carrying gear, changing diapers, etc. (NYSCEF DOC NO 19). In her testimony, Plaintiff did note difficulty sitting for long periods of time as a result of her pain and limitations in that she is unable to perform certain activities such as lifting heavy piles of paperwork, lifting her 30-pound child, and bending over are insufficient to create an issue of fact (*see Reyes v Park*, 127 AD3d 459, 461 [1st Dept 2015] [holding in part that plaintiff’s “claimed limitations, such as his inability to clean his house or play dominoes, were not “substantially all” of his usual and customary daily activities”]). There is no competent medical evidence before the Court demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]).

With regard to the significant limitation category of serious injury under Insurance Law 5102 (d), Defendant has failed to establish prima facie that Plaintiff did not sustain a serious injury. Defendant's neurologist, Dr. Roger A Bonomo, reviewed relevant records prior to his examination of Plaintiff, including Plaintiff's Bill of Particulars, Lawrence Hospital Emergency Room records, and physical therapy notes and records. In examining Plaintiff, Dr. Bonomo found that Plaintiff had normal range of motion of the neck, normal cranial nerves 2-12, no muscle atrophy, normal muscle strength and tone, and active and equal reflexes. However, Dr. Bonomo's report fails to list normal ranges of motion that would permit a court to make a comparison and gauge the significance of the alleged loss or limitation (*Toure* at 272). Dr. Bonomo does not mention whether he used a device such as a goniometer or an inclinometer to measure the extent or degree of physical limitation and their duration or state any basis for his comparison (i.e., whether he compared plaintiff's range to the normal active range of motion based on the American Medical Association's "Guidelines to the Evaluation of Permanent Impairment"). Therefore, in the absence of any showing that Dr. Bonomo performed any objective range of motion test on Plaintiff's back and neck, Dr. Bonomo's opinions that Plaintiff's medical history and that his conclusions based on the neurological exam are consistent with "resolved muscle strains at most. There is no objective evidence of injury to any part of the nervous system or spine..." are merely speculative and conclusory (*Reyes v Diaz*, 82 AD3d 484, 484 [1st Dept 2011] [Defendants failed to make a prima facie showing where defendants' orthopedic surgeon failed to indicate the objective tests used to determine the range of motion in plaintiff's hip]; *Taylor v Terrigno*, 27 AD3d 316 [1st Dept 2006][failure to raise material issue of fact where medical submissions contained no numerical ranges of motion, did not describe qualitative nature of plaintiff's limitations and did not identify objective tests used in making diagnosis]).

Even if Defendant's expert report was not deficient, and the burden shifted, Plaintiff's submission raises an issue of fact through Plaintiff's affidavit, the chiropractor affidavit of Dr. Neal Goldsmith, the chiropractic records of Dr. Richard G Harvey, Plaintiff's treating chiropractor, the MRI reports, and Dr. Ronald Wagner's affirmation. Dr. Goldsmith's affidavit specifically notes that Plaintiff's "injuries are clearly a result of the accident that occurred on 10/27/18" (NYSCEF DOC NO 29), which is sufficient to raise an issue of fact (*see Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]). Accordingly, based on the foregoing it is hereby

ORDERED that Defendant's motion for summary judgment is DENIED except as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law 5102 (d); and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

11/15/2022

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