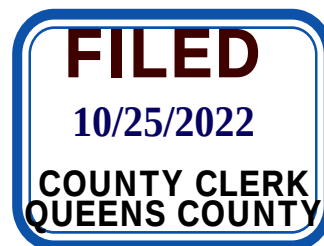


Valenzuela v Singh
2022 NY Slip Op 35203(U)
October 21, 2022
Supreme Court, Queens County
Docket Number: Index No. 704155/2019
Judge: Sally E. Unger
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SALLY E. UNGER
Justice

IA Part 24



IRIS VALENZUELA,

Index Number 704155/2019

Plaintiff,

- against -

Motion Date: 4/21/2022

LAKHWINDER SINGH,

Motion Seq. No. 3

Defendant.

The following numbered papers were read on this motion by defendant for an order granting summary judgment and dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in the Insurance Law §§5104(a) and 5102(d).

	Papers Numbered
Notice of Motion – Affidavits – Exhibits	EF 24 – 40
Answering Affidavits – Exhibits	EF 48 – 54
Reply Affidavits – Exhibits	EF 55

Upon the foregoing papers it is ordered that the motion is determined as follows:

BACKGROUND

This is a personal injury action in which plaintiff seeks to recover damages for injuries she allegedly sustained as a result of a motor vehicle/pedestrian collision that occurred on August 17, 2018, at or near the intersection of Woodhaven Boulevard and Jamaica Avenue, Queens County, New York. At the time of the incident, plaintiff was a pedestrian crossing the crosswalk when she was struck by defendant's motor vehicle. Plaintiff commenced this action by the filing of a summons and verified complaint on March 10, 2019. In her bill of particulars, plaintiff alleges that she sustained injuries to her 1) left shoulder; 2) left knee; and 3) cervical spine and lumbar spine.

DISCUSSION

Whether a plaintiff has sustained a "serious injury" within the meaning of Insurance Law §5102(d) is initially a question of law for the court (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865(2002); *Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). A defendant also may establish entitlement to summary judgment

using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2nd Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2nd Dept 1994]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy, supra*; *Pagano v. Kingsbury*, 182 AD2d 268, 587 NYS2d 692 (2nd Dept, 1992); see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Under the Insurance Law §5102(d), a "serious injury" is defined as one which results in (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system or a medically determined injury; or (4) impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that 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 (see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]).

In support of his motion, the defendant submits pleadings, bill of particulars, plaintiff's examination before trial transcript, an independent examination and evaluation reports of Dr. Pierce Ferriter, an orthopedic surgeon and Dr. Scott A. Springer, a radiologist.

On June 29, 2021, Dr. Ferriter conducted an independent orthopedic examination of plaintiff. Dr. Ferriter concluded that the orthopedic examination is objectively normal and indicated no findings which would result in orthopedic limitations in use of the body parts examined. He opined plaintiff's left knee was healed, and further plaintiff is capable of functional use of the examined body parts for normal activities of daily living. He reported there is no disability or permanency.

On February 2, 2019, Dr. Springer conducted an independent radiological evaluation of plaintiff who evaluated the records one month and 11 days after the collision. Dr. Springer noted that the plaintiff denied undergoing prior surgeries. Dr. Springer concluded the plaintiff's injuries to the left knee, cervical spine, lumbar spine and right shoulder were caused by degeneration, there was no evidence of traumatic injury, and they were not causally related to the accident.

Based upon the review of Dr. Ferriter's and Dr. Springer's reports, which will be discussed *infra*, the court finds defendant has established his prima facie burden of demonstrating plaintiff did not sustain a serious injury within the meaning of the Insurance Law §5102(d).

The burden now shifts to plaintiff to establish the existence of a triable issue of material fact. In opposition, the plaintiff submits plaintiff's affidavit, an affirmed MRI report from CitiMed, an affirmed surgical report of orthopedic surgeon Dr. Aron Rovner, an affirmed medical report of orthopedic surgeon Dr. Shahid Mian and an affirmed medical report of physician Dr. Alred Smith, as well as physical therapy medical records from Metro Pain Specialists PC and City Anesthesia Healthcare, PC.

The court will not consider plaintiff's counsel's affirmation entitled 'summary of case' because it appears plaintiff's counsel has addressed a different plaintiff from a different case not related to the plaintiff herein and the subject action. Rather, the court will consider the plaintiff's medical records and her affidavit.

On October 26, 2018, Dr. Rovner performed an arthroscopic surgery for the plaintiff. In his affirmation, Dr. Rovner opined plaintiff's injuries to her left shoulder, left knee, cervical and lumbar spines, as well as her left knee surgery, were causally related to the incident of August 17, 2018; and not due to a preexisting condition or degeneration.

On January 14, 2022, Dr. Mian conducted an orthopedic consultation with the plaintiff and reviewed plaintiff's medical records. He concluded plaintiff's injuries are causally related to the occurrence on August 17, 2018, and that the injury to her left knee is permanent.

In his affirmation, Dr. Smith opined plaintiff's injuries to her left shoulder, left knee, cervical and lumbar spines were causally related to her incident of August 17, 2018.

Gap In Treatment

Defendant argues that plaintiff underwent medical treatment for her alleged injuries for approximately eight (8) months - from August 2018 until April 2019 - and plaintiff did not receive treatment again until January 14, 2022, creating a 33-month gap in treatment.

Even if objective medical proof of injury exists, the chain of causation between the incident and the claimed injury maybe broken by, e.g., "a gap in treatment, an intervening medical problem or a pre-existing condition" (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). "While a cessation of treatment is not dispositive - the law surely does not require a record of needless treatment in order to survive summary judgment - a plaintiff who terminates therapeutic measures following the incident, while claiming "serious injury," must offer some reasonable explanation for having done so" (*id.*).

In opposition, plaintiff alleges she discontinued medical treatment, because her no-fault benefits terminated. This answer is the "bare minimum" required to raise an issue regarding "some reasonable explanation" for the discontinuance of treatment (see *Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905, 976 NYS2d 1 [2013]).

Permanent Consequential Limitation of Use and Significant Limitation of Use

[T]o prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury....An expert's *qualitative* assessment of a plaintiff's condition also may suffice, 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 (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002], citing *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]).

Evidence of a soft tissue injury alone is insufficient to establish a serious injury, there must be additional objective medical evidence establishing the incident resulted in significant physical limitations (see *Pommells* at 574; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2nd Dept 2011]; *Larson v Delgado*, 71 AD3d 739, 897 NYS2d 167 [2nd Dept 2010]). For these two statutory categories, the Court of Appeals has held, whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Toure*, at 353, quoting *Dufel*, at 798).

Defendant maintains plaintiff has not suffered a serious injury based on defendant’s expert medical findings that her condition was degenerative. An aggravation of a pre-existing condition or injury may constitute “serious injury” pursuant to Insurance Law §5102(d). Nevertheless, the defendant may establish prima facie entitlement to summary judgment by presenting “persuasive evidence that plaintiff’s alleged pain and injuries were related to a preexisting condition” (*Pommells, supra*), and “were not caused or exacerbated by the subject accident” (*Sanclemente v. MTA Bus Co.*, 116 AD3d 688, 983 NYS2d 280 [2nd Dept 2014]; see, *Little v. Ajah*, 97 AD3d 801, 949 NYS2d 109 [2nd Dept 2012]; *Rodgers v. Duffy*, 95 AD3d 864, 944 NYS2d 175 [2nd Dept 2012]). Where the defendant has demonstrated prima facie that the plaintiff’s condition was not caused or exacerbated by the subject incident, to survive summary judgment, the plaintiff must “explain, in a specific and nonconclusory manner, how the subject accident exacerbated the plaintiff’s preexisting condition” (*Inzalaco v. Consalvo*, 115 AD3d 807, 982 NYS2d 165 [2nd Dept 2014]).

Where the defendant has presented expert medical evidence that the plaintiff’s alleged pain and injuries were related to a pre-existing condition or to a prior or subsequent accident, the plaintiff must address the defense expert’s findings and present competent, nonconclusory expert evidence the claimed injury was proximately caused by the incident at issue, and not by a different occurrence or by a pre-existing condition (see *Pommells*, at 580; *John v. Linden*, 124 AD3d 598, 1 NYS3d 274 [2nd Dept 2015]; *Henry v. Hartley*, 119 AD3d 528, 989 NYS2d 94 [2nd Dept 2014]).

1) Left Knee

Defendant’s expert, Dr. Ferriter, provided a qualitative assessment and reported a normal range of motion (hereinafter “ROM”) in flexion and extension of the plaintiff’s left knee. He opined that there was no atrophy noted in the quadriceps and hamstring muscles and no chondromalacia present on palpation of the patella. Dr. Ferriter concluded plaintiff’s status of post arthroscopic surgery from which she has fully recovered and no disability or permanency was present. Based on his physical examination of the plaintiff, she is able to return to work and normal daily living activities without limitations.

Defendant’s radiologist, Dr. Springer, performed an evaluation of plaintiff’s MRI report from CitiMed dated September 28, 2018. Dr. Springer concluded plaintiff’s

anterior horn, body and posterior horn of the lateral meniscus are unremarkable. There is myxoid degenerative change in the posterior horn of the medial meniscus, which is a degenerative, non-traumatic finding that could not have occurred in the time interval between the incident and the examination. The anterior horn and body of the medial meniscus are intact. No fracture, dislocation or internal derangement of the knee. No posttraumatic changes causally related to the August 17, 2018 incident.

Defendant has submitted competent medical evidence establishing, prima facie, that plaintiff's alleged injuries to the left knee did not constitute a serious injury and were not causally related to the accident (see *Ogle v Higgins*, 122 AD3d 696, 996 NYS2d 181 [2d Dept 2014]). Consequently, the burden shifts, and it is incumbent upon plaintiff to produce prima facie evidence, in admissible form, to support the claim of "serious injury" (see *Licari*, at 237).

In opposition, plaintiff's expert, Dr. Rovner, reported on plaintiff's left knee arthroscopic surgery as follows: "partial bilateral meniscectomy, ACL debridement, synovectomy and postoperative injection", to repair the tears listed in plaintiff's bill of particulars. Both Dr. Rovner and Dr. Mian, in their affirmed reports, identified the meniscal tears shown on the plaintiff's MRI report. Dr. Mian opined that plaintiff's left knee injuries were permanent in nature and were attributable to the subject incident. In reply, defendant did not dispute the findings of plaintiff's doctors, but focused on the aforementioned "gap in treatment" argument.

Consequently, plaintiff has submitted sufficient evidence to raise an issue of material fact as to whether she sustained a serious injury to her left knee under the permanent consequential or significant limitation of use categories of Insurance Law §5102(d) (see *Shtesl v Kokoros*, 56 AD3d 544, 867 NYS2d 492 [2nd Dept 2008]; *Ragabear v Lallmahamad*, 90 AD3d 883, 935 NYS2d 77 [2nd Dept 2011]; *Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2nd Dept 2011]). Construing the evidence in a light most favorable to plaintiff, her medical evidence has demonstrated injuries based on findings both contemporaneous to the collision and recent examinations (see *Perl v. Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Shtesl v Kokoros*, 56 AD3d 544, 867 NYS2d 492 [2nd Dept 2008]).

While there are triable issues of material fact regarding whether the plaintiff sustained a serious injury to her left knee, she is entitled to seek recovery for all injuries allegedly incurred as a result of the incident (see Insurance Law §5104[a]; see also *Nussbaum v Chase*, 166 AD3d 638, 87 NYS3d 120 [2nd Dept 2018]; *Marte v NY City Tr. Auth.*, 59 AD3d 398, 871 NYS2d 921 [2nd Dept 2009]; *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 [2nd Dept 2004]). In the event plaintiff establishes at trial that she sustained a serious injury to her left knee as a result of the subject collision, she will be entitled to seek damages for all of the injuries she sustained as a result of the incident (see *Nussbaum*, at 639).

Defendant's remaining contentions are either without merit or need not be addressed in

light of the foregoing determination.

CONCLUSION

Accordingly, defendant's motion for summary judgment is denied.

Dated: October 21, 2022


SALLY E. UNGER, A.J.S.C.

