

Nieves-Rosado v Tri State Soil Solutions LLC

2023 NY Slip Op 31285(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 156609/2015

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

SANDRA NIEVES-ROSADO,

Plaintiff,

- v -

TRI STATE SOIL SOLUTIONS LIMITED LIABILITY
COMPANY, CHARLES H DEMAREST, TEMPLE TAXI, LLC,
RANJIT SINGH MULTANI

Defendant.

-----X

INDEX NO. 156609/2015

MOTION DATE 06/03/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and following oral argument, it is ordered that the motion by Defendants Tri State Soil Solutions Limited Liability Company and Charles Demarest for summary judgment and dismissal of the complaint and any cross-claims against them on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold of Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a July 3, 2012 accident between a vehicle owned by Tri State Soil Solutions Limited Liability Company (Defendant Tri State Soil) and operated by Charles Demarest (Defendant Demarest) and a vehicle owned by Temple Taxi, LLC (Defendant Temple Taxi) and operated by Ranjit Singh Multani (Defendant Multani) within which Plaintiff was a passenger. Plaintiff's Bill of Particulars alleges injuries to her cervical spine, right shoulder and right elbow that fall within the serious injury categories of Insurance Law 5102 (d). Defendant Temple Taxi and Defendant Multani have not submitted a written response to this motion.

In support of their motion, Defendants Tri State Soil and Demarest rely on the affirmed orthopedic examination report by Dr. Jeffrey Passick, the affirmed neurosurgical examination report by Dr. Ashok Anant, and Plaintiff's examination before trial (EBT) testimony.

Dr. Passick examined Plaintiff on November 16, 2018 and concluded that Plaintiff's cervical spine strain, right shoulder strain, and right elbow contusion were all resolved. Dr. Passick measured Plaintiff's range of motion with a goniometer and based the normal range of motion values on both the New York State Workers' Compensation guidelines and the AMA guidelines and found normal range of motion with no tenderness as to Plaintiff's right and left shoulders, and right and left elbows, and normal range of motion with minimal tenderness as to Plaintiff's cervical spine. Dr. Passick noted that Plaintiff has a preexisting condition, a prior cervical laminectomy due to degenerative disc disease and concluded that based on the physical examination and on the medical documentation he reviewed, he found no orthopedic disability with no causally related orthopedic permanent residual. He reported that Plaintiff is capable of performing all the tasks of daily living and maintaining full employment without restriction.

Dr. Anant examined Plaintiff on May 20, 2019. Plaintiff was 19 weeks pregnant. Dr. Anant measured Plaintiff's range of motion of Plaintiff's cervical spine and lumbar spine with a goniometer and found normal ranges with no spasms and no pain. Dr. Anant reviewed MRI reports and diagnosed Plaintiff with a mild cervical sprain as a result of the subject accident, which has resolved. Unrelated to the accident, Dr. Anant reported, Plaintiff has chronic degenerative disc disease, but these degenerative changes have remained static since at least August 2012. Dr. Anant concluded that Plaintiff's exam indicated normal neurological findings with no objective evidence of cervical radiculopathy or myelopathy, full range of motion of the cervical spine, intact gait, and Plaintiff can perform all activities of daily living.

At her EBT, Plaintiff testified that she lost no time off because of the accident, she did not stay in bed or confined to her home after the accident, her job duties did not change and continued to remain the same in the new company prior to her promotion, she went to physical therapy for six months after consulting with several doctors, she received one epidural injection from Dr. Mehta, and she has difficulty with some daily tasks such as lifting, vacuuming, and grocery shopping. Plaintiff testified that in 2010 she underwent neck surgery on C-6 to C-7 of her cervical spine.

Defendants Tri State Soil and Demarest have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Plaintiff relies on the affirmed reports of Dr. Franco P. Cerabona and Dr. Andrew Merola, the Mount Sinai Hospital records, MRI reports, and Plaintiff's treatment records.

In reply, Defendants Tri State Soil and Demarest contend that Plaintiff's medical treatment records are not admissible and not properly before the Court because they are unsworn. The report of Dr. Charles DeMarco of University Orthopedics of New York, PLLC is unsworn, the report of Dr. Andrew Merola is unsigned, unsworn and not incorporated or referenced in his affirmation, the Mount Sinai office visit records are uncertified and unsworn, and the Weill Cornell Neurological Surgery records and EMG report are uncertified and unsworn. However, attached to the Mount Sinai Emergency Room records (ER records) is a certification that the records are true copies of the treatment performed and that they were prepared in the ordinary course of business for the hospital. The Court finds that the ER records constitute business records under CPLR 4518 as they are day-to-day business entries of a treating physician (*Komar v Showers*, 227 AD2d 135 [1st Dept 1996]).

Defendants also contend that the MRI reports from Mount Sinai Radiology are similarly inadmissible because they are unsworn, and Defendants' experts did not rely on Plaintiff's medical records to reach their conclusions. However, Dr. Anant's report incorporated and relied on the unaffirmed MRI reports in rendering his opinion (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]). Dr. Passick's report also states that his conclusion was based on both the physical examination and the available medical documentation. Even so, the unaffirmed MRI reports may be considered by the Court since they are not the sole basis for Plaintiff's opposition (*Ahmed v Cannon*, 129 AD3d 645 [1st Dept 2015]; *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]).

Dr. Merola examined Plaintiff for the first time on September 24, 2012 and found that Plaintiff sustained an aggravation of a preexisting condition to her cervical spine at the C5-C6 segment as well as the C6-C7 segment with a recurrence of her radicular symptoms, along with neurological loss. Dr. Merola also reported spasms and contractures in Plaintiff's right arm. Dr. Merola concluded that this was all causally related to the subject motor vehicle accident.

Dr. Merola reexamined Plaintiff on July 31, 2017. He measured Plaintiff's range of motion with a goniometer and found a decreased range of motion as to Plaintiff's cervical spine. Dr. Merola concluded that as Plaintiff remains symptomatic, with positive findings on physical

examination, she has suffered a 30% loss of range of motion which would impair her ability to perform normal, daily tasks and leaves her with a permanent disability.

Dr. Cerabona examined Plaintiff on October 19, 2020 and measured the range of motion of her cervical spine with a goniometer. Dr. Cerabona reported no tenderness but a limitation in Plaintiff's range of motion. Dr. Cerabona also reviewed Plaintiff's cervical MRI images and compared the cervical MRI from December 22, 2011 to the MRI of August 1, 2012, the first cervical MRI taken following the subject accident. Dr. Cerabona reported that the disc herniation at C5-6 is larger in the 2012 MRI and that the disc herniation seen at C6-7 is slightly more prominent in the 2012 scan, concluding that the subject accident caused aggravation and worsening of Plaintiff's neck pain, a recurrence of Plaintiff's C-7 radiculopathy, which had previously been resolved by the 2010 surgery, and caused permanent damage to her right C-7 nerve root. Dr. Cerabona also noted that Plaintiff's condition could be improved by undergoing an anterior cervical discectomy and fusion procedure of the C5-6 and C6-7 spinal segments.

The MRI report of Plaintiff's cervical spine taken on August 1, 2012 revealed degenerative changes more pronounced at C5-6 and C6-7 compared with the MRI taken prior to the accident in December 2011. As to Plaintiff's right shoulder, an MRI taken on September 6, 2012 showed mild later supraspinatus tendinosis, no evidence of a rotator cuff tear, and a small glenohumeral joint effusion with accompanying fluid within the subscapularis recess and rotator interval. As to Plaintiff's right elbow, an MRI taken on September 11, 2012, showed no acute fracture or dislocation, but noted possible mild strain of the brachialis muscle.

Plaintiff's submission has raised a triable issue of fact as to whether Plaintiff's cervical spine injury meets the serious injury threshold under Insurance Law 5102 (d). As Plaintiff has shown sufficient evidence of serious injury to her cervical spine, it is not necessary to determine the adequacy of evidence as to the right shoulder and right elbow. She may be entitled to recover for all injuries causally related to the subject accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

With respect to the 90/180 days category of serious injury, there is no competent medical evidence 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]). Plaintiff's Bill of Particulars alleges that she was confined to her bed one day and confined to her home for one day. This defeats her claim under this category (*Frias*

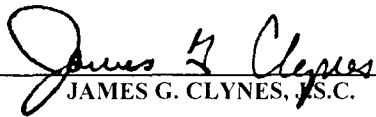
v Son Tien Liu, 107 AD3d 589, 590 [1st Dept 2013] [“Plaintiff’s deposition testimony that he was confined to bed and home for about one week after the accident, and that his work day was shortened by an hour, defeats his 90/180 day claim”). While Plaintiff testified and averred to not being able to complete household and extracurricular activities such as taking out the garbage, shopping, cleaning, and going to the gym, she admitted that she did not miss any day of work (*Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011] Plaintiff failed to raise a triable issue of fact when Defendants established through Plaintiff’s deposition testimony that he had not been confined to bed and did not miss work following the accident).

Plaintiff’s subjective claims of pain and his unsubstantiated claim that she was unable to perform her customary daily activities during the relevant period following the accident are insufficient to raise a triable issue of fact (*Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Therefore, Defendants Tri State Soil and Demarest’s motion for summary judgment is granted under the 90/180 category only. Accordingly, it is

ORDERED that the motion by Defendants Tri State Soil and Demarest 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, Plaintiff shall serve a copy of this Decision and Order upon all Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

4/21/2023					
DATE			JAMES G. CLYNES, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	OTHER	
				REFERENCE	