

Lopez v Target Mech. Inc.

2023 NY Slip Op 31286(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 156973/2020

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

INDEX NO. 156973/2020

DANIEL LOPEZ, REINA CINTRON, JASMINE VEGA

Plaintiff,

MOTION DATE 06/07/2022, 06/13/2022

- v -

MOTION SEQ. NO. 005 006

TARGET MECHANICAL INC., JOHN DOE,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 106, 108, 109, 110, 111, 119, 120, 121

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 103, 104, 105, 107, 112, 113, 114, 115, 116, 117, 118, 122

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that Motion Sequence Numbers 5 and 6 are consolidated for decision and decided as follows:

This personal injury action arises from an incident which occurred on August 17, 2019 at approximately 9:56 p.m., when plaintiff Daniel Lopez ("Lopez") was driving on the Willis Avenue Bridge on East 125th Street and 1st Avenue, with plaintiff Reina Cintron ("Cintron") a front seat passenger, and plaintiff Jasmine Vega ("Vega") a rear seat passenger (Cintron Tr. [NYSCEF Doc. No. 99] at 26, line 15; 30, line 15; NYSCEF Doc. No. 92 at ¶ 2). Plaintiffs were struck in the rear by a white van owned by defendant Target Mechanical Inc. ("Target") and operated by co-defendant, John Doe. After colliding with Plaintiffs' car, defendants' white van then allegedly moved to the adjoining lane and fled the scene (Cintron Tr. at 41, line 18). Plaintiffs allege that they sustained serious injuries as a result of the subject accident due to defendants' negligence.

Defendant Target's Answer to the Complaint asserts a counterclaim against plaintiff Lopez, alleging that if plaintiffs Cintron and Vega sustained injuries or damages, they were caused by Lopez, and that he should be held liable for the full amount of any judgment against Target.

In the Verified Bill of Particulars dated December 18, 2020 and Supplemental Bill of Particulars dated September 14, 2021, Cintron alleges that she sustained, amongst other injuries, injuries to her right knee, right shoulder, neck, and back (NYSCEF Doc. No. 92 at ¶ 5b; NYSCEF Doc. No. 94). Cintron claims that she sustained a serious injury as defined in Insurance Law 5102(d), in that her injuries from the subject accident resulted in: a permanent loss of use of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (NYSCEF Doc. No. 92 at ¶ 16).

In Motion Sequence Number 5, defendant Target moves for an order, pursuant to CPLR 3212, granting summary judgment to dismiss the claims alleged by plaintiff Reina Cintron (“Cintron”) for failing to meet the serious injury threshold requirement as mandated by Insurance Law 5102(d), or in the alternative, to dismiss any or all sub-portions of Insurance Law 5102 that are not viable as a matter of law with respect to said plaintiff Cintron.

Plaintiff Cintron opposes defendant Target’s motion, claiming that Target failed to present a prima facie case that Cintron did not sustain a serious injury as defined by Insurance Law 5102(d), and that a question of fact remains as Cintron’s physicians opined in their findings that Cintron’s alleged injuries were traumatic, sustained as a direct result of the motor vehicle accident at issue, and that she sustained a serious injury under the Insurance Law.

In reply, Target argues that it met its prima facie case to show that any injuries Cintron sustained were minor, mild, or slight and are otherwise classified as insignificant within the meaning of the Insurance Law and not a “serious injury” pursuant to the same statute. It further contends that the supporting medical documentation that Cintron proffered is inadequate and/or inadmissible to bolster her claims.

In Motion Sequence Number 6, Lopez (Plaintiff on the Counterclaim) moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissal of Plaintiff Cintron’s Complaint and any and all cross-claims against Lopez on the grounds that Cintron did

not sustain a serious injury as defined under Insurance Law 5102(d), and any and all counterclaims¹ against Lopez. Lopez argues that Cintron did not meet the threshold requirement pursuant to Insurance Law 5102(d) and adopts and incorporates the facts, legal arguments, procedural history, and exhibits of Target defendant's moving papers, as they relate to Cintron, in Motion Sequence Number 5.

Plaintiff's opposition papers mirror its opposition papers in Motion Sequence Number 5.

Lopez's reply papers adopt and incorporates the facts, legal arguments, procedural history and exhibits of Target's reply papers in Motion Sequence Number 5.

DISCUSSION

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "In determining a motion for summary judgment where the issue is whether the plaintiff suffered serious injury, . . . [t]he initial burden is on defendants to present evidence, in competent form, showing that plaintiff has no cause of action," (*Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208, 209 [1st Dept 1996] [internal quotation marks and citation omitted]), and "that the injuries sustained by plaintiff are not serious" (*Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006] [internal quotation marks and citation omitted]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992], citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]). The court's role is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

¹ Plaintiff Lopez moves to dismiss cross claims against him by Target, but Target correctly asserted counterclaims and not cross claims (NYSCEF Doc. No. 6).

Pursuant to Insurance Law 5104 (a), “in any action by . . . a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle . . . there shall be no right of recovery for non-economic loss, except in the case of a serious injury”. Accordingly, the court must consider the threshold inquiry of whether plaintiff suffered serious injuries within the meaning of Insurance Law 5102(d). Such statute defines serious injury as:

“a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Insurance Law 5102 (d).

Pursuant to CPLR 2106, physician reports constitute evidentiary proof in admissible form if “[t]he statement of . . . a physician . . . authorized by law to practice in the state, who is not a party to the action, when subscribed and affirmed by him to be true under penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.”

Defendant’s Medical Affirmations

In order to establish a basis for entitlement to summary judgment on the issue of serious injury, the defendant has the initial burden of submitting competent evidentiary proof in admissible form demonstrating that plaintiff has not suffered serious injury as defined by Insurance Law 5102(d).

In support of its motion (Motion Sequence Number 5), Target proffered, *inter alia*, the medical reports of Drs. Richard Semble, Elizabeth Ortof, and Jonathan Lerner dated October 21, 2021, October 8, 2021, and September 2, 2021 respectively (NYSCEF Doc. Nos. 96 – 98).

Dr. Semble conducted an orthopedic medical evaluation of Cintron and noted that Cintron’s current complaints are of pain in the right shoulder and right knee (NYSCEF Doc. No. 96). Dr. Semble measured the range of motion for Cintron’s cervical spine, lumbar spine, right and left shoulders, and right and left knees and noted that Cintron fell within the normal range of all the aforementioned except for the right knee, where range of motion is flexion at 125 degrees (150

degrees normal) (*id.*). Dr. Semple reports that the diagnoses of the cervical and lumbar spine sprains, right shoulder sprain, and right knee sprain have all been resolved, and there is no evidence of a causally related disability (*id.*). Dr. Semple also notes that the clicking of the right shoulder is causally related, is a common finding after injuries to the shoulder, and no treatment is necessary (*id.*).

Dr. Ortof performed a neurological evaluation of Cintron and noted that Cintron's current complaint is that she sometimes experiences pain in her right knee and sometimes the same knee clicks, and further noted that she did not complain about any pain in her neck or back (NYSCEF Doc. No. 97). The report also provides that Cintron missed a day or two from work after the accident at issue (*id.*). Dr. Ortof reports that there was no pain or palpitation of the cervical spine and the range of motion falls within the normal ranges and reported the same for the thoracic spine or lower lumbar spine (*id.*). Dr. Ortof also conducted a motor exam of the upper and lower extremities and reported normal tone and bulk, no Babinski reflex, and coordination intact (*id.*). She concluded that Cintron can perform all normal activities of daily living and is capable of working in her current capacity (*id.*).

Dr. Lerner performed a radiological review of Cintron's MRIs of her right and left shoulders, cervical and lumbar spine, and right knee and reported degenerative disc disease/osteoarthritis in the spinal column and tendinosis/bursitis of the right knee/right shoulder (NYSCEF Doc. No. 98). The MRIs of these areas were all from October 16, 2019 (cervical spine and right shoulder), October 17, 2019 (right knee), and November 1, 2019 (lumbar spine and left shoulder) – about two to two-and-a-half months post-accident (*id.*). Dr. Lerner reports that none of the observed conditions were causally related to the subject accident (*id.*).

Defendant Target made a *prima facie* showing that Plaintiff Cintron did not sustain a serious injury through the medical affirmations of their examining physicians. Those physicians found that Cintron had a normal range of motion in her cervical and lumbar spine, right and left shoulders, and her left knee; one physician noted that the right knee fell slightly below the normal range. All of the examining physicians concluded that Cintron was not disabled (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Clementson v Price*, 107 AD3d 533 [1st Dept 2013]).

Plaintiff's Rebuttal Medical Affirmations

Once placed in question, the plaintiff has the burden of coming forward with evidentiary proof in admissible form which is sufficient to raise a triable issue of fact relating to the serious injury (*Licari v Elliot*, 57 NY2d 230, 235 [1982]; *Toure v Avis Rent A Car Sys.*, 98 NY2d at 352). In order to show a permanent injury, the plaintiff must present a physician's affirmation based on an examination both shortly after the accident and a recent exam (*see Bandoian v Bernstein*, 254 AD2d 205 [1st Dept 1998]). The plaintiff has done this through the affirmation, medical reports² of Dr. Thomas Scilaris dated October 14, 2019, August 18, 2020, and May 10, 2020, and a narrative report dated July 15, 2022. She further proffered the medical reports from the following doctors: (1) Dr. Vincent Vasile dated September 13, 2019, September 25, 2019, October 4, 2019, October 14, 2019, November 8, 2019, December 4, 2019, December 23, 2019, January 10, 2020, and January 24, 2020; (2) the affirmation and medical reports of Dr. Siddharth Prakash dated October 17, 2019, November 1, 2019, and November 2, 2019; and (3) the medical report of Dr. Kolb dated January 4, 2020. However, the medical reports she proffered in support are insufficient to make a prima facie case to meet the serious injury threshold as mandated by Insurance Law 5102(d).

As footnoted earlier, the medical reports of Dr. Scilaris dated October 14, 2019 and May 10, 2022, as submitted, appear to be incomplete (NYSCEF Doc. No. 109). From the information that is available, Dr. Scilaris notes a cervical radiculopathy based on an EMG/NCV report dated September 25, 2019, some limited range in movement in the right knee and both shoulders, and pain with attempt at squatting and deep knee bends (*id.*).

Dr. Scilaris' narrative report provides that Cintron continues to experience shoulder, neck, and back discomfort, and complains that she has difficulty standing for long periods of time and has difficulty performing physical activities outside of work that require bending, squatting, and kneeling (*id.*). Dr. Scilaris measured Cintron's range of motion and found limited motion in her shoulders, right knee, and cervical and lumbar spine (*id.*). He noted a labral tear and partial rotator cuff tear in her left shoulder, cervical radiculopathy, lumbar disc bulging with radiculopathic

² The Court notes that the Preliminary Medical Report dated October 14, 2019 and the Medical Report dated May 10, 2022, as submitted appear to be incomplete (NYSCEF Doc. No. 109).

symptoms (*id.*). He opined that the injuries mentioned are causally related to the subject accident and that further treatment may alleviate some of her symptoms, but the injuries she sustained in the accident will never be fully resolved, her symptoms will remain significant, and there will be residual permanent injuries that she will experience for the balance of her lifetime (*id.*). The range of motion limits found by Dr. Scilaris are minor and insufficient to establish a significant or consequential limitation (*Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]).

Dr. Vasile completed a physiotherapy report of Cintron and noted that Cintron complained of pain in the right shoulder and right knee (NYSCEF Doc. NO. 109). He measured her range of motion and found that her range of motion for the right shoulder is painful and limited (flexion is 130 degrees and normal is 0 to 180; abduction is 120 degrees and normal is 0 to 180), and within normal limits but with pain for the right knee (*id.*). He reported that Cintron is unable to perform usual and customary daily activities such as shopping, driving, grooming, work, and social/physical activities, since the subject accident (*id.*). Dr. Vasile concluded that Cintron's signs and symptoms are causally related to the subject accident (*id.*). Dr. Vasile's nine reports, dated September 13, 2019 to January 24, 2020 that follow the Physiotherapy Report, are neither certified nor affirmed and therefore, are inadmissible as evidence (*see Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; CPLR 4518[c]).

Dr. Prakash performed a radiological review of Cintron's MRIs of her right knee (from 10/17/2019), left shoulder (11/1/2019), and lumbar spine (11/1/2019) and reported tears in the left shoulder and right knee, and disc bulging in the lumbar spine (*id.*). Dr. Prakash's findings that Cintron has tears and a bulging disc are insufficient to constitute a serious injury as defined under the statute. It is well settled that "[f]or a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration..." (*Foley v Karvelis*, 276 AD2d 666, 667 [2nd Dept 2000] [citations omitted]; *see also Simms v APA Truck Leasing Corp.*, 14 AD3d 322 (1st Dept 2005). The Court has held that "a herniated or bulging disc, or even a tear in a tendon, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*Caraballo v Kim*, 63 AD3d 976, 977-978 [2d Dept 2009]).

Furthermore, in order to present a prima facie case of serious injury, the plaintiff must show objective proof that the injury is causing a limitation of motion and that the limitation, when compared to a normal range of motion, is medically significant (*see Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]; *Williams v New York City Tr. Auth.*, 12 AD3d 365 [2nd Dept 2005]). To establish permanent consequential limitation or a significant limitation of use, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 350). This is not available here, as Dr. Prakash offered no opinion as to a causal connection between the accident and the tears or disc bulging (*see Whisenant v Farazi*, 67 AD3d 535 [1st Dept 2009]). In addition, Dr. Prakash's medical report does not review the films of Ms. Cintron's right shoulder and cervical spine, which were personal injuries she alleges she sustained in the subject accident.

Dr. Kolb's report indicates that he reviewed the films of Cintron's lumbar spine, cervical spine, right shoulder, and right knee from October 14, 2019 (2 months post-accident) and found all examinations to be normal (*id.*).

Plaintiff's serious injury claim predicated on an alleged inability to engage in substantially all her daily activities for 90 of the first 180 days post-accident was refuted by her own testimony. She testified that she did not miss any days at work (although Dr. Ortof's notes reflect that Cintron missed a day or two of work), did not make home modifications or hired help around the house post-accident (Cintron Tr. At 9, lines 13-24).

"While there is little doubt that plaintiff suffered discomfort as a result of the accident, the court has no choice but to enforce the legislative mandate and dismiss the complaint when a plaintiff fails to meet the burden of proving the threshold requirement of establishing a prima facie case that he sustained a serious injury within the meaning of the statute" (*Licari v Elliot*, 57 NY2d at 240). The Court has held that a "minor, mild or slight limitation of use [is] classified as insignificant within the meaning of the [no-fault] statute" (*Gaddy v Eyler*, 79 NY2d 955, 957 (1992) (internal quotation marks and citations omitted)).

Accordingly, it is

ORDERED that the motions for summary judgment of defendant Target Mechanical Inc. (Motion Sequence Number 5) and plaintiff on the Counterclaim Daniel Lopez (Motion Sequence Number 6) are granted and the complaint is dismissed as against defendant Target by plaintiff Reina Cintron only; and it is further

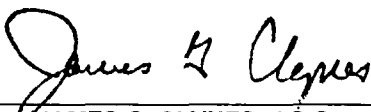
ORDERED that the counterclaim of Target Mechanical Inc. against plaintiff Daniel Lopez as based upon the allegations of Reina Cintron, is dismissed; and it is further

ORDERED that the claims from the remaining plaintiffs are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/20/2023
DATE


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