Dalrymple v Motor Veh. Acc. Indem. Corp.
2023 NY Slip Op 35154(U)
May 18, 2023
Supreme Court, Queens County
Docket Number: Index No. 702601/2021
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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VANESSA DALRYMPLE,

Plaintiff,

-against-

MOTOR VEHICLE ACCIDENT INDEMNIFICATION COPORATION,

Defendants.

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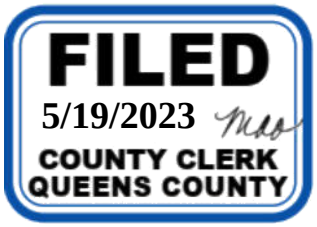
Index No.: 702601/2021

DECISION and ORDER
Motion Sequence No.: 1



PRESENT: **HON. ULYSSES B. LEVERETT, J.S.C.**

	Papers Numbered
Notice of Motion-Statement of Material Facts-Affirmation- Exhibits	EF 14-22
Affirmation in Opposition -Exhibits	EF 26-31
Affirmation in Reply	EF 33

Upon the foregoing papers, it is ordered that defendant's Motor Vehicle Accident Indemnification Corporation's (MVAIC) motion for an order pursuant to CPLR §3212 granting summary judgment and dismissing the plaintiff's complaint pursuant to Insurance Law §5104(a) in that plaintiff did not sustain a serious injury as defined under Insurance Law §5102(d) is denied.

The action was brought to recover damages for serious personal injuries allegedly sustained by Plaintiff as a result of a motor vehicle accident on February 9, 2018.

Plaintiff alleges that the driver of a taxi cab in which she was a passenger in drove up on the median and crashed. Plaintiff states that as a result of the accident, she sustained injuries to his lumbar and cervical spine.

Insurance Law §5102(d) defines a "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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

"[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 may also 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" *See Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

In support of the motion, Defendant MVAIC assert that plaintiff did not sustain a serious injury as defined in insurance Law §5102(d). Defendant submitted an independent medical examination report by Dr. Ernesto Seldman from an April 13, 2022 visit.

During the examination, plaintiff noted that she was currently on a course of physical therapy, acupuncture treatment, massage therapy and chiropractic care three times a week.

Examination of plaintiff's thoracic spine revealed no spasm, tenderness to palpation over the thoracic paraspinal musculature. Range of motion of the thoracic spine reveals right lateral bending at 45 degrees (normal 45 degrees), left lateral bending to 45 degrees (normal 45 degrees), right rotation 30 degrees (normal 30 degrees) and left rotation 30 degrees (normal 30 degrees).

Examination of the plaintiff's lumbar spine revealed no muscle spasm here were no complaints of tenderness noted over the paraspinal musculature on palpation. Range of motion of the lumbar spine reveals flexion 60 degrees (60 degrees being normal), extension 25 degrees (25 degrees being normal), and right and left lateral bending 25 degrees (25 degrees being normal). Neurological examination reveals patellar and Achilles reflexes to be 2+. Muscle strength of the lower extremities is graded at 5/5 bilaterally. Sensory examination of the lower extremities including the medial and lateral thighs, calves and feet are normal. There is no atrophy noted in the muscles of the lower extremities. Straight leg raising is negative. The claimant is able to tiptoe and heel walk.

Dr. Seldman opined that there is no evidence of an orthopedic disability to the mid back and low back. The claimant is able to work and can perform all normal activities of daily living without restrictions.

Where a defendant has made a showing sufficient for entitlement to summary judgment, the burden shifts to the plaintiff to raise an issue of material fact as to whether plaintiff has sustained a serious injury. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Plaintiff in opposition to the motion, states that Defendant has not demonstrated that Plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) and that Plaintiff has raised triable issues that he did indeed sustain a serious injury.

Plaintiff alleges she has sustained serious injuries under the "permanent loss of use", "significant limitation of use" and/or a "permanent consequential limitation of use of a body function or system", and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from customary activities as a result of the subject accident."

Plaintiff submitted a report from Dr. Daniel Schlussekberg, M.D. from Diagnostic Imaging of Rockville Centre, PC.

Plaintiff submitted a report from Dr. David Abbatematteo, M.D., a physician from Metro Pain Specialists, PC

Plaintiff also submitted an affirmation from Andrew C, Susi, D.C. a chiropractor licensed in

the State of New York. Dr. Susi affirmed that the plaintiff first presented herself to his office on February 16, 2018 with complaints of neck pain, lower back pain and mid and upper back pain. Physical examination revealed the plaintiff to be in distress due to pain and discomfort with an anatalgic gait.

Examination of the cervical spine revealed grade III tenderness. Static and motion palpation revealed fixation, restriction, biomechanical dysfunction and pain at the C1, C2, C3, C4, C5, C6 and C7 levels. The maximum compression test was positive bilaterally and shoulder depression test was positive bilaterally. Range of motion tests of the cervical spine revealed limitation of motion of the cervical spine of 20 degrees on flexion (normal 50 degrees), 30 degrees on extension (normal 65 degrees), 20 degrees on left lateral flexion (normal 45 degrees), 20 degrees on right lateral flexion (normal 45 degrees), 50 degrees on right rotation (normal 85 degrees) and 50 degrees on left rotation (normal 85 degrees).

Examination of the lumbar spine revealed grade III tenderness and hyperness. The Lasegue's, Braggard's, Kemp's. Soto hall and Valsalva test were all positive bilaterally. Static and motion palpation revealed fixation, restriction, biomechanical dysfunction and pain at the L1, L2, L3, L4 and L15 levels. Range of motion tests of the lumbar spine revealed limitation of motion of the lumbar spine of 25 degrees on flexion (normal 65 degrees), 5 degrees on extension (normal 30 degrees), 10 degrees on left lateral flexion (normal 25 degrees) and 10 degrees on right lateral flexion (normal 25 degrees).

Examination of the thoracic spine revealed grade III tenderness and hypertonicity of the paraspinal muscles. Static and motion palpation revealed fixation restriction, biomechanical dysfunction and pain at the T1, T2, T3, T4, T5, T6, T7 and T8 levels. The plaintiff was diagnosed as having sprain and strain of the cervical spine, multiple cervical subluxations, sprain and strain of the thoracic spine, thoracic subluxation, sprain and strain of the lumbar spine, lumbar subluxation and headaches.

Dr. Susi concluded that the plaintiff sustained partially disabling injuries to her neck and lower back which are causally related to the accident of February 9, 2018 following his exam and review of her MRI from November 2018. He further opined that clinical findings on the basis of his examinations were consistent with the positive findings of the cervical MRI and lumbar MRI. He believes the findings to be consistent with the nature of the injuries of February 9 2018.

In further opposition, plaintiff provided a physician affirmation from Dr. John McGee, DO, a physician with a specialty in physical medicine and rehabilitation following a visit with the plaintiff on February 15, 2018.

Dr. McGee stated that physical examination revealed the plaintiff to be in moderate distress. Examination of the cervical spine demonstrated deep/superficial muscle spasm and tenderness. Range of motion of the cervical spine revealed limitation of motion 20 degrees on flexion (normal 60 degrees), 20 degrees on extension (normal 50 degrees), 20 degrees on left rotation (normal 80 degrees), 20 degrees on right rotation (normal 80 degrees), 10 degrees on left sidebend (normal 45 degrees) and 20 degrees on right sidebend (normal 45 degrees).

Examination of the lumbosacral spine revealed deep/superficial tenderness and muscle spasm. Range of motion tests of the lumbar spine revealed limitation of motion of the lumbar spine was 30 degrees on flexion (normal 90 degrees), 10 degrees on extension (normal 30 degrees), 10

degrees on left rotation (normal 45 degrees), 10 degrees on right rotation (normal4 5 degrees), 10 degrees on left sidebend (normal 35 degrees), 20 degrees on right sidebend (normal 35 degrees) and the straight leg raising exam was positive on both sides at 10 degrees.

Dr. McGee saw the plaintiff on a regular basis until the final appointment discussed in the affidavit on January 10, 2019. Range of motion of the cervical spine revealed limitations as motion on flexion was 30 degrees (normal 60 degrees), 30 degrees on extension (normal 50 degrees), 30 degrees on left rotation (normal 80 degrees), 40 degrees on right rotation (normal 80 degrees), 20 degrees on left sidebend (normal 45 degrees) and 30 degrees on right sidebend (normal 45 degrees).

Range of motion tests of the lumbar spine revealed limitation of motion of the lumbar spine was 50 degrees on flexion (normal 90 degrees), 20 degrees on extension (normal 30 degrees), 20 degrees on left rotation (normal 45 degrees), 20 degrees on right rotation (normal 45 degrees), 20 degrees on left sidebend (normal 35 degrees), 20 degrees on right sidebend (normal 35 degrees).

Dr. McGee concluded his report with the opinion that based upon his examinations and his review of her MRIs that the plaintiff sustained significant partially disabling injuries to her neck and lower back which are causally related to the accident of February 9, 2018. He further opined that the injuries resulted in a significant substantial loss of use and function of the cervical and lumbar spine.

In further support, plaintiff submitted an MRI report by Dr. Daniel Schlusselberg, MD of Diagnostic Imaging of Rockville Centre, P.C.

Dr. Schlusselberg found that the MRI of the cervical spine revealed reversal of the lordosis consistent with muscular spasm. Anterior spondylitic spur were seen arising off the cervical vertebrae. At C2-C3 there was a central disc bulge. At C3-C4 there was a central disc bulge effacing the anterior subarachnoid space. At C4-C5 there is a broad based disc bulge effacing the anterior subarachnoid space with bilateral neural foraminal narrowing. At C5-C6 there is abroad based disc bulge with right neural foraminal narrowing. At C6-C7 there is a right paracentral disc bulge with bilateral neural foraminal narrowing right greater than left. The C7-T1 interspace was found to be unremarkable.

As to the lumbosacral spine, there was maintenance of the lordotic curvature, the vertebrae were normal in height and signal, partial interspace dehydration at L5-S1 and the conus medullaris and cauda equina were well visualized and appeared to be unremarkable. There was partial interspace dehydration at L5-S1, bulging annulus at L3-L4, central disc bulge at L4-L5 and broad-based disc bulge with bilateral neural foraminal narrowing/lateral recess stenosis and relative compression on the exiting nerve roots bilaterally.

In addition, defendant filed their reply affirmation and argued that plaintiff has not met their burden of proving she was prevented from performing all of her usual and customary activities for not less than ninety days during the one hundred eighty days following the accident. Though this is the case, Plaintiff's affidavit filed with the Opposition papers states that a result of the injuries she sustained she is unable to lift heavy packages and bags of laundry due to limitation of motion in her neck and lower back. She further stated she has difficulty climbing stairs and walking more than a short distance, nor can she stand or sit for any extended period and has difficulty rising from a seated position.

It is well established that the proponent of summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

The Court finds triable issues of fact as to the existence of serious injury. Consequently, defendant Motor Vehicle Accident Indemnification Corporation's motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of plaintiff Vanessa Dalrymple on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

This is the decision and order of this Court.

Dated:

5/18/2023

Hon. Ulysses B. Leverett, JSC

Hon. Ulysses B. Leverett

FILED
5/19/2023
COUNTY CLERK
QUEENS COUNTY