

Alicea v Breen Bros Towing Inc.
2023 NY Slip Op 35184(U)
March 23, 2023
Supreme Court, Richmond County
Docket Number: Index No. 152572/2018
Judge: Catherine M. DiDomenico
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND-----X
NILIA ALICEA,

Plaintiff

Part- IAS 11

Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDERBREEN BROS TOWING INC. and
ROBERT SANTIAGO,

Index No. 152572/2018

Motion Sequence Nos.: 003

Defendants.
-----X

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion
Sequence Number 003

	<u>Numbered</u>
Notice of Motion by Defendant (003),	1
Affirmation in Opposition by Plaintiff	2
Reply Affirmation by Defendant	3
Transcript of Oral Argument dated 9/28/22	4

Upon the foregoing cited papers, the Decision and Order is as follows:

Procedural History

Defendants, Breen Bros. Towing Inc., and Robert Santiago, move by Notice of Motion (Seq. No. 003) for an order granting them summary judgment dismissing Plaintiff's case on the ground that Plaintiff, Nilia Alicea, did not sustain a threshold "serious injury" as defined by Section 5102(d) of the Insurance Law. Plaintiff has filed written opposition to the motion in its entirety. Oral argument was held on September 28, 2022. Defendant's motion was submitted for Decision upon receipt of the transcript of oral argument.

Factual Background

The present motion relates to a motor vehicle accident which occurred on May 2, 2016. At the time of the accident Defendant Robert Santiago was operating a tow truck owned by Defendant Breen Bros. Towing Inc., and Plaintiff was operating a sedan. Plaintiff alleges that she was struck in the rear by the tow truck as she waited for a red light. In her Verified Bill of Particulars dated June 28, 2019, Plaintiff alleges injuries to her bilateral shoulders, neck (cervical spine), and back (lumbar spine). Immediately following the accident Plaintiff did not seek

medical treatment at the scene, nor did she go to the hospital. Plaintiff returned to work two days after the accident. Plaintiff first sought medical care at the “Spine Pain Institute of New York” approximately seven days after the accident, however it is unclear from her medical records if this treatment was related to the present accident or pre-existing neck and back conditions. It is undisputed that Plaintiff had been to this same medical provider in the past. She last sought treatment at the Spine Pain Institute three weeks before the accident for similar complaints of neck and back pain. The medical records from Plaintiff’s first post-accident visit to the Spine Pain Institute contain no indication that she informed her doctor that she had recently been in a motor vehicle accident.

After a program of conservative treatment with several providers Plaintiff underwent two surgeries. On September 11, 2018, Plaintiff underwent arthroscopic surgery on her left shoulder performed by Dr. Thomas Scilaris M.D., and on November 7, 2019, Plaintiff underwent an anterior discectomy and fusion surgery at the C5-C6 level of her neck performed by Dr. Michael C. Gerling, M.D. Both Dr. Scilaris and Dr. Gerling have provided affirmations in opposition to the present motion. Plaintiff’s medical records indicate considerable gaps in treatment between the date of the accident and the surgeries in 2018 and 2019.

This is not Plaintiff’s first allegation of traumatic injury to her neck, back and shoulders. In support of their motion Defendants allege that Plaintiff sustained at least 11 prior injuries extending as far back as 2009. Most of these injuries took place during Plaintiff’s employment at a psychiatric hospital. Plaintiff does not deny that she had pre-existing conditions. However, she claims that her current injuries are either “new” or were aggravated by the 2016 accident. Plaintiff’s Bill of Particulars specifically alleges “to the extent defendants claim that any injuries sustained by plaintiff were caused by pre-existing and/or degenerative conditions, plaintiff alleges that any so claimed... conditions... were exacerbated, activated, and/or aggravated” by the Defendants. It is well settled law that a preexisting injury or condition that is exacerbated or aggravated by a motor vehicle accident may be sufficient to satisfy the serious injury threshold. See *Ambroselli v. Team Massapequa, Inc.*, 88 A.D.3d 927 (2d Dept. 2011).

Plaintiff commenced the present suit on September 27, 2018. After an exchange of document discovery, including authorizations for medical records relating to both her prior injuries and treatment related to the present accident, Plaintiff was seen for two Independent Medical Examinations (IME’s). Plaintiff was examined by Dr. Frances Cuomo, M.D., on June 30, 2021. Dr. Cuomo is a board-certified Orthopedic Surgeon. Prior to her examination, Dr. Cuomo conducted a thorough review of the medical records relating to Plaintiff’s treatment for her prior injuries.

After her medical record review, Dr. Cuomo admits that Plaintiff's MRI films "possibly indicate a small partial tear of the supraspinatus." As part of her physical examination of Plaintiff Dr. Cuomo conducted range of motion testing. She opines that Plaintiff has normal range of motion in her right shoulder but indicates limitations in her left shoulder with mildly positive impingement signs. She notes that Plaintiff's pre-operative MRI and post-operative MRI show the same small partial thickness shoulder tear, although noting that the images are of poor quality. In conclusion, Dr. Cuomo opines, without explanation, that the findings on the MRI are chronic and preexisting and do not evidence an acute injury. Dr. Cuomo does not address Plaintiff's exacerbation and aggravation claims.

In addition to being examined by Dr. Cuomo, Plaintiff also underwent an independent medical evaluation by Dr. Yong H. Kim M.D., a board-certified orthopedic surgeon who specializes in conditions of the spine. Like Dr. Cuomo, Dr. Kim lists the voluminous legal and medical documentation that he reviewed before conducting his examination. As part of his medical record review, Dr. Kim reviewed several MRI films ranging from 2010 to 2020. Dr. Kim admits that the later films indicate the presence of herniations and bulges in Plaintiff's cervical and lumbar Spine. Upon physical examination, Dr. Kim notes that Plaintiff exhibited range of motion deficits, however he attributes those limitations, in part, to suboptimal effort. After his record review and examination, Dr. Kim concludes that the conditions present in Plaintiff's neck and back are pre-existing and were caused by a mixture of prior trauma and age-related degeneration. Regarding the cervical discectomy and fusion surgery performed by Dr. Gerling, Dr. Kim opines that the surgery was "arbitrarily done" with no objective correlation to ongoing symptoms. Finally, Dr. Kim addresses the issue of exacerbation and aggravation by stating that Plaintiff's "ongoing complaints with respect to her *lumbar spine* existed prior to the subject accident of May 2, 2016, with no evidence of any acute exacerbation immediately following the subject accident." Notably missing from this conclusion is any reference to the aggravation and exacerbation claims relating to the Plaintiff's *cervical spine*, the location of her surgery.

Applicable Law

The proponent of a summary judgment motion has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. *See Otty Cab Corp. v. Nazir*, 72 N.Y.S.3d 517 (2d Dept. 2017). A movant's burden can be satisfied by the submission of sworn affirmations (from physicians), affidavits, or deposition testimony in proper evidentiary form. *See Charlie Fox, Inc. v. Diallo*, 48 N.Y.S.3d 264 (2d Dept. 2016). When seeking summary judgment pursuant to Insurance Law §5102(d) the moving defendant must conclusively establish

that the plaintiff did not suffer any of the enumerated “serious injuries” set forth in that statute. **See *Cortez v. Bray*, 192 A.D.3d 451 (1st Dept. 2021).** Once a prima facie showing of entitlement to summary judgment has been established, the burden shifts to the non-moving party to raise a material issue of fact sufficient to warrant a trial. **See *Ubillus-Tambini v. Ischakov*, 36 N.Y.S.3d 410 (2d Dept. 2016).** A plaintiff opposing a “threshold” motion bears the burden of offering objective evidence of a serious injury. **See *Stevens v. Homiak Transp., Inc.*, 21 A.D.3d 300 (1st Dept. 2005).** When relying upon the “significant limitation” category, a plaintiff must also offer objective evidence of a significant loss of use, normally measured by range of motion testing. **See *Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 343 (2002).** When facing a claim that the conditions predate the accident at issue, are degenerative in nature, or were caused by a prior injury, it becomes the Plaintiff’s burden, if and when the burden shifts, to distinguish prior injuries from present ones. **See *Pommells v. Perez*, 4 N.Y.3d 566 (2005).** If it is claimed that the current accident made preexisting injuries or conditions worse, it becomes a plaintiff’s burden to explain “in a specific and nonconclusory manner” how the accident aggravated or exacerbated their preexisting conditions. **See *Sanchez v. Steele*, 149 A.D.3d 458 (1st Dept. 2017).**

Decision

It is undisputed that there is objective medical evidence in the form of MRI films, that indicate the presence of soft tissue conditions in Plaintiff’s neck, back, and left shoulder. It is also undisputed that upon examination by her treating physician, and the IME physicians, that Plaintiff exhibited significant range of motion deficits as compared to what is normal in all three areas. These undisputed facts are sufficient to satisfy two out of the three prongs of a serious injury claim under the “significant limitation of use of a body function or system” category relied upon by Plaintiff. To the extent that Plaintiff alleges that her “injuries” are permanent, the same analysis applies to the “permanent consequential limitation” category. The issue raised by Defendant’s motion is one of causation. Defendant alleges that all the conditions claimed by Plaintiff as injuries related to the 2016 accident were actually caused by Plaintiff’s prior long history of work-related incidents together with age-related degeneration. Thus, it is Defendant’s initial burden to establish, through admissible evidence, that the injuries claimed by Plaintiff were not related to the 2016 accident, but instead were preexisting. **See *Cavitolo v. Broser*, 163 A.D.3d 913 (2d Dept. 2018); see also *Cinelli v. Greyhound Lines, Inc.*, 211 A.D.3d 517 (1st Dept. 2022).**

Defendants have not met their initial burden on this summary judgment motion. Dr. Cuomo’s report, while detailed, does not adequately establish how the shoulder injury claimed by Plaintiff was caused by the prior incidents and not the present accident. Dr. Cuomo’s conclusory opinion that the MRI films “suggested chronicity” is insufficient to support summary

judgment. See *Williams v. Maleachern*, 186 A.D.3d 1462 (2d Dept. 2020).

While Dr. Kim's report does adequately distinguish Plaintiff's cervical and lumbar spine injuries, supporting a conclusion that they predated the 2016 accident, it is also insufficient to satisfy Defendant's burden on this motion. Both Dr. Cuomo and Dr. Kim fail to adequately address Plaintiff's exacerbation and aggravation claims. See *Pero v. Transervice Logistics, Inc.*, 83 A.D.3d 681 (2d Dept. 2011); see also *Pfeiffer v. New York Cent. Mut. Fire Ins. Co.*, 71 A.D.3d 971 (2d Dept. 2010); *Edouazin v. Champlain*, 89 A.D.3d 892 (2d Dept. 2011). Dr. Cuomo's report fails to even address the issue of exacerbation. While Dr. Kim's report does make the necessary findings in relation to Plaintiff's lumbar spine, he fails to make the same finding in relation to her cervical spine, which is arguably the more serious of her claimed spinal injuries, and the location of her discectomy and fusion surgery. As Defendant's experts fail to adequately address the issue of exacerbation and aggravation, Defendants have failed to satisfy their initial burden on the motion. See *Menjivar v. Capers*, 2023 N.Y. Slip Op 01083 (2d Dept. 2023); see also *Little v. Ajah*, 97 A.D.3d 801 (2d Dept. 2012); *Keenum v. Atkins*, 82 A.D.3d 843 (2d Dept. 2011). Accordingly, the motion must be denied without consideration of the Plaintiff's opposition papers. See *Cervantes v. McDermott*, 159 A.D.3d 669 (2d Dept. 2018); see also *Rabinowitz v. Kahl*, 78 A.D.3d 678 (2d Dept. 2010).

For the detailed reasons set forth above, Defendants' motion for summary judgment dismissing Plaintiff's Complaint on the ground that she did not suffer a serious injury is hereby denied. This constitutes the Decision and Order of the Court in relation to Motion Sequence Number 003. As this case is already certified for trial counsel for both parties are hereby directed to appear for a post certification telephone conference on April 19, 2023, at 10:30 AM to discuss next steps.

Dated: March 23, 2023



Hon. Catherine M. DiDomenico