

De La Cruz v Liu
2024 NY Slip Op 35642(U)
May 16, 2024
Supreme Court, Westchester County
Docket Number: Index No. 65274/2022
Judge: Thomas Quiñones
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

-----X
ANA DE LA CRUZ,

Plaintiff(s)

DECISION AND ORDER

Index No. 65274/2022

Motion Sequence No. 2

-against-

KATHY LIU AND JOHN DOE,

Defendant(s).
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The papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 33-42, 44, 47-57 were read and considered on Defendant's motion for summary judgment pursuant to CPLR §3212 dismissing the complaint on the basis that Plaintiff, ANA DE LA CRUZ, did not sustain a "serious injury" under Insurance Law §5102(d), and for such other and further relief as this Court deems necessary and proper.

Upon the foregoing papers, the motion is determined as follows:

Plaintiff commenced this action by filing pleadings on September 21, 2022 to recover for personal injuries allegedly sustained as a result of an automobile incident that occurred on February 21, 2022. (NYSCEF Doc. 1). Defendant KATHY LIU interposed an answer on October 26, 2022. (NYSCEF Doc. 4). A Trial Readiness Order was filed on December 4, 2023, after which Note of Issue was filed on December 6, 2023. Accordingly, this matter is ripe for dispositive motions.

Defendant's Motion:

Defendant filed the instant motion for summary judgment pursuant to CPLR §3212 dismissing the complaint on the basis that Plaintiff, ANA DE LA CRUZ, did not sustain a "serious injury" under Insurance Law §5102(d).

Counsel contends that Plaintiff's Bill of Particulars essentially alleged that Plaintiff, ANA DE LA CRUZ, sustained "soft tissue" injuries. Counsel further contends that the medical records demonstrate that Plaintiff did not suffer a "serious injury" as required by New York State Insurance Law §5102.

Counsel cites Plaintiff's deposition testimony insofar as Plaintiff testified that she left the scene, and proceeded to make her delivery (Plaintiff's EBT pp. 37-38). Counsel states that the first time Plaintiff sought any medical attention was one (1) week later at Metropolitan (*Id.* at p. 39). She received physical therapy at this facility (*Id.* at p. 41). About 1½ months after the accident, she was referred to Dr. Segreto, and given one (1) Lumbar injection (*Id.* at pp. 45-49). Dr. Segreto performed ambulatory Left Shoulder arthroscopic surgery in September 2022 (*Id.* at pp. 49 50, 52). She did not seek any second opinion (*Id.* at p. 51). Following surgery, she resumed another 3-4 months of physical therapy, then ceased all treatment (*Id.* at pp. 41, 55). She did not treat at any other facilities (*Id.* at pp. 57-58).

Counsel also cites the defense's orthopedic examination findings of Dr. Jason R. Baynes. (Defendant's Motion Exhibit C). In pertinent part, Dr. Baynes opined that (i) Plaintiff's observed range of motion is considered to be normal and found full range of motion throughout all planes of the Plaintiff's Cervical Spine, Lumbar Spine and bilateral Shoulders; (ii) Plaintiff's Left Shoulder intra-operative photos reflected acute injury and no necessity for surgery; (iii) Plaintiff's injuries show no permanency and no sequelae in terms of function or symptoms as a result of the motor vehicle accident; and (iv) Plaintiff can do all of her activities of daily living with no restrictions and has no disability. Dr. Baynes also reviewed Plaintiff's Left Shoulder MRI dated March 26, 2022 and opined that Plaintiff's MRI did not show any full tears and Dr. Baynes opined that there was no condition that would necessitate surgery.

Plaintiff's Opposition:

Plaintiff filed opposition to the instant motion. It is Plaintiff's contention that Plaintiff sustained serious injuries within the meaning of Insurance Law §5102. Specifically, Plaintiff contends that, following the incident, Plaintiff complained of pain in her shoulders, back and neck. (Plaintiff's EBT at 41). She treated until February 2023, about a year. (*Id.* at p. 40-41). She began going to physical therapy three or four days a week, which was later reduced. (*Id.* at 41). She also received chiropractic treatment. (*Id.* at 44). In addition to the therapy, De La Cruz received an injection in her lower back (*Id.* at 45) and a neck brace which she used for one week (*Id.* at 46). In September 2022, she also underwent left shoulder surgery with Dr. Segreto. (Plaintiff's EBT at 49-54). After the surgery, her shoulder was in a sling for three months. (*Id.* at 54). Her physical therapy continued for three or four months after the surgery. (*Id.* at 55).

Plaintiff also submits MRI reports of Plaintiff's left shoulder, lumbar spine, cervical spine, and right shoulder, taken in March 2022. (Plaintiff's Opp. Exhibit A). Counsel makes the following assessment of the MRI reports. The left shoulder MRI reflects a partial tear of the distal supraspinatus tendon at the footprint of the most posterior fibers, mild glenohumeral joint effusion, and mild amount of fluids/synovitis of the subacromial subdeltoid bursa. (*Id.* at 1). The lumbar MRI showed a right foraminal/extraforaminal disc protrusion at L4-L5 contacting the nerve root. (*Id.* at 3). The cervical MRI showed reversal of cervical lordosis and anterior endplate spondylosis at C5-C6. (*Id.*

at 6). The right shoulder MRI showed a partial tear of the distal supraspinatus tendon involving the footprint of the most posterior fibers as well as trace glenohumeral joint effusion. (*Id.* at 7). Counsel also submits the medical records of De La Cruz's left shoulder surgery conducted on September 15, 2022, including the operative report which counsel states reflects postoperative diagnoses of bankart labral tear, rotator cuff tears, extensive hypertrophic synovitis, multiple adhesions, and impingement. (Plaintiff's Opp. Exhibit B at 1). Counsel also proffers Plaintiff's medical records related to trigger point injection treatments, as well as physical therapy and chiropractic records (Plaintiff's Opp. Exhibits C and D, respectively).

Plaintiff also cites portions of Plaintiff's deposition testimony stating certain restrictions to usual activities as a result of the incident. De La Cruz testified that she worked for Instacart and Uber Eats before the accident and that she missed three months of work. (NYSCEF Doc. 37 at p. 9-11). She stayed home except for medical appointments, also for about three months. (*Id.* at p. 60-61). Plaintiff also submitted a factual affidavit in connection with the instant application (NYSCEF Doc. 49, De La Cruz Aff.). Plaintiff states that, during the six months immediately after the accident, De La Cruz's limitations were more severe than at the time of her deposition. (*Id.* at ¶ 5). During that time, she felt intense pain in her back and shoulders, particularly her left shoulder, and could not, or could only with great difficulty, lift and carry, walk or stand for long periods, sit for long periods, climb stairs, sleep without having to constantly change position, and care for herself. (*Id.*)

Plaintiff stated that performing such activities caused aggravated pain. (*Id.*) Plaintiff also stated that any task that involved my shoulders and required reaching or lifting was exceptionally difficult and usually impossible. (*Id.*)

Decision:

On a summary judgment motion, the movant has the initial obligation to show its entitlement to judgment as a matter of law. (*See Zuckerman v. City of N.Y.*, 49 NY2d 557 [1980]). Thus, it is the defendants' burden to show that plaintiff did not suffer a "serious injury", which by statute includes: (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; significant limitation of use of a body function or system"; or (3) "a medically determined injury or impairment which prevents the injured person from performing substantially all of... [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury". (See Insurance Law § 5102[d]). Upon establishing a prima facie entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude summary judgment. [*Alvarez v. Prospect Hospital, et. al.*, 68 NY2d 320, 324 (1986); *Zuckerman*, supra. at 562].

Here, the motion record contains conflicting medical records and defense expert opinion raising issues of fact to be resolved by a trier of fact, including whether Plaintiff sustained "permanent

consequential limitation of use of a body organ or member; significant limitation of use of a body function or system” (Insurance Law § 5102[d][2]); whether Plaintiff was prevented from performing usual activities for not less than 90 days during the 180 days immediately following the occurrence of the injury” (Insurance Law §5102[d][3]); and whether any such condition(s) necessitated Plaintiff’s left shoulder surgical procedure.

Based on the foregoing, it is hereby

ORDERED that, Defendant’s motion for summary judgment pursuant to CPLR §3212 dismissing the complaint on the basis that Plaintiff, ANA DE LA CRUZ, did not sustain a “serious injury” under Insurance Law §5102(d) and related relief is **DENIED** as herein stated. It is further

ORDERED that the Judge's Part Clerk, Anissa Robinson, will issue a separate court notice scheduling a Pre-Trial Settlement Conference shortly.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 16, 2024
White Plains, New York

E N T E R :



HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*