

Paz v Guevara

2012 NY Slip Op 30925(U)

April 2, 2012

Supreme Court, Nassau County

Docket Number: 12285/10

Judge: Anthony L. Parga

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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 6

GLORIBEL PAZ,

Plaintiff,

INDEX NO. 12285/10

-against-

MOTION DATE: 02/24/12

SEQUENCE NO. 001, 002

ANIBAR GUEVARA, CLAUDETTE CHANG,
and SHAWN URON,

Defendants.

-----X

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Upon the foregoing papers, it is ordered that the motion by defendant, Anibar Guevara, and the cross-motion by defendants, Claudette Chang and Shawn Uron, for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law §§5102(d) are denied.

This is an action for personal injuries allegedly sustained by plaintiff Gloribel Paz in an automobile accident which occurred on April 5, 2009 on North 22nd Street, at or about its intersection with Merritt Avenue, in Wyandanch, Suffolk County, New York.

Movants contend that plaintiff's injuries fail to meet the "serious injury" requirements of Insurance Law §§5102(d). In support of their motion and cross-motion, Movants submit the plaintiff's verified bill of particulars, plaintiff's deposition transcript, an examination report of neurologist, Dr. Maria Audrie DeJesus, an examination report of orthopedic surgeon, Dr. Robert Israel, and a radiology report by Dr. Audrey Eisenstadt relating to plaintiff's left shoulder MRI, left knee MRI, cervical spine MRI, and lumbar spine MRI. To begin, Movants contend that

plaintiff testified that she was a front seat passenger in the vehicle operated by her boyfriend, Anibar Guevara. Plaintiff testified that she did not lose consciousness as a result of the accident, nor did her body make contact with the interior of the vehicle. She did not leave the scene of the accident in an ambulance or seek medical treatment at the hospital. She consulted with a doctor nine days after the accident on April 14, 2009, complaining of pain in her neck, left shoulder, left knee, and both wrists. Thereafter, she underwent six months of physical therapy. Plaintiff testified that she underwent arthroscopic surgery to her left shoulder on March 24, 2010 by Dr. Dov Berkowitz. After the accident, plaintiff attempted to return to work as a baby sitter, but testified that she was unable to return to work and has not attempted to work since said time.

Movants submit the report of Dr. Maria Audrie DeJesus, a board certified neurologist. Dr. DeJesus examined the plaintiff at defendant's request on May 19, 2011. Dr. DeJesus found no evidence of a primary neurological disability or deficit and diagnosed plaintiff with "post cervical and thoracolumbar spine sprain/strain, resolved." She also opined that plaintiff "can return to work as a baby sitter and perform all usual daily activities without restriction or any neurological limitations." Movants further submit the report of board certified orthopedic surgeon, Dr. Robert Israel, who examined plaintiff at defendant's request on April 19, 2011. Dr. Israel examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. Israel found that plaintiff had normal ranges of motion in her cervical spine, left shoulder, and left knee. Dr. Israel concluded that plaintiff had resolved sprain of the cervical spine and left knee and "SP arthroscopy of the left shoulder." Dr. Israel opined that based upon his examination, the plaintiff has no orthopedic disability as a result of the accident. He also opined that the plaintiff is capable of work activities and activities of daily living without restriction.

Lastly, Movants submit the radiology report of Dr. Audrey Eisenstadt, who reviewed plaintiff's left shoulder MRI, left knee MRI, cervical spine MRI, and lumbar spine MRI. Dr. Eisenstadt opined that plaintiff's left shoulder MRI was normal and showed no rotator cuff tear. Dr. Eisenstadt opined that plaintiff's left knee MRI showed a grade II mucoid intrasubstance degenerative signal change, posterior horn of the medial meniscus with minimal joint effusion. She opined that same is a degenerative process without traumatic basis or causal relationship to

the within accident. Dr. Eisenstadt opined that plaintiff's cervical spine MRI showed cervical straightening, a congenital block vertebra at C3-4 with a hypoplastic intervertebral disc, and desiccation at C2-3, C4-5, and C5-6. Dr. Eisenstadt opined that same is not traumatic in origin or causally related to the accident. Dr. Eisenstadt opined that plaintiff's lumbar spine MRI showed desiccation and bulging at the L4-5 level, which she also opined is a manifestation of degenerative disc disease and not causally related to the accident.

Accordingly, Movants have demonstrated a prima facie showing of entitlement to summary judgment on the grounds that plaintiff's alleged injuries do not meet the serious injury threshold of Insurance Law §§5102(d). The proponent of a 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 issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movants have demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, plaintiff submits the affirmed reports of Dr. Joseph Perez, Dr. Miguel Vargus, Dr. Kelman, Dr. Benatar, and radiologist, Dr. Alan B. Greenfield. The unsworn report of chiropractor, Dr. Peter A. Kicha, is not in admissible form and shall not be considered by this Court.

Dr. Joseph Perez examined the plaintiff two days after the accident on April 16, 2009. Dr. Perez's affirmed reports of April 16, 2009, April 30, 2009, June 4, 2009, and April 21, 2009, May 21, 2009, and June 25, 2009 demonstrate that plaintiff made complaints of left shoulder pain, right shoulder pain, mid and lower back pain, and bilateral wrist pain. Dr. Perez performed range of motion examinations with dual inclinometer protocol on April 21, 2009, May 21, 2009 and June 29, 2009, which determined that plaintiff had decreased ranges of motion in her cervical, thoracic, and lumbar spines, as well as her upper and lower extremities, with a final whole body impairment of 34%, 33% and 23%, respectively. Dr. Miguel Vargus, a physiatrist, examined plaintiff on April 21, 2009 and June 16, 2009 and found restrictions in plaintiff's range of motion in her left shoulder and cervical spine.

In addition, radiologist, Dr. Alan B. Greenfeld, interpreted plaintiff's left shoulder, left knee, cervical spine, and lumbar spine MRIs. He opined that plaintiff's left shoulder MRI revealed tendinosis of the distal supraspinatus tendon; that plaintiff's left knee MRI revealed a grade II signal throughout the menisci, without evidence of a focal tear, and joint effusion; that plaintiff's cervical spine MRI revealed a midline tear of the annulus fibrosis with shallow central disc herniation at C5-6 and bulging disc at C6-7; and that plaintiff's lumbar spine MRI revealed a central disc herniation with midline tear of the annulus fibrosis at L4-5, and facet arthropathy at L3-4 and L4-5 bilaterally.

Plaintiff thereafter went for orthopedic examinations with Dr. Harshad C. Bhatt on August 11, 2009 and September 22, 2009. Plaintiff made complaints of left shoulder pain and left knee pain. Dr. Bhatt performed range of motion testing which revealed decreased ranges of motion in plaintiff's left shoulder, but normal ranges of motion in her left knee. As a result, Dr. Bhatt recommended arthroscopic surgery of the left shoulder. Plaintiff thereafter went to Dr. Dov J. Berkowitz, an orthopedic surgeon, on October 13, 2009. Dr. Dov J. Berkowitz recommended arthroscopic surgery to plaintiff's left shoulder. Dr. Berkowitz performed an intra-articular debridement of the subscapularis tendon and of the SLAP lesion on March 24, 2010. On April 21, 2010, after her arthroscopic left shoulder surgery, plaintiff consulted with Dr. Samuel Kelman who found that plaintiff still had restricted ranges of motion in her left shoulder.

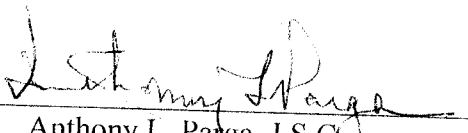
Finally, plaintiff was seen by Dr. David Benatar on September 15, 2011. Dr. Benatar performed range of motion testing and determined that plaintiff had decreased ranges of motion in her left shoulder and that her left knee examination revealed a possible patellar grind with pain. He agreed that her left knee MRI did not show a "definitive" grade 3 tear, but opined that plaintiff's examination exhibited a medial meniscal tear. Dr. Benatar opined that further physical therapy will not benefit plaintiff's left shoulder. He also opined that plaintiff's injuries are permanent, her overall prognosis is fair, and her left shoulder prognosis is fair to poor. He further opined that there is a causal relationship between plaintiff's injuries and the motor vehicle accident of April 5, 2009.

Plaintiff has produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this action. (*See, Adetunji v. U-Haul*,

250 A.D.2d 483, 672 N.Y.S.2d 869 (1st Dept. 1998); *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 (1st Dept. 2004)). The affirmed report of Dr. Benatar, as well as the reports of Dr. Joseph Perez, Dr. Miguel Vargus, and Dr. Kelman, demonstrate objective evidence of the physical limitations in plaintiff's left shoulder resulting from the within accident and warrant the denial of the defendants' motion and cross-motion. (See, *Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005)). In addition, while the Court of Appeals has held that submission of a doctor's report bearing contemporaneous numerical measurements of plaintiff's ranges of motion is not required to defeat a motion for summary judgment on threshold grounds, plaintiff's submission of Dr. Perez's reports demonstrates significant limitations contemporaneous with the accident sufficient to establish a causal relationship between the accident and the injuries alleged. (See, *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011)).

Accordingly, defendants' motion and cross-motion for summary judgment are denied. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

Dated: April 2, 2012


 Anthony L. Parga, J.S.C.

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