

Vaccaro v Schonholz
2012 NY Slip Op 31070(U)
April 10, 2012
Supreme Court, Suffolk County
Docket Number: 09-44675
Judge: John J.J. Jones Jr
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 7-14-11
ADJ. DATE 12-7-11
Mot. Seq. # 003 - MD

-----X

JULIE VACCARO,
Plaintiff,

- against -

JOYCE M. SCHONHOLZ,
Defendant.

-----X

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 17; Replying Affidavits and supporting papers 18 - 19; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on October 18, 2008 when the driver's side of her vehicle was struck by the front of defendant's vehicle. The accident occurred on Locust Avenue at or near its intersection with Ocean Avenue in Suffolk County, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including full thickness tearing of the anterior edge of the supraspinatus tendon of the left shoulder; 90 percent tear of the biceps tendon of the left shoulder requiring an arthroscopic procedure on October 22, 2009; rotator cuff tear of the left shoulder; herniated disc at C4-C5; and bulging discs at C5-C6 and C6-C7. On the date of the accident, plaintiff was treated at and then released from the emergency room of Southside Hospital. She underwent ambulatory surgery on her left shoulder one year later on October 22, 2009 and was thereafter incapacitated from her employment as a senior typist confidential for the Sayville School District until November 2, 2009.

In her bill of particulars, plaintiff alleges that as a result of said accident she sustained injuries under the following categories of serious injury pursuant to Insurance Law § 5102 (d): 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 non-permanent injury or impairment that prevents the performance of substantially

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all of the material acts of plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendant submits the pleadings, plaintiff's bill of particulars and her supplemental bill of particulars, plaintiff's deposition transcript, and the affirmed reports of her examining orthopedic surgeon and examining radiologist.

Insurance Law § 5102 (d) 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" (*see* Insurance Law § 5102 [d]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Plaintiff's deposition testimony from August 11, 2010 reveals that her vehicle was struck on the driver's side passenger door and rear panel, that the left side of her body struck the left side of her vehicle's interior, that her driver's side air bag deployed, and that she complained of neck and left shoulder pain at the scene of the accident and at the emergency room. In addition, plaintiff's testimony indicates that she began seeing her treating orthopedic surgeon, Dr. Cappellino, a few days after the accident, that she continues to see him every six to eight weeks, and that she continues to receive physical therapy for her left shoulder. Plaintiff explained that her treating orthopedic surgeon recommended physical therapy during the first visit, that she underwent physical therapy for six months for the pain and tingling in her left shoulder

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and arm, and that when she obtained no relief from therapy she decided to undergo arthroscopic surgery. According to plaintiff, the last time that she felt tingling in her left arm was in the spring of 2009 and following surgery the pain has decreased but the range of motion of her left shoulder is still restricted. Plaintiff stated that prior to the subject accident she had not injured her neck or shoulder nor did she re-injure her neck or shoulder after the accident. She also testified that she cannot lift objects from a high shelf, or do exercises that require the raising of her arms, or play tennis, and that it is more difficult for her to clean her house, open a heavy car door, put her arm through shirt sleeves, or fix her hair.

Defendant's examining orthopedic surgeon, Michael J. Katz, M.D. (Dr. Katz), indicates in his affirmed report dated September 21, 2010 that he examined plaintiff on said date and performed range of motion testing using a goniometer. His examination results of plaintiff's cervical spine, lumbar spine, and left shoulder reveal full range of motion testing results as compared with normal findings (*see Staff v Yshua*, 59 AD3d 614, 614, 874 NYS2d 180 [2d Dept 2009]). Dr. Katz notes with respect to plaintiff's left shoulder that there are well healed arthroscopic portals, that there is no crepitation at the AC joint, that there is no deformity about the clavicle or AC joint, and that there is no dislocation, clicking or grating with movement. He also provides negative results for the apprehension test, O'Brien's test, and Hawkin's Kennedy test (*see id*). Dr. Katz also mentions that there is no tenderness about the cervical spine and no paravertebral muscle spasm. He diagnoses plaintiff with cervical strain with pre-existing degenerative changes that have resolved, status post arthroscopy of the left shoulder which was successful, and lumbar strain as per the bill of particulars, also resolved. In concluding his report, Dr. Katz opines that plaintiff currently shows no signs or symptoms of permanence relative to her neck, that she has had an excellent surgical outcome with respect to her left shoulder, and that she is currently not disabled. According to Dr. Katz, plaintiff is capable of gainful employment as administrative assistant without restrictions. Dr. Katz notes that the MRI reports of plaintiff's cervical spine and left shoulder indicate degenerative changes which are confirmed by the reviews of defendant's examining radiologist, Dr. Tantleff. Dr. Katz further opines that based on the history provided and the records reviewed, the mechanism of injury is consistent with the injury to the neck and left shoulder but that injury to the back is not reflected in the records.

The affirmed reports dated September 13, 2010 of defendant's examining radiologist, A. Robert Tantleff, M.D. (Dr. Tantleff), indicate that he reviewed the MRI of plaintiff's cervical spine as well as the MRI of plaintiff's left shoulder. In a detailed report, Dr. Tantleff indicates that plaintiff's cervical spine MRI reveals longstanding chronic degenerative discogenic disc disease and cervicothoracic spondylosis. He notes that there is no evidence of recent trauma or annular edema of any of the outermost annuli to suggest a recent herniation or recent acute exacerbation. He also notes that there is no evidence of posterior endplate fractures of the opposing discovertebral endplates to suggest whiplash or trauma. Dr. Tantleff opines that the findings are consistent with plaintiff's age and are not causally related to the date of the subject accident as they are chronic longstanding processes requiring years to develop as presented and are consistent with the wear and tear of the normal aging process. Regarding the MRI of plaintiff's left shoulder, Dr. Tantleff found age related wear and tear degenerative overuse changes that are consistent with plaintiff's age and not the result of a single traumatic event. He notes that there is degenerative tendinosis of the supraspinatus tendon with a prominent anterolateral fraying and "shredded wheat" appearance of the supraspinatus tendon consistent with underlying chronic degenerative tearing of the supraspinatus. He indicates that there is no evidence of full thickness tear or retraction.

Here, defendant submitted competent medical evidence establishing, prima facie, that plaintiff's

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alleged injuries to her spine and left shoulder did not constitute serious injuries within the meaning of Insurance Law § 5102 (d) (see *Torres v Ozel*, ___ NYS2d ___, 2012 NY Slip Op 01241 [2d Dept 2012]) and, in any event, were not caused by the subject accident (see *Hall v Hecht*, ___ NYS2d ___, 2012 NY Slip Op 01210 [2d Dept 2012]; *Jilani v Palmer*, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). Defendant also demonstrated that plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident (see *Dunbar v Prahovo Taxi, Inc.*, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (see *Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d) inasmuch as prior to the subject accident she had no problems with her neck and left shoulder and sought no treatment for her neck and left shoulder. In support of her opposition, plaintiff submits her affidavit, the uncertified police accident report, her uncertified records from the emergency room of Southside Hospital, the unsworn MRI report of plaintiff's cervical spine, the unsworn MRI report of her left shoulder, the unsworn report of her operation on October 22, 2009, and the affirmed report dated October 19, 2011 of her surgeon, Anthony Cappellino, M.D.

In reply, defendant argues that the majority of the plaintiff's submissions are in inadmissible form and cannot be considered and that the affirmed report of Dr. Cappellino impermissibly relies on the unsworn records and reports of other physicians. Defendant's other arguments include the lack of admissible contemporaneous range of motion testing results for plaintiff.

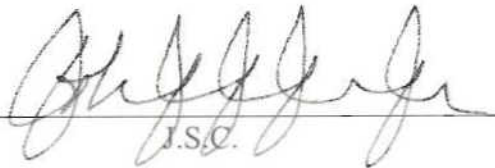
In opposition to the motion, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to her left shoulder constituted a serious injury under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102 (d) (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Kliche v All Is. Truck and Leasing*, ___ NYS2d ___, 2012 NY Slip Op 01214 [2d Dept 2012]; *Kyoung Yun Kim v Emkay Inc. Trust*, 91 AD3d 830, 936 NYS2d 674 [2d Dept 2012]). Plaintiff relied on, among other things, the affirmed report dated October 19, 2011 of her treating orthopedic surgeon, Dr. Cappellino. Notably, and in contradiction of the MRI findings of Dr. Tantleff, Dr. Cappellino stated in said report that while performing plaintiff's surgery on October 22, 2009 he found full thickness tearing of the anterior aspect of the supraspinatus tendon for which he performed arthroscopic repair. In addition, Dr. Cappellino stated that the neck pathology noted and plaintiff's complaints, specifically disc herniation, as well as the left shoulder injury are all the result of and are causally related to the subject accident. He indicated that prior to the subject accident, plaintiff did not have any problems with her neck or shoulder and that she never sought treatment of any type for either of these regions. Dr. Cappellino noted that the MRI of the cervical spine showed spasm, which would indicate underlying pathology, specifically as a result of the subject accident. He added that there was a tearing of the biceps which is uncommon in a patient of plaintiff's age of 44 without marked impingement phenomena. Also in contradiction to Dr. Tantleff's findings upon MRI review, Dr. Cappellino stated that at the time of surgery there was an obvious anterior edge rent tear which was not non-retracted and can be missed on an MRI. Dr. Cappellino concluded that although plaintiff has attained a good functional outcome with regard to her left shoulder, some issues persist which are permanent in nature and are a result

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of both the injury and the subsequent surgery required to appropriately treat the injury. According to Dr. Cappellino, plaintiff has some restrictions in range of motion, which he provided indicating that he used a goniometer and the opposite arm for comparison, and restricted maneuvers which impact plaintiff's activities of daily living and said issues are permanent. The contents of said report are sufficient to rebut defendant's prima facie showing and, thus, raise a triable issue of fact (see *Jilani v Palmer, supra*). Contrary to the assertions of defendant in reply, Dr. Cappellino relied on his own personal observations during surgery, not the unsworn reports, in rendering his own affirmed report. Also, contemporaneous range of motion testing results are not a prerequisite to recovery (see *Perl v Meher, supra*).

Accordingly, the instant motion is denied.

Dated: 10 April 2012



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION