

Rosenbach v Rahman
2016 NY Slip Op 30213(U)
February 4, 2016
Supreme Court, New York County
Docket Number: 161889/13
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

HEIDI ROSENBACH and MEL ROSENBACH,

Plaintiffs,

-against-

MD HABIBUR RAHMAN and PATTY TAXI CORP.,

Defendants.

Motion Seq.: 01

Index No.: 161889/13

DECISION/ORDER

HON. LETICIA M. RAMIREZ, JSC

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff Heidi Rosenbach ("plaintiff") did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) and for dismissal of plaintiff's Complaint, pursuant to CPLR §3211(a)(2) for lack of subject matter jurisdiction and CPLR §3211(a)(7) for failure to state a cause of action, is denied.

While the plaintiff has the burden of proof, at trial, of establishing a prima facie case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), the defendants have the burden, on a summary judgment motion, of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). Only if the defendants have satisfied the Court to that effect, must the plaintiff then present evidence that she sustained a "serious injury" within the meaning of Insurance Law §5102(d). *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 491 N.E.2d 1088 (1982). *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 491 N.E.2d 1088 (1982).

A review of the papers submitted reveals that the vehicle owned and operated by plaintiff Mel Rosenbach, in which plaintiff Heidi Rosenbach was a passenger, was involved in an accident with the vehicle owned by defendant Patty Taxi Corp. and operated by MD Habibur Rahman. The subject motor vehicle accident occurred on April 17, 2013, at approximately 1:00 a.m., on East 23rd Street at its intersection with 1st Avenue, New York, New York. A review of plaintiffs' Bill of Particulars reveals that plaintiff Heidi Rosenbach ("plaintiff") alleges, inter alia, left shoulder rotator cuff tear, partial left shoulder acromioplasty, left shoulder adhesive capsulitis, left shoulder labrum tear, left shoulder synovitis/scar, tendinosis of the left supraspinatus and limited range of motion in the left shoulder.

In support of their summary judgment motion, the defendants submitted the affirmed report of Dr. Robert Goodman dated December 11, 2014. Dr. Goodman reviewed x-rays of the plaintiff's left shoulder conducted at Bellevue Medical Center on April 17, 2013, where the plaintiff received emergency room treatment following the subject accident. Dr. Goodman opined that the x-rays were normal, with no findings of acute trauma. His report noted that the x-rays took four views of the plaintiff's left shoulder, including AP, internal rotation, external rotation and transscapular Y views.

Also submitted in support of the defendants' motion is the affirmed report of orthopedist, Dr. Arnold Berman, who examined the plaintiff on January 22, 2015. Dr. Berman diagnosed the plaintiff with a resolved left shoulder strain/sprain with pre-existing underlying degenerative changes. He opined that there was no aggravation of a pre-existing condition as a result of the subject accident and that the plaintiff's prognosis was "good for continued stable function at the current level." However, Dr. Berman's report did reveal that upon his examination, the plaintiff had limited range of motion of her left shoulder, to wit: forward elevation (flexion) was to 140 degrees (normal is 180 degrees), abduction was to 90 degrees (normal is 180 degrees), internal rotation was to 80 degrees (normal is 90 degrees) and external rotation was to 80 degrees (normal is 90 degrees).

In opposition, the plaintiff submitted the affirmation of orthopedic surgeon, Dr. Ronald Krinick, who treated the plaintiff from April 18, 2013 through April 1, 2014, when he retired. Dr. Krinick also performed the plaintiff's left shoulder surgery, on October 23, 2013, which entailed

the manipulation of her left shoulder, repair of a rotator cuff tear and partial acromioplasty. His post-operative diagnoses were a torn labrum, a torn rotator cuff, adhesive capsulitis and a subacromial spur. Dr. Krinick noted that his initial examination of the plaintiff's left shoulder on April 18, 2013 revealed flexion at 100 degrees (normal is 180 degrees) and abduction at 90 degrees (normal is 180 degrees). His final examination of her left shoulder on April 1, 2014 indicated flexion at 120 degrees (normal is 180 degrees), abduction at 120 degrees (normal is 180 degrees), and external rotation at 45 degrees (normal at 90 degrees). Dr. Krinick opined that the plaintiff's left shoulder condition resulted from the subject accident and was not degenerative in nature.

In further opposition to the defendants' motion, the plaintiff submitted the affirmation of Dr. Marc Levinson, with whom the plaintiff began treating after Dr. Krinick retired. Dr. Levinson examined the plaintiff on July 27, 2015 and September 9, 2015. His examination of the plaintiff's left shoulder on July 27, 2015 indicated flexion at 150 degrees (normal is 180 degrees), abduction to 140 degrees (normal is 180 degrees) and external rotation at 70 degrees (normal is 90 degrees). On September 9, 2015, the plaintiff's left shoulder demonstrated flexion to 90 degrees (normal is 180 degrees), abduction to 120 degrees (normal is 180 degrees) and external rotation to 60 degrees (normal is 90 degrees).

In light of the foregoing, this Court finds the defendants have not demonstrated entitlement to summary judgment, as a matter of law. The reports of the defendants' own expert witnesses are contradictory. Dr. Goodman asserts that the plaintiff's left shoulder x-rays of April 17, 2013 were normal. However, Dr. Berman finds limited range of motion in the areas viewed upon x-ray, *inter alia* internal rotation and external rotation and opines that a resolved left shoulder strain/sprain with pre-existing underlying degenerative changes. This conflict is fatal to the defendants' motion.

Furthermore, the conflict between the expert opinions of Dr. Goodman and Dr. Berman and the expert opinions of Dr. Krinich and Dr. Levinson, as to their diagnoses and findings, whether the plaintiff has significant limited range of motion of her left shoulder as a result of the subject accident and whether the plaintiff's injuries are degenerative or traumatic in nature, also warrant denial of the motion. It is well settled that the finder of fact must resolve conflicts in

expert medical opinions. *Ugarriza v. Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Moreno v. Chemtob*, 706 N.Y.S.2d 150 (2nd Dept. 2000).

Accordingly, as there remain material issues of fact as to whether the plaintiff sustained a “significant limitation of use of a body function or system” within the meaning of Insurance Law §5102(d), the defendants’ request for summary judgment on that basis is denied.


Next, that portion of the defendants’ motion seeking dismissal of the plaintiffs’ Complaint for lack of subject matter jurisdiction is also denied, as the defendants failed to set forth a prima facie basis for the relief sought.

Similarly, the defendants’ request for dismissal of the plaintiffs’ Complaint based upon plaintiff’s failure to state a cause of action is denied. Contrary to the defendants’ contentions, the plaintiffs do not allege a cause of action for negligent entrustment in their Complaint. A cause of action based upon negligent entrustment must be specifically pled in a Complaint. *Bischoff v. City of New York*, 2007 NY Misc. LEXIS 4363 (*Sup. Ct Kings 2007*). As no such cause of action is specified in the plaintiffs’ Complaint, the defendants’ request is denied, as moot.

Based upon the foregoing, the defendants’ motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: February 4, 2016
New York, New York


HON. LETICIA M. RAMIREZ, J.S.C.
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