Am v Santaniello
2016 NY Slip Op 32531(U)
November 21, 2016
Supreme Court, Suffolk County
Docket Number: 04093/2013
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Sharon Israel I Am,

Plaintiff,

-against-

Ralph Santaniello and Jenna M. Santaniello,

Defendants.

Motion Sequence No.: 002; MG; CD
Motion Date: 5/25/16
Submitted: 8/10/16

Index No.: 04093/2013

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 19 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 13 - 17; Replying Affidavits and supporting papers, 18 - 19; it is

ORDERED that this motion by defendants, Ralph Santaniello and Jenna M. Santaniello, for an order granting summary judgment dismissing the complaint on the ground that the plaintiff, Sharon Israel I Am, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is granted, and the complaint is hereby dismissed.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident on September 7, 2011. It is alleged in the bill of particulars that as a result of the accident, plaintiff sustained cervical and lumbar radiculopathy, a right shoulder rotator cuff tear and other soft tissue injuries. At her deposition, plaintiff testified that she had

sustained multiple prior injuries to her shoulders, back and neck and had been receiving Medicare and Social Security Disability benefits since the 1990's. She also testified that she had been treated by Dr. Silverman since 1987 when she had a work-related injury, and that she had undergone multiple surgeries. Defendants now move for an order awarding summary judgment in their favor; plaintiff has opposed the application.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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" (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 (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries sustained do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim that a serious injury was sustained as a result of the subject accident (***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, *supra*; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

Defendants submitted the reports of Audrey Eisenstadt, M.D., who reviewed MRI films taken on September 29, 2009 of plaintiff's lumbar spine and compared them to the MRI study taken on

February 21, 2012. Among the findings seen on the earlier films were osteophyte formation and degenerative disc disease which are also seen on the later films and determined to be "all bony degenerative changes which have no traumatic etiology." In addition, the L5 transitional S1 paracentral disc herniation seen on the earlier study was unchanged on the post-traumatic study, and Dr. Eisenstadt opined that it has no causal relationship to the underlying accident. She also reviewed the MRI films taken on October 7, 2009, February 20, 2012 and March 23, 2013 of plaintiff's cervical spine. The 2009 study showed cervical straightening with osteophyte formation at C5-6 and C6-7 levels, disc dessication at C2-3, C5-6 and C6-7, bulging disc at C5-6 and herniated disc at C6-7. The 2012 study reportedly no change in the appearance of the disc bulge or herniation in flexion or extension, and the 2013 films also reportedly showed no change in the central C6-7 disc herniation and no annular tears. In Dr. Eisenstadt's opinion, the MRI studies reveal degenerative disc disease without traumatic etiology, and the disc herniation at C6-7 is not causally related to the underlying accident. In addition, Dr. Eisenstadt reviewed the MRI study of plaintiff's left shoulder taken on November 4, 2009 as well as the MRI study taken of her right shoulder on March 26, 2013. The review of the 2009 study of the left shoulder revealed "a persistent narrowing of the subacromial space due to degenerative joint disease at the acromioclavicular joint with bony hypertrophy noted and subacromial spurring ...", all of which pre-date the underlying accident. The post-accident study of plaintiff's right shoulder reportedly showed degenerative joint disease at the acromioclavicular joint that was not traumatic in origin.

Defendant also submitted the affirmed medical report of Richard Lechtenberg, M.D., who conducted a neurological examination of plaintiff on February 16, 2016. Although plaintiff refused to allow the doctor to have physical contact with her person, the doctor observed that her gait was normal. Range of motion was measured with a goniometer and by visual observation. Range of motion of the cervical spine was 10/50 degrees forward flexion, 10/60 degrees extension, 45/45 degrees lateral flexion and 60/80 degrees lateral rotation. There was full range of motion of the thoracic spine. Range of motion of the lumbar area of the spine was 20/60 degrees forward flexion, 20/25 degrees right lateral flexion, 5/25 degrees left lateral flexion, and 0/25 degrees extension. The doctor remarked that the plaintiff voluntarily restricted movement because of complaints of pain, although "[i]ncidental movements revealed a largely normal range of motion" of the cervical and lumbar areas of the spine. Range of motion of the shoulders was approximately 60/180 degrees flexion, 40/40 degrees extension, 60/180 degrees abduction, 30/30 degrees adduction, 80/80 degrees internal rotation and 90/90 degrees external rotation. There was full range of motion of the knees. Tendon reflexes were 0-1+ at the arms and 2+ at the legs. The doctor found "no consistent, objective, clinical, neurologic deficits" to substantiate plaintiff's claims of injury as a result of the underlying accident, and he opined that she is not disabled.

Defendant also submitted the affirmed medical report of Isaac Cohen, M.D., who conducted an orthopedic examination of plaintiff on March 15, 2016. Range of motion of the thoracolumbar spine, as measured with a goniometer and/or a bubble inclinometer and by visual evaluation, revealed 45/60 degrees flexion, 10/25 degrees hyper-extension, 20/25 degrees bilateral lateral bending, and 20/30 degrees bilateral rotation. Reflexes of biceps, triceps and brachioradialis were 1+, and plaintiff would not permit testing of lower extremity reflexes. Plaintiff had full extension

and flexion of the knees bilaterally, and there was "mild patellofemoral joint crepitation" noted in both knee joints. Visual examination of the shoulders showed 120/180 degrees in forward elevation, 150/180 degrees in abduction, 0/90 degrees internal rotation, 40/90 degrees external rotation. Adduction was within normal limits. Plaintiff would not permit a complete examination but, based on the doctor's observations, no significant abnormalities were noted to be present. Upon his examination and review of medical records, the doctor concluded that there is no indication "of any acute posttraumatic findings related to this accident of 9/7/11."

Defendants satisfied their initial burden of establishing that plaintiff did not suffer a causally-related serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 352, 774 NE2d 1197, 746 NYS2d 865 [2002]; *see also* ***McCauley v Ross,*** 298 AD2d 506, 748 NYS2d 409 [2d Dept 2002]; ***McKinney v Lane,*** 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing ***Gaddy v Eyler***, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990). The evidence of a pre-existing condition shifted the burden to plaintiff to "set forth competent medical evidence based upon objective medical findings and tests to support [the] claim of serious injury and to connect the condition to the accident" (***MacMillan v Cleveland,*** 82 AD3d 1388, 1388, 918 NYS2d 263 [3d Dept 2011], quoting ***Tracy v Tracy,*** 69 AD3d 1218, 1219, 893 NYS2d 672 [2010]). In opposition to the defendant's *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra* at 98 NY2d 350). The plaintiff failed to meet this burden.

In opposition to the motion, plaintiff submitted the affirmed report of Marc M. Silverman, M.D., who has served as plaintiff's treating orthopedist "for many years, substantially predating her motor vehicle accident on September 7, 2011." Although Dr. Silverman states in his report that "[a]n MRI imaging study of plaintiff's right shoulder conducted after the said motor vehicle accident showed a right shoulder full thickness rotator cuff tear as well as impingement", the date of that study is not specified and the doctor fails to state that he actually reviewed the MRI film itself, as opposed to merely reading the narrative report, which was not submitted (*see* ***Jeng-Jen Chen v Marc,*** 10 AD3d 295, 781 NYS2d 32 [1st Dept 2004]). Furthermore, no triable issue of fact is presented by Dr. Silverman's opinion that plaintiff suffered exacerbated injuries to her knees, which relies on the unsworn report of nerve conduction studies performed by another physician (*see* ***Varveris v Franco,*** 71 AD3d 1128, 898 NYS2d 213 [2d Dept 2010]; *see also* ***Ayala v Katsionis,*** 67 AD3d 836, 888 NYS2d 431 [2d Dept 2009]).

Plaintiff also submitted the medical report of Sebastian Lattuga, M.D., who examined plaintiff "on or about June 14, 2012", approximately nine months following the accident. In addition, while the doctor sets forth range of motion findings of the plaintiff's cervical spine based on his visual observation and goniometric measurements, he failed to provide objective evidence of contemporaneous limitations as a result of the accident (*see* ***Soho v Konate,*** 85 AD3d 522, 925 NYS2d 456 [1st Dept 2011]) and he failed to present any comparison between his range of motion findings with plaintiff's condition prior to the accident. Absent such a comparative quantification,

findings with plaintiff's condition prior to the accident. Absent such a comparative quantification, it can not be established that plaintiff's alleged limitation in spinal range of motion was exacerbated by the accident, and the doctor otherwise failed to establish causation for his findings (*see* ***Nociforo v Penna,*** 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]). In this regard, the conclusion that a causal relationship is established between the plaintiff's symptoms and the subject accident is speculative (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]). Moreover, neither the reports of Dr. Silverman or Dr. Lattuga, or the sworn report of Myron C. Boxer, DPM, set forth the dates of any treatment or examination of plaintiff subsequent to the underlying accident. Since no objective evidence was provided as to the extent of any alleged limitations, no triable issue of fact has been raised as to whether plaintiff sustained a "serious injury" within the meaning of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.,*** *supra*, 98 NY2d 345).

Dated: 11/21/2016

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ **FINAL DISPOSITION**_____ **NON-FINAL DISPOSITION**