SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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CLAUDIA SANDOVAL,

Plaintiff,

-against-

ANTHONY URENA, MARTHA URENA, and JASON A. VAUGHN,

Defendants.

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Index №.: 158177/13
Motion Seq. Nos. 003 and 004

DECISION AND ORDER

PAUL A. GOETZ, J.S.C.:

In a motor vehicle action, defendant Jason Vaughn (Vaughn) moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint (motion seq. No. 003). Defendants Anthony and Martha Urena (together, the Urenas) separately move for the same relief (motion seq. No. 004). Both Vaughn and the Urenas contend that plaintiff Claudia Sandoval's complaint should be dismissed because she fails to meet the requirements for serious injury under Insurance Law § 5102 (d). The motions are consolidated for disposition.

BACKGROUND

On the afternoon of December 10, 2010, plaintiff was a passenger in a motor vehicle owned by defendant Martha Urena and driven by Anthony Urena, when it collided with another vehicle driven by Vaughn. Plaintiff alleges that she suffered disc herniations in her lumbar and cervical spine, strains in her left shoulder and right knee, a sprain in left wrist, and right hip bruises as a result of the accident. Plaintiff avers that her injuries meet the following Insurance Law § 5102(d) criteria: significant limitation of use and 90/180-day. Vaughn and Urena, in their motions, argue that plaintiff's injuries are not serious as defined by Insurance Law § 5102 (d).

Medical Opinions

Vaughn and the Urenas submit several medical reports supporting their position that plaintiff did not suffer a serious injury from the December 2010 accident, while plaintiff submits, in opposition, her own expert report supporting her position that she did receive such an injury.

Dr. Stuart Hershon, Orthopedist (Hershon)

Hershon, an orthopedic surgeon, performed a medical examination on plaintiff on November 13, 2014. Vaughn submits the report from that examination, in which Hershon concludes that "there is no current disability in reference to activities of daily living, occupation or recreational activities" (Hershon report at 8). Hershon came to this conclusion after performing a variety of range of motion exams. Under "impression/diagnosis," Hershon writes that various injuries -- cervical sprain, lumbar sprain, and various contusions -- had resolved (*id.*).

Dr. Jonathan Lerner, Radiologist (Lerner)

Lerner, a radiologist, read images, on January 16, 2011, from a magnetic resonance imaging (MRI) examination of plaintiff's spine and found, essentially, that plaintiff did have disc injuries between the following vertebrae: C4-C5, C5-C6, C6-C7. Both Vaughn and the Urenas submit Lerner's report, which found:

> "There is a central disc bulge at C4-C5 with effacement of the ventral subarachnoid space . . . . There is a mild diffuse disc bulge at C5-C6 with effacement of the ventral subarachnoid space . . . . There is a right paracentral disc protrusion at C6-C7 with an annular fissure. There is effacement of the ventral subarachnoid space and narrowing of the right lateral recess. There is mid right neural foraminal narrowing"

(Lerner report at 2).

Instead of attributing these problems to plaintiff's accident, Lerner sees them as "consistent with degenerative disc disease and suggestive of a chronic degenerative process" (*id.*). In support of this conclusion, Lerner cites to a study finding that "disc bulges in the cervical spine will be seen in up to 57% of asymptomatic individuals" (*id.* at 3). "Thus," Lerner writes, "the findings are frequently nonspecific" (*id.*). Finally, Lerner concludes that "this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on this MRI examination" (*id.*).

Dr. Jean-Robert Desrouleaux, Neurologist (Desrouleaux)

Both Vaughn and the Urenas submit a report from Desrouleaux, a neurologist, who, after examining plaintiff on November 6, 2014, concluded that plaintiff had "no neurological disability" (Desrouleaux report at 3).

Dr. Jacques Serge Parisien, Orthopedist (Parisien)

The Urenas submit a report from Parisien, an orthopedist, who examined plaintiff on November 18, 2014. Parisien concluded that "there is no evidence of any orthopedic disability (Parisien report at 4). As to diagnosis, Parisien lists a series of "sprain/strain[s]" -- in the cervical spine, thoracic spine, lumbar spine, left shoulder, left wrist, right hip, right knee -- and lists them all as resolved (*id.*).

Dr. Robert April, Neurologist (April)

The Urenas submit a report from April, a neurologist who examined plaintiff on November 19, 2014. April concluded that "the accident of record did not produce a neurological diagnosis, disability, limitation or need for further neurological intervention" (April report at 3).

Dr. Orsuville Cabatu, Electrodiagnostics & Physical Medicine (Cabatu)

Plaintiff submits a report from Cabatu dated July 1, 2016. Cabatu initially examined plaintiff on December 16, 2010, and conducted follow-up examinations on January 14, 2011, February 18, 2011, March 22, 2011, April 19, 2011, December 13, 2011, January 27, 2015, and June 30, 2016 (Cabatu report at 1-3). While discussing his initial consultation with the plaintiff, Cabatu correctly identifies the day of the accident as December 10, 2010 (*id.* at 1). However, subsequently in the report, while opining on whether plaintiff had a serious injury, Dr. Cabatu incorrectly refers to the date of the accident as June 30 2011 (*id.* at 5). This typographical error, which defendants place a great deal of weight on in their reply papers, may relate to the fact that Cabatu examined plaintiff on June 30, 2016.

In any event, Cabatu states that plaintiff's MRIs revealed herniations, while an electromyography (EMG) examination revealed "left C5 radiculopathy" (*id.* at 3). Thus, Cabatu diagnoses this radiculopathy, as well as "[c]ervical C4-5, C5-6, C6-7 disc herniations with impingement upon the thecal sac and abutting the spinal cord" and "[l]umbar L5-S1 disc herniation with impingement upon the thecal sac," as well as cervical, lumbar and wrist sprains/strains (*id.* at 3). Cabatu also found limited decreased range of motion in Plaintiff's cervical and lumbar spine and left wrist. As to serious injury, Cabatu opines that:

> Ms. Sandoval has sustained serious injuries as a result of the subject accident. She sustained multiple cervical and lumbar spine herniations, with impingement and continues to exhibit significant restrictions in the cervical and lumbar spine range of motion as well as radicular symptoms correlated by studies suggesting left C5 nerve radiculopathy. These correlate with a restricted and painful range of motion measured with [a] goniometer. It is my opinion that these injuries are casually [sic] related to the motor vehicle accident that occurred on June 30, 2011 [sic]. It is my opinion based on, MRI's, EMG's, trigger pint injections, continued loss of range of motion and pain, that she is permanently partially disabled as a result of injuries sustained on June 30, 2011 [sic].[1]

[1] The court assumes not only that plaintiff was not injured on the day she was examined by Cabatu, but also that Cabatu intended to say that the car accident was causally, rather than casually related to

(*id.* at 4-5).

DISCUSSION

"To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

90-180 Category

The Court of Appeals has held that "[i]n order to prove serious injury under the 90-out-of-180 day rule, plaintiff must prove that she was curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Gaddy v Eyler*, 79 NY2d 955, 958 [1992] [internal quotation marks and citation omitted]).

Defendants argue that plaintiff does not qualify under the 90-180 category, as she was not prevented from performing her usual and customary activities for at least 90 days out of 180 following the accident. In support, defendants submit plaintiff's deposition testimony, in which she states that she was not confined to her home following the accident:

> "Q: … I want to talk about confinement, a term we use. And I will ask if [at] any point after the accident you were confined to your bed and by that I mean you were in your bed for everything other than getting up and going

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plaintiff's injuries.

to the bathroom or getting up and going to doctor's appointment or for a medical emergency?

A: No.

Q: And what about your home were you confined to [it] . . . for any period of time and by this I mean were you able to get out of your bed and walk around your home but you couldn't leave your house for anything [] other than going to the doctor's appointments or for medical emergencies?

Q: No"

(Plaintiff tr at 67-68).

Plaintiff also testified that she returned to work after the accident, but then missed a month of work after she visited Cabatu and he directed her to stay home (*id.* at 68-70). Beyond that one month, plaintiff missed a handful of days from work following the accident:

"Q: Other than that one month can you approximate how many days you missed from work -- related to this accident?

A: Like not together it was like separate like maybe one week. Let's say 12 days maybe to 15.

Q: And those 12 days or so days that you took off . . . were you ever told to take those days off or was that because you weren't feeling up to it?

A: There was times that I used to go to the doctor and maybe one or two times [Cabatu] gave me notes for a couple of days"

(*id.* at 70-71).

In opposition, plaintiff submits her own affidavit, in which she states that "I was, and I am still, unable to do substantially all of my material activities for more than 180 days after the accident. Workers' Compensation paid me for 81 weeks for lost wages. That condition still applies for today (plaintiff's aff, ¶ 7)."

Here, defendants make a prima facie showing of entitlement to summary judgment dismissing the complaint through plaintiff's own deposition transcript, in which she states that, other than the month and half, approximately, which she took off, plaintiff was able to return to work for more than half of the time during the first 180 days after the accident. Plaintiff's affidavit does not raise an issue of fact as to this question: while she states that she missed 81

weeks for lost wages, she does not state that she missed this work within 180 days of the accident. As plaintiff fails to rebut defendants' prima facie showing as to the 90/180 category of serious injury, plaintiff's allegations regarding this category must be dismissed.

Significant Limitation of a Body Function or System

Defendants make a prima facie showing as to this category of serious injury through the medical reports submitted above. Crucially, defendants submit the findings of orthopedists Hershon and Parisien -- specifically, that plaintiff did not suffer from any orthopedic disability. Moreover, neurologists Desroleaux and April both found that there was no neurological injury. As to plaintiff's disc injuries, Lerner, the radiologist, concluded that there was no basis to conclude that these injuries were caused by the subject accident.

Plaintiff created a triable issue of fact whether she suffered a serious injury to her cervical and lumbar spine and left wrist through Cabatu's report since he found a functional decreased range of motion in her cervical and lumbar spine and left wrist and opines that the accident caused Plaintiff's permanent partial disability. Consequently, since there is conflicting medical evidence on the issue of whether Plaintiff's injuries to her cervical and lumbar spine and left wrist is permanent and whether the accident caused these injuries, and varying inferences may be drawn, the question is one for the jury to decide (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306 [1st Dept 2008]).

CONCLUSION

Accordingly, it is

ORDERED that the motions of defendants Jason Vaughn (motion seq. No. 003), Anthony Urena, and Martha Urena (motion seq. No.004) are GRANTED as to Plaintiff's

90/180-day claim and DENIED as to Plaintiff's significant limitation of use claim.

Dated: July 28, 2017

ENTER:

HON. PAUL A GOETZ, J.S.C.