Lopez v Adames
2017 NY Slip Op 32451(U)
November 16, 2017
Supreme Court, New York County
Docket Number: 153590/2015
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22
----------X
Jeanette Lopez,

Plaintiff,

Index Number:

-against-

153590/2015

Jose G. Adames and Katty E. Jimenez Garcia,

Defendants.
----------X

Paul Goetz, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 (the No-Fault Law).

Underlying Allegations

Plaintiff states that, on March 11, 2013, she was a passenger in a car driven by her then boyfriend (bill of particulars, item 5; plaintiff EBT at 9). She further states the car had been driving down 116th Street, New York, New York and was stopped at the intersection of 116th Street and Park Avenue, when it was hit in the rear by a car driven by defendant Adames and owned by defendant Garcia (bill of particulars, item 6; plaintiff EBT at 13, 20-21, 25). She asserts that the impact of the collision was heavy and that, due to the accident, she suffered C-4 to C-5 and C-5 to C-6 disc bulges, neck and left shoulder pain (bill of particulars, item 8; plaintiff EBT at 29,

54, 68).

Defendants note that, in her deposition, plaintiff stated that she went to the doctor for the first time about a month after the accident and for a second time 3 months later (*id.* at 52, 60). They further point out that plaintiff stated that she missed a total of 30 days of her full-time work at Odyssey in the period of September to October 2013 and a further 10 days of work from her part-time employment at Target in November 2013 (*id.* at 91-92). Defendants also note that, in her deposition, plaintiff stated there were 15 days in the September to October 2013 period when she could not leave her home, due to the accident (*id.* at 101-102). They therefore contend that plaintiff did not have substantial impairment of her "usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following [her accident]."

Defendants also present the affirmed report (the Ferriter Report) of Dr. Pierce Ferriter, an orthopedic surgeon, who examined plaintiff on June 3, 2016. He found that plaintiff exhibited a normal range of motion in her cervical and lumbar spine and in her left shoulder and determined that her injuries were "resolved." Accordingly, defendants assert that they have established that plaintiff did not suffer a serious injury and that their motion for summary judgment dismissing the complaint should be granted.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

The No-Fault Law

The No-Fault Law provides, in pertinent part:

> "'Serious injury' means a personal injury which results in . . . a fracture; . . . 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."

"[T]he 'legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries' . . . [by requiring] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002] [internal citations omitted]). Objective proof sufficient to sustain a claim is "[a]n expert's designation of a numeric percentage of a plaintiff's loss of range of motion . . . [or] [a]n expert's *qualitative* assessment . . . provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.* at 350 [italics in original]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]). Minor limitations of movement in a plaintiff's neck and back are insufficient to be considered a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Rather, plaintiff must

present "objective evidence" in the form of tests indicating a significant limitation to satisfy the No-Fault Law (*Toure*, 98 NY2d at 350-351; *Reyes v Esquilin*, 54 AD3d 615, 615-616 [1st Dept 2008]; *Brown v Achy*, 9 AD3d 30, 31-32 [1st Dept 2004]).

Discussion

Defendants have proffered the Ferriter Report and "the affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in [her] [left] shoulder and cervical and lumbar spines" meet defendants' burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law (*Williams v Perez*, 92 AD3d 528, 528 [1st Dept 2012]; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]; *Tsamos v Diaz*, 81 AD3d 546, 546 [1st Dept 2011]). Plaintiff has not submitted an affidavit by a doctor controverting the claims of the Ferriter Report. Accordingly, "[i]n opposition, [plaintiff] failed to raise an issue of fact, since [she] submitted no medical evidence supporting [her] claim of lumbar [and cervical] spine [and left shoulder] injury, and no evidence of current range-of-motion deficits" (*Luetto v Abreu*, 105 AD3d 558, 558 [1st Dept 2013]).

Plaintiff contends that, since the Ferriter Report fails to mention the 90/180-day issue, this portion of plaintiff's claim must be sustained (Campson affirmation, ¶¶ 17, 28). However, defendants "established that plaintiff sustained no 90/180-day

injury by submitting plaintiff's deposition testimony that she missed less than 90 days of work" (*Stevens v Bolton*, 135 AD3d 647, 648 [1st Dept 2016]; *see also Williams*, 92 AD3d at 529). Even assuming that the 15 days plaintiff asserted that she could not leave her home are in addition to the 40 lost days of work, the total does not amount to 90 days. Consequently, defendants' motion for summary judgment dismissing plaintiff's complaint for failure to meet the statutory threshold of a serious injury must be granted.

Order

It is, therefore,

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 16 2017

NOV 16 2017

ENTER:

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