

Gonzalez v Oleiveira
2013 NY Slip Op 33953(U)
August 2, 2013
Supreme Court, Bronx County
Docket Number: 309827/10
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

AUG 08 2013

PRESENT: Honorable Mary Ann Brigantti-Hughes

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ISABEL GONZALEZ,

Plaintiffs,

-against-

DECISION / ORDER

Index No. 309827/10

VITOR OLEIVEIRA, WHEELS LT and
ERNESTO ORIVE, JR.,

Defendants.

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The following papers numbered 1 to 8 read on the below motions noticed on January 4, 2013,
and duly submitted on the Part IA15 Motion calendar of **May 8, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Wheels LT and Orive's Notice of Motion, Exhibits	1,2
Def. Oleiviera's Cross-Motion, Exhibits	3,4
Pl.'s Affirmation in Opposition, Exhibits	5,6
Def. Wheels LT and Orive's Affirmation in Reply	7,8

In an action for damages for personal injuries arising out of a motor vehicle accident, defendants Vitor Oleiveira, Wheels LT, and Ernesto Orive, Jr. (hereinafter collectively referred to as "Defendants") move and cross-move for summary judgment, dismissing the complaint of the plaintiff Isabel Gonzalez ("Plaintiff") for failure to meet the "serious injury" threshold as required by New York Insurance Law §5102. Plaintiff opposes the motion.

I. Background

This is an action seeking personal injuries as a result of an alleged motor vehicle accident that occurred on March 19, 2009, at approximately 5:20PM. The accident allegedly occurred on Route 495 approximately 1/4 mile west of South Oyster Bay Road in Syosset, New York.

Defendants now move for summary judgment, asserting that Plaintiff's injuries fail to meet the "serious injury" threshold as set forth in New York Insurance Law Sec. 5102(d).

In her verified bill of particulars, Plaintiff alleges the following injuries to her left shoulder, cervical and lumbar spine, among others: (1) post-traumatic left shoulder impingement

syndrome with supraspinatus tendinosis/tendinopathy; (2) cervical spine disc bulging and herniation impressing the cord resulting in stenosis, narrowing of the neural foramina; and (3) lumbar spine posterior disc bulging, grade I spondylolistheses.

II. Standard of Review

“[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

III. Party Contentions

Defendants' submissions

Plaintiff submitted to an independent medical examination on May 21, 2012, before Dr.

Gabriel L. Dassa, an orthopedist. At the examination, Plaintiff complained of pain and limited range of motion in the left shoulder, lower back, and lower spine. Dr. Dassa reviewed Plaintiff's medical records. Upon physical examination of the cervical spine, Plaintiff demonstrated full range of motion in all directions. Spurling maneuver and Valsalva maneuvers were negative. Plaintiff also demonstrated full range of motion in the lumbar spine in all directions, and all other objective testing was either normal or negative. Regarding the left shoulder, Plaintiff did demonstrate restricted movement upon flexion (150 degrees, 170 normal), abduction (150 degrees, 170 normal), internal rotation (40 degrees, 60 normal), external rotation (70 degrees, 90 normal), extension (10 degrees, 30 normal), and abduction (20 degrees, 40 normal). Moreover, Impingement sign testing was positive in the left shoulder, and Plaintiff had tenderness over the subacromial bursa and positive crepitus. Dr. Dassa diagnosed Plaintiff with, among other things, "resolved" cervical and lumbosacral spine strain/sprain. He also diagnosed Plaintiff with "left shoulder derangement with arthritis and impingement syndrome based upon the objective findings on orthopedic examination as well as MRI 7-2-09." He concludes that Plaintiff's left shoulder findings are "abornmal," but opines that the MRI "does not suggest they are due to acute trauma given the amount of degenerative arthritis present."

Defendants also provide the sworn IME report of Micharl J. Carciente, M.D., a neurologist. Dr. Carciente examined Plaintiff on May 2, 2012. He performed a physical examination of the plaintiff's cervical and lumbar spine, yet for the most part did not delineate numerical ranges of motion attained. After a complete exam, he concluded that Plaintiff had no neurological disability. He opined that the positive MRI findings in Plaintiff's cervical and lumbar spine were consistent with a chronic and pre-existing condition, and could not be related to this accident.

Defendants also submit the sworn report of Jessica F. Berkowitz, a radiologist who reviewed MRIs of Plaintiff's left shoulder and lumbar spine. Regarding the left shoulder, Dr. Berkowitz found slight degenerative changes and rotator cuff tendinopathy. She opined that this was related to a chronic condition, and there was no evidence of an acute traumatic injury to the shoulder. With respect to the lumbar spine, Dr. Berkowitz noted the existence of various bulges and other abnormal findings, however she related them to a degenerative condition. Again, she

opined that there was no evidence of an acute traumatic injury to the lumbar spine.

Finally, Defendants note that at her Examination Before Trial, Plaintiff testified that she returned to work shortly after the accident.

Plaintiff's Opposition

In opposition, Plaintiff initially argues that defendant Oliveira's cross-motion is untimely. However, "an otherwise untimely cross-motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross-motion." (*Filannio v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 [1st Dept. 2006]). Defendant Oliveira's cross-motion, and Plaintiff's opposition, will therefore be considered on the merits. Moreover, since the motion and cross-motion indeed contain a "complete set" of the pleadings, denial is not warranted on those grounds.

Plaintiff also argues that her deposition transcript, annexed to the moving papers, is inadmissible since it is unsigned. The transcript is, however, certified by the reporter. It is well-settled that an unsigned but certified deposition transcript can be used against a party as an admission (CPLR 3116[a], *Martin v. City of New York*, 82 A.D.3d 653 [1st Dept. 2011]).

Plaintiff next argues that the MRI reports of Dr. Jessica Berkowitz, M.D., cannot be considered, since those reports were not served upon Plaintiff before Note Of Issue was filed. Moreover, even if the reports were considered, Dr. Berkowitz does not review the MRI of Plaintiff's cervical spine. Moreover, the IME report of Dr. Dassa notes restrictions in movement in Plaintiff's left shoulder. Although he opines that the restrictions are due to an unrelated condition, Plaintiff argues that this opinion is unsubstantiated by the record. Accordingly, Plaintiff argues that the Defendants have not met their initial prima facie burden of entitlement to summary judgment on "serious injury" grounds.

Even if this Court were to find that Defendants have met their initial burden, Plaintiff argues that she has sufficiently raised an issue of fact so as to warrant denial of the motion. Plaintiff annexes, *inter alia*, the affirmation of Engracia Lazatin, M.D. Dr. Lazatin affirms that Plaintiff presented to her on March 20, 2009 complaining of neck, lower back, and upper

extremity pain. Dr. Lazatin examined Plaintiff's cervical spine, and found restricted movement upon all planes, notably flexion (60 degrees, 75 normal), extension (20 degrees, 60 normal), and right and left lateral rotation (20 degrees, 45 normal). Dr. Lazatin also affirms that on March 31, 2009, Plaintiff complained about pain to her left arm, and tingling and radiating pain from her left shoulder down. By June 2009, the pain had localized to her left shoulder. Plaintiff was thereafter placed on a physical therapy plan for her neck, back, and left shoulder three times per week, and acupuncture three times per week. Dr. Lazatin referred Plaintiff for MRI exams, which contained various positive findings, including disc herniations in the cervical spine and bulges in the lumbar spine. MRI of the left shoulder revealed a labral tear, and supraspinatus and subscapularis tendinosis/tendinopathy. Dr. Lazatin affirms that these findings were causally related to the accident. She states that Plaintiff underwent physical therapy for approximately one year until March 17, 2010, when she had reached maximum medical improvement. The expert annexes to her affirmation a list detailing the Plaintiff's physical therapy visits.

Plaintiff also annexes the affirmation of Nizarali Visram, M.D. Dr. Visram first examined Plaintiff on November 19, 2010 and found restricted movement in her cervical and lumbar spine, as well as left shoulder. He recommended physical therapy treatment, which Plaintiff attended until September 2011. On January 25, 2013, Dr. Visram again examined Plaintiff. Upon range of motion examination of the cervical spine, Plaintiff continued to demonstrate restrictions upon flexion (24 degrees, 50 normal), extension (22 degrees, 60 normal), and right and left side bending (20 and 22 degrees, respectively, 45 normal). Plaintiff also demonstrated slight limitations in the lumbar spine, particularly upon extension (16 degrees, 30 normal). With respect to the left shoulder, Plaintiff demonstrated forward flexion 116 degrees (150 normal), extension to 36 degrees (60 normal), and abduction to 80 degrees (150 normal). Dr. Visram opines that Plaintiff's various findings are causally related to the accident, and are permanent in nature. He notes that, although the MRI reports indicate age-related and pre-existing conditions, these conditions "actually made her neck, lower back, and left shoulder susceptible to the injuries she sustained..." He states further that, considering Plaintiff's asymptomatic condition before the accident, it is reasonable to state that the accident caused her injuries to become symptomatic. The expert opines specifically that Plaintiff's cervical disc

herniations, cervical and lumbar disc bulges, and left shoulder labral tear and impingement syndrome are not related to any pre-existing condition.

IV. Applicable Law and Analysis

Here, even assuming that Defendants have satisfactorily carried their burden of proving entitlement to judgment as a matter of law, in light of the above admissible evidence, Plaintiff has demonstrated an issue of fact as to whether she suffered a permanent, serious injury in accordance with New York Insurance Law §5102(d). "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept. 1998), *LaMasa v. Bachman*, 56 A.D.3d 340 (1st Dept. 2008). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment. *Bradley v. Soundview Healthcenter*, 4 A.D.3d 194 (1st Dept. 2004); *Lewis v. Capalbo*, 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 455 [2001].

Plaintiff has submitted sufficient evidence in admissible form to raise a triable issue of fact as to whether her left shoulder, cervical, and lumbar spine injuries is "serious" by providing objective medical evidence of contemporaneous, as well as more recent, limitations in movement. See *Winters v Cruz*, 2011 NY Slip Op 8671 (1st Dept. 2011) citing *Torain v Bah*, 78 A.D.3d 588 (1st Dept. 2010). Dr. Lazatin, who first examined the plaintiff a day after the accident, reported diminished range of motion of plaintiff's cervical and lumbar spine, as well as positive findings in the left shoulder. This constitutes qualitative medical evidence of a serious injury contemporaneous with the accident. See *Perl v. Mehr*, 18 N.Y.3d (2011); *Prestol v. McKissock*, 50 A.D.3d 600 (1st Dept. 2008). The fact that the contemporaneous findings with respect to the left shoulder do not contain numerical measurements regarding the severity of Plaintiff's alleged injuries does not render them insufficient (see *Rosa v. Mejia*, 95 A.D.3d 402 [1st Dept. 2012], citing *Perl v. Meher*, 18 N.Y.3d 208 [2011]). Plaintiff also addressed an apparent gap or cessation in treatment, as her physicians opined that it would only be palliative in nature. Drs. Lambert and Tyorkin, however, both opined that Plaintiff had reached maximum medical improvement in November 2009, and any further treatment would have been only

palliative in nature. (*Barhak v. Almanzar-Cepedes*, 2012 N.Y. Slip. Op. 08792 [1st Dept. 2012], citing *Ayala v. Cruz*, 95 A.D.3d 699, 700 [1st Dept. 2012]).

Moreover Plaintiff's medical experts adequately address the defense experts' non-conclusory opinion that the injuries were "pre-existing" and "degenerative" in origin, by noting *inter alia* that Plaintiff was asymptomatic before the accident. "[B]y attributing the injuries to a different, equally plausible cause, that is, this accident," the plaintiff had rejected the defense experts' opinions and his opinion was entitled to equal weight (*Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1st Dept. 2011]; citing *Linton v. Nawaz*, 62 A.D.3d 434 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]).

As to Plaintiff's 90/180 day claim, however, she has failed to meet her burden that she was prevented from performing his usual and customary activities for 90 of the 180 days following the incident (*Nelson v. Distant*, 308 A.D.2d 338, 340 [1st Dept. 2003]). Plaintiff testified at deposition that she returned to work shortly after the accident occurred, and she provides no medical documentation regarding alleged restrictions within the statutory period (*see DeSouza v. Hamilton*, 55 A.D.3d 352 [1st Dept. 2008]). Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's "90/180" claim is granted.

V. Conclusion

Accordingly, it is hereby

ORDERED, that the defendants' motion and cross-motion for summary judgment, dismissing Plaintiff's "permanent consequential" and "significant limitation" claims under New York Insurance Law, are denied, and it is further,

ORDERED, that the defendants' motion and cross-motion for summary judgment, dismissing Plaintiff's "90/180" claim, is granted.

This constitutes the Decision and Order of this Court.

Dated: 8/2 2013



Hon. Mary Ann Brigantti-Hughes, J.S.C.