Woolard v Puleo
2014 NY Slip Op 30778(U)
March 13, 2014
Supreme Court, Suffolk County
Docket Number: 11-9756
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 11-9756
CAL No. 13-00662MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-10-13
ADJ. DATE 11-26-13
Mot. Seq. # 003 - MG; CASEDISP

---X

DANIELLE WOOLARD,

Plaintiff,

- against -

VINCENT TYLER PULEO,

Defendant.

---X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury' as defined in Insurance Law § 5102 as a result of the subject accident is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on August 29, 2010 in a motor vehicle accident that occurred on Broadway at its intersection with Church Street in Islip, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including: disc protrusions at C2-3 and C3-4 which indent the anterior thecal sac, disc protrusions at C4-5 which indent the anterior thecal sac with encroachment of the anterior neural foramina bilaterally, disc protrusions at C5-6 which deform the anterior thecal sac and indents the ventral spinal cord with encroachment of the bilateral neural foramina and impingement on the bilateral exiting C6 nerve roots, left shoulder bursitis requiring cortisone injections, cervical radiculopathy, and aggravation and/or exacerbation of previously asymptomatic degenerative disc disease of the cervical spine. In addition, plaintiff alleges that she received emergency room treatment on the date of the accident at Brookhaven Memorial Hospital

3-4-14

Medical Center and that she was thereafter confined to bed up to approximately September 3, 2010 and confined to home up to approximately September 13, 2010. She was not employed at the time of the accident. Plaintiff also alleges that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Defendant's submissions in support of his motion include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, the affirmed report of defendant's examining orthopedic surgeon, Michael J. Katz, M.D., the affirmed report of defendant's examining neurologist, Beatrice C. Engstrand, M.D., and the affirmed report of defendant's examining radiologist, Alan B. Greenfield, M.D., based on his review of plaintiff's left shoulder MRI and cervical spine MRI.

Insurance Law § 5102 (d) defines "serious injury" 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 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***,18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff testified at her deposition that as a result of the accident's impact, her vehicle's air bags did not deploy, her head and left shoulder came into contact with her driver's side window and door, and she

felt pain in said parts of her body as well as her entire back. In addition, plaintiff testified that she was taken from the scene of the accident by ambulance to Brookhaven Memorial Hospital and evaluated in the emergency room, underwent x-rays, and was told "that everything looked okay" and was discharged. The following day, plaintiff went to see her primary care physician, Dr. Andrew Radzik, who suggested that she see an orthopedist for her shoulder and a chiropractor for her back. According to plaintiff, approximately one week later she went to see her treating chiropractor, Robert Wilder, from whom she had last received treatment for her back approximately one year prior. Approximately two weeks later she went to see an orthopedist, James Penna, to whom she was referred by her treating physician. Plaintiff also testified that she received treatment for her neck and back from the chiropractor in the form of manipulation, electrical stimulation and ice, every other day for approximately a year and a half. Thereafter, the frequency of her treatments decreased to approximately once or twice a week and continued for four or five months and after said period she went as needed. Plaintiff explained that Dr. Penna gave her a cortisone injection in her left shoulder for inflammation on her first visit, after which she felt an improvement, and that her second and last visit was two weeks later just for a follow-up. Dr. Penna did not prescribe any other tests for her. Plaintiff added that she also saw on two occasions a neurologist, Dr. Bruce Meyerson, who sent her for an MRI of her head, neck and left shoulder and performed certain tests in his office in response to plaintiff's complaints of tingling and numbness in her left arm. According to plaintiff, after said tests, Dr. Meyerson told her that she required medication for the inflammation in her neck. Plaintiff further testified that she saw her treating dentist as well as a dental specialist, Dr. Risa Beck, whom she saw twice for pain and cracking in her jaw. Plaintiff described her current complaints as pain in her neck and back and a crunching sound in her jaw when she chews. She claims that as a result of said accident she can no longer shovel snow from her driveway or cut hedges and that it takes longer for her to mow her lawn, and she cannot lift anything over 30 or 40 pounds.

In his affirmed report dated February 19, 2013, defendant's examining orthopedic surgeon, Dr. Katz, indicated that he examined plaintiff on said date and provided the results of his range of motion testing of plaintiff's cervical spine, lumbar spine and left shoulder using a goniometer. With respect to plaintiff's cervical spine, Dr. Katz noted that there was no tenderness and no paravertebral muscle spasm and provided flexion, extension, lateral flexion, and rotation measurements compared to normal measurements indicating that plaintiff had full range of motion in all planes. He added that sensation was intact in the C5-T1 innervated dermatomes and that Adson's test was negative. Regarding plaintiff's lumbar spine, Dr. Katz stated that plaintiff's gait was normal without antalgic or Trendelenburg component, that no paravertebral muscle spasm was present, and reported the range of motion results of her forward flexion, extension, lateral and side bending and rotation, comparing said results to normal, revealing that plaintiff had full range of motion in all planes. He also indicated that plaintiff's straight leg raising test was negative. As for plaintiff's left shoulder, Dr. Katz found that there was no swelling, erythema or induration. He indicated the range of motion testing results of plaintiff's left shoulder which when compared with normal results showed full range of motion in all planes, and that there was no crepitation at the AC joint, and no deformity about the clavicle or AC joint. Among his other findings were intact sensation in the axillary nerve autonomous zone, no dislocation, clicking or grating with movement, and negative O'Brien's test and Hawkins Kennedy test. In conclusion, Dr. Katz diagnosed cervical strain with radiculopathy by history, resolved, and left shoulder contusion, resolved. He opined that plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and noted that plaintiff's x-ray and MRI reports of her

cervical spine indicated degenerative changes. Dr. Katz further opined that plaintiff was not disabled and was capable of her activities of daily living.

Defendant's examining neurologist, Dr. Engstrand, indicated in her affirmed report that she examined plaintiff on February 15, 2013. She reported that plaintiff's cranial nerve testing was normal, that her motor examination showed normal tone, bulk and power, that there was no atrophy or fasciculations, and that plaintiff's head was normocephalic and atraumatic. Dr. Engstrand did note mild spasms in plaintiff's neck but she provided the results of range of motion testing by goniometer of plaintiff's cervical spine of flexion, extension, lateral flexion and rotation, which she compared to normal results, and demonstrated that plaintiff had full range of motion in all planes. She also found normal sensory testing and that plaintiff's deep tendon reflexes were 2 and equal bilaterally in the biceps, brachioradialis, triceps, patellar jerks, and Achilles jerks. Dr. Engstrand concluded that plaintiff had cervical and lumbar strain as well as pre-existing cervical and lumbar degenerative disc disease and opined that plaintiff was not disabled, that her prognosis is excellent, and that she would be able to continue with her current activities of daily living without restrictions or limitations.

Dr. Greenfield, defendant's examining radiologist, indicated in his affirmed report dated September 22, 2012 that he reviewed plaintiff's left shoulder MRI and found mild subacromion/subdeltoid bursitis with small joint effusions and opined that said findings were nonspecific and could not be attributed to the subject accident with any reasonable degree of medical certainty. He added that there was no evidence of rotator cuff rupture or fractures or of focal labral detachment. Dr. Greenfield concluded that there were no findings attributable to the subject accident with any reasonable degree of medical certainty. He also indicated that he reviewed plaintiff's cervical spine MRI and reported that there was diffuse degenerative disc disease at all cervical disc levels associated with degenerative bone spur formation from C4 through C7 on both sides. He opined that said findings were clearly longstanding and degenerative, having evolved over a period of years, and thus were entirely unrelated to the subject accident. Dr. Greenfield also stated that there were coexistent disc herniations at C5-C6 and C6-C7 contacting the cord and explained that they were a culmination of chronic, longstanding, degenerative discopathy as evidenced by the absence of any focal bright signal in the area of either disc herniation to indicate a recently torn annulus fibrosus or other recent post-traumatic inflammatory edema. Dr. Greenfield concluded that none of the cervical spine MRI findings could be attributed to the subject accident with any reasonable degree of medical certainty.

Here, defendant met his prima facie burden of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Ranford v Tim's Tree and Lawn Service, Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]). Defendant also submitted evidence establishing, prima facie, that plaintiff did not sustain a "serious injury" under the 90/180-day category of Insurance Law § 5102(d) (*see* ***Jackson v Aghwana***, ___ AD3d ___, 980 NYS2d 145 [2d Dept 2014]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see* ***Marietta v Scelzo***, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. She submits her bill of particulars, deposition transcript, her own affidavit and affidavits of her treating chiropractor, neurologist, and dentists with their attached records, and the affirmation of her radiologist annexing the cervical spine MRI report of a different radiologist.

Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see* ***Gastaldi v Chen***, 56 AD3d 420, 866 NYS2d 750 [2d Dept 2008]; ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; *see also* ***Ambos v New York City Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2d Dept 2010]). Initially, the Court notes that defendant is not required to address plaintiff's jaw injuries, since no claim for said injuries appeared in the complaint or bill of particulars, and plaintiff made no motion to amend the bill of particulars so as to include those injuries (*see* ***Moran v Kollar***, 96 AD3d 811, 947 NYS2d 133 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180; ***Felix v Wildred***, 54 AD3d 891, 863 NYS2d 832 [2d Dept 2008]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]). Based on the foregoing, the Court will not consider the affidavits and attached records of plaintiff's treating dentists Kerri Lynn Lopez and Risa Beck, D.D.S. The Court notes that even if said annexed records were considered, they would be found indecipherable as they contain illegible handwritten notes (*see* ***Tornatore v Haggerty***, 307 AD2d 522, 763 NYS2d 344 [3d Dept 2003]) .

In addition, plaintiff submitted a purported affidavit of her treating chiropractor, Robert S. Wilder, D.C., in which the chiropractor stated "I reiterate, adopt and affirm, under the penalties of perjury, the contents of the annexed records as true ...", but her chiropractor failed to appear before a notary or other such official to formally declare the truth of the contents of the annexed records. The purported affidavit is devoid of a notary stamp. Therefore, plaintiff's chiropractor's purported affidavit and attached records do not constitute competent evidence and cannot be considered by the Court (*see* CPLR 2106; ***Cubero v DiMarco***, 272 AD2d 430, 708 NYS2d 324 [2d Dept 2000]; ***Doumanis v Conzo***, 265 AD2d 296, 696 NYS2d 201 [2d Dept 1999]; *see also* ***Kowalsky v Khan***, 279 AD2d 556, 719 NYS2d 666 [2d Dept 2001]). Even if the Court were to consider the annexed reports of plaintiff's treating chiropractor from September 10, 2010 to May 27, 2011, said reports would not raise a triable issue of fact inasmuch as plaintiff's treating chiropractor does not provide range of motion testing results for all planes of plaintiff's cervical spine and thoraco-lumbar spine and does not compare his findings to normal results, he does not provide a diagnosis, and he does not opine that plaintiff's injuries are causally related to the subject accident (*see* ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***Dilone v Tak Leu Cheng***, 56 AD3d 397, 868 NYS2d 52 [1st Dept 2008]).

Moreover, plaintiff's radiologist, Steven L. Mendelsohn, submits an affirmation in which he states that to the best of his knowledge the information on the cervical MRI report interpreted by Gabriel J. Gelves, D.O. is true and correct with respect to the plaintiff's name, the date that the MRI was performed, the identifying number and the facility's name. Said affirmation and attached report also cannot be considered by this Court inasmuch as the expert radiologist improperly relied on an unsworn MRI report prepared by another physician and there is no indication that he reviewed the actual MRI films (*see* ***D'Amato v Mandello***, 2 AD3d 482, 767 NYS2d 894 [2d Dept 2003]; ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]). In any event, were the Court to consider the unsworn MRI report by Dr. Gelves it would not raise a triable issue of fact due to the absence of any opinion as to the cause of the

findings contained therein, "[b]i-level ventral spinal cord impingement at the C5-6 and C6-7 levels on the basis of disc protrusions" and "[c]ompression of the bilateral exiting C6 nerve roots at the C5-6 level on the basis of vertebral endplate spur encroachment into the neural foramina" (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). In addition, said unsworn MRI report would be insufficient to raise a triable issue of fact to rebut the finding of defendant's radiologist that the injuries depicted in plaintiff's cervical MRI films were degenerative in nature and could not be attributed to the subject accident (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]).

The only physician's report in admissible form, the report dated November 16, 2010 of plaintiff's treating neurologist, Bruce R. Mayerson, M.D., indicates that he examined plaintiff on said date and that his findings included normal shoulder shrug, motor examination 4+/5 weakness in her left deltoid muscle but was otherwise 5/5 in all extremities with normal bulk and tone, no Babinski sign, negative Hoffman sign, no noted atrophy, negative Romberg test, and sensory examination intact to temperature, light touch, vibration and joint position sense. Dr. Mayerson also reported that plaintiff's neck was supple, positive Spurling test on the left, negative on the right, and that there was left-sided cervical and upper trapezius muscle region tenderness to palpation with possible trigger points. He opined that plaintiff had cervical radiculopathy at C5-6 and "[g]iven the trauma of the shoulder and mild weakness, an axillary neuropathy is in the differential diagnosis here." Dr. Mayerson indicated that he was ordering EMG and nerve conduction studies of the left upper extremity and an MRI of the brain, and that he was giving her prescriptions for medication. Said report is not sufficient to raise a triable issue of fact inasmuch as plaintiff's treating neurologist does not indicate anywhere in the report that plaintiff's possible radiculopathy or neuropathy were "serious," as defined by the statute and are causally related to the subject accident (*see* ***Verrelli v Tronolone***, 230 AD2d 789, 646 NYS2d 542 [2d Dept1996]; *see also* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Correa v City of New York***, 18 AD3d 418, 794 NYS2d 408 [2d Dept 2005]; ***Itskovich v Lichenstadter***, 2 AD3d 406, 767 NYS2d 859 [2d Dept 2003]).

Moreover, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see* ***Ryan v Xuda***, 243 AD2d 457, 663 NYS2d 220 [2d Dept 1997]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: March 13, 2014 W. Gerard Asher
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**