Kerrigan v Marconi Corp.
2014 NY Slip Op 33370(U)
December 10, 2014
Supreme Court, Suffolk County
Docket Number: 11-21578
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-21578
CAL. No. 13-01515MV

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-5-14
ADJ. DATE
Mot. Seq. # 002 - MG

CHRISTINA M. KERRIGAN,	:	LEVINE & GILBERT
	:	Attorney for Plaintiff
Plaintiff,	:	115 Christopher Street
	:	New York, New York 10014
-against-	:	
	:	BAKER, McEVOY, MORRISSEY &
MARCONI CORPORATION and MICHAEL R.	:	MOSKOVITS, P.C.
DAMELIA,	:	Attorney for Defendants
	:	One Metro Tech Center
Defendants.	:	Brooklyn, New York 11201

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated July 9, 2014, and supporting papers 1-57 (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated August 7, 2014, and supporting papers 58 - 60; (4) Reply Affirmation by the plaintiff , dated August 21, 2014, and supporting papers 61 - 62; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff for an order granting leave to reargue the prior motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law 5102 (d) as a result of the subject accident, which was granted by order of this Court dated June 13, 2014, is considered under CPLR 2221 and is granted. Upon granting leave to reargue, the Court modifies its order to the extent indicated herein.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 25, 2011 when her vehicle was struck by a vehicle owned by defendant Marconi Corporation and operated by defendant Michael R. Damelia. The accident occurred in the westbound lanes of the Long Island Expressway approximately 500 feet east of Exit 61 in Suffolk County, New York. By her bill of particulars, plaintiff alleges that as a result of said accident she sustained the following serious injuries, herniated

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nucleus pulposis C6-C7, peripheral neuropathy C5-C6, lumbar radiculopathy L5-S1, right shoulder impingement syndrome, internal derangement of the right knee joint, right knee sprain, right knee patellar subluxation, and pervasive muscle spasm. Following said accident, plaintiff was treated at and then released from the emergency room of Stony Brook University Medical Center. Plaintiff alleges that thereafter she was confined to bed and home through January 28, 2011. She also claims that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (d).

Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Their submissions in support of the motion include the summons and complaint, defendants' answer, plaintiff's bill of particulars, the affirmed reports of their examining neurologist, Edward M. Weiland, M.D., their examining orthopedic surgeon, Robert Israel, M.D., their trauma expert in emergency medicine, Ronald A. Paynter, M.D., their neuroradiologist Jeffrey N. Lang, M.D., and plaintiff's deposition transcript.

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 her vehicle was struck in the rear by a taxicab, that her right

knee hit the underside of the dashboard and her abdomen hit the steering wheel, and that she complained of pain in her neck, right shoulder, right knee and abdomen at the hospital. In addition, she testified that she was treated and released from the hospital on the same day and told to follow-up with an orthopedist. The following day plaintiff saw an orthopedist, Dr. Michael Silio, who prescribed physical therapy for her knee and shoulder, which she received three to five times a week for several months. After two or three visits to Dr. Silio, plaintiff began treating with another orthopedist, Dr. Lieberman, in 2011 whom she saw five or six times and he prescribed anti-inflammatory medication for her knee and shoulder. She also received treatment from a chiropractor, Dr. Semente, who treated her neck and back. Plaintiff explained that she was involved in a prior motor vehicle accident in 2007 in which she injured her neck and lower back and received chiropractic treatment from Dr. Semente three to five times a week for a few months then stopped at which time she was "okay" and "[e]verything was good." After the subject accident, Dr. Semente ordered x-rays and MRI's and nerve conduction studies and plaintiff received chiropractic treatment three to five times a week, alternating with the physical therapy treatment, until 2012. She continued both treatments after her no-fault stopped paying for them but eventually ended the physical therapy and then the chiropractic treatment when her insurance co-pays became costly. Plaintiff stated that she felt better at the time that the physical therapy and the chiropractic treatment ended. She also indicated that she had no future appointments scheduled for treatment or to see any doctors with respect to the subject accident. Plaintiff further testified that there are no activities that she can no longer do at all as a result of the accident and that the activities that she can do but with difficulty are using stairs, long walks, using a treadmill, bicycling, bending and gardening. She informed that she currently has pain in the back of her right knee.

Defendants' examining neuroradiologist, Dr. Lang, indicated in his affirmed reports dated January 12, 2012 that plaintiff's MRI of the cervical spine dated March 12, 2011and her MRI of the right knee dated February 18, 2011 were both normal and did not show any post-traumatic findings or findings related to the subject accident.

By his affirmed report dated March 26, 2013, defendants' examining orthopedic surgeon, Dr. Israel, indicated that on said date he recorded plaintiff's history, reviewed her verified bill of particulars, and reported her current complaints as continued pain in her neck, lower back, right shoulder, right hand, right knee and finger numbness. He provided range of motion testing results, using a goniometer, for plaintiff's cervical spine, lumbar spine, right shoulder and right knee. For plaintiff's cervical and lumbar spine, Dr. Israel reported range of motion testing results that when compared to normal findings were all normal. In addition, he noted that there was no tenderness or spasm to palpation, that sensation was intact and that there was no pain with movement. Results for the following cervical spine tests, cervical compression, Soto Hall, Valsalva and Spurling, and for the following lumbar spine tests, straight leg raising, Bechterew's, and Hoover's, were all negative. With respect to plaintiff's right shoulder, Dr. Israel found that range of motion testing results when compared with normal findings were all normal and that there was no instability, sign of impingement or pain with movement. He also reported negative results for the following tests: drop arm, Yergason's, apprehension, speed, O'Brien, clunk and Hawkins. Regarding plaintiff's right knee, he reported a normal gait, no tenderness or effusion, muscle strength graded at 5/5, and normal range of motion testing results. Dr. Israel added that there was no patellofemoral crepitus or pain with movement and that the posterior drawer sign, McMurray test and patellofemoral compression test results were all negative. He concluded that plaintiff's alleged injuries to her cervical spine, lumbar spine, right shoulder and right knee had all resolved, that plaintiff had no disability as a result of the subject accident, that she did not require

further treatment and that she was capable of work activities without restrictions.

Defendants' examining neurologist, Dr. Weiland, indicated in his affirmed report dated June 6, 2013 that on that date he noted plaintiff's history, current complaints and reviewed her verified bill of particulars. Plaintiff's complaints consisted of persistent knee pain apparently provoked by weight-bearing maneuvers and flexion and extension, occasional numbing sensation in the second through fourth digits of the right hand and third through fifth digits of the left hand, and posterior spine pain with extreme flexion and extension of the torso. Dr. Weiland also indicated that he performed range of motion testing of the cervical spine and lumbar spine using a goniometer and reported findings which when compared to normal results were all normal. His other findings included an absence of signs of active tissue inflammation or soft tissue swelling as well as joint crepitus or effusions with range of motion activities of the axial structures, negative Adson's maneuver on the right, and no clinical evidence of scapular winging. He concluded that it was a normal neurological examination with resolved cervical and lumbosacral sprain and strain.

Here, defendants met their 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* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Defendants 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***, 114 AD3d 728, 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]).

Plaintiff contends in opposition that defendants failed to meet their initial burden on summary judgment and that plaintiff did sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff's attorney calls into question the findings of defendants' experts based on their alleged failure to review plaintiff's medical records and use of similar verbiage in their reports concerning the availability of medical records for review. In addition, plaintiff's attorney asserts that Dr. Israel's report should be ignored inasmuch as subsequent to his examination of plaintiff, he entered into a Consent Agreement and Order with the New York State Department of Health's Board for Professional Medical Conduct consenting to a three year suspension of his right to perform orthopedic evaluations on the part of insurance carriers and that the basis for said suspension calls into question his examination and conclusions. In support of her opposition, plaintiff submits the affirmed reports of plaintiff's examining radiologist, Michele Rubin, M.D., based on her review of plaintiff's MRI of the right knee and MRI of the right shoulder, and the affirmation of her treating orthopedic surgeon, Gregory M. Lieberman, M.D.

The Court initially notes that although mentioned by plaintiff in her original opposition papers, the actual contents of the documents of the New York State Department of Health's Board for Professional Medical Conduct relating to Dr. Israel were not provided to this Court until this motion to reargue. Said documents reveal that Dr. Israel was charged with, but not prosecuted or determined to have actually committed, professional misconduct for negligently practicing medicine between 2006 and 2008 while

performing the Independent Medical Examinations ("IME") of five undisclosed patients. Pursuant to the Consent Agreement and Order signed by him on May 28, 2013, Dr. Israel indicated that he had voluntarily stopped practicing as an Independent Medical Examiner as of March 2013 and agreed to be placed on probation for a period of three years and to have his license to practice medicine in New York State limited in that he would be precluded from practicing as an Independent Medical Examiner. The order and its penalties went into effect on June 7, 2013.

Plaintiff challenges the statements in Dr. Israel's affirmed report dated March 26, 2013 as well as Dr. Weiland's affirmed report dated June 6, 2013 that "I am advised that there are no legally authenticated medical records available for review. If any legally authenticated medical records are available at any later time, I would be pleased to review them and advise whether they have any effect on my opinion, which is based on today's examination." Plaintiff's attorney asserts by affirmation that forensic evaluations which included multiple MRI's, EMG's and other tests were provided to defendants' counsel and that it should be inferred that they were either intentionally withheld from, or ignored by, Dr. Israel and that Dr. Semente's nerve conduction studies and report on range of motion limitation were forwarded to defendants' counsel and that it should similarly be inferred that Dr. Weiland was either not provided with said records or ignored them. Plaintiff argues that the reports of Dr. Israel and Dr. Weiland should have been disregarded because neither had before him existing forensic evaluations that would have given them a complete picture of plaintiff's post-accident physical condition and that Dr. Weiland's failure to evaluate and include plaintiff's EMG's, which were in the possession of defense counsel, in his examination of plaintiff compromised defendants' ability to meet their burden for summary judgment under Insurance Law § 5102 (d).

The newly submitted documents reveal that the Consent Order was not in effect when Dr. Israel examined plaintiff, is limited in its scope, and does not affect the Court's analysis herein. Plaintiff's attorney's contention that Dr. Israel committed the same wrongs alleged in said order during plaintiff's IME constitutes speculation. In any event, there is no reason at this juncture to disregard the examination findings contained in the reports of either Dr. Israel or Dr. Weiland based on their purported failure to review plaintiff's forensic records that were made available to defendants' counsel or that plaintiff claims they should have specifically requested. Both medical experts were aware of plaintiff's alleged injuries based on their admitted review of her bill of particulars. Any alleged failure by defendants' medical experts to address the findings contained in plaintiff's MRI or EMG or other test reports, whether or not reviewed as part of each expert's examination, is rendered academic by their finding of a full range of motion and a lack of disabilities causally related to the motor vehicle accident (*see* ***Kearse v New York City Transit Auth.***, 16 AD3d 45, 50, 789 NYS2d 281 [2d Dept 2005]; *see* ***Bernabel v Perullo***, 300 AD2d 330, 331,751 NYS2d 314 [2d Dept 2002]).

Turning to plaintiff's original submissions in opposition to summary judgment, plaintiff's examining radiologist, Dr. Rubin, indicated in her affirmation upon review of plaintiff's MRI of the right knee performed on February 18, 2011 her impression of patella alta and mild lateral patellar subluxation, femoral trochlear dysplasia, mild posterior tibial subluxation, joint effusion and medial patellar plica. In addition, Dr. Rubin indicated by affirmation that the MRI of plaintiff's right shoulder performed on February 10, 2011 showed possible supraspinatus impingement syndrome related to the acromioclavicular arch.

Plaintiff's treating orthopedic surgeon Dr. Lieberman indicated by affirmation that he began treating

plaintiff on April 1, 2011 and saw her on April 15, 2011, May 13, 2011, June 10, 2011 and August 12, 2011. He provides initial range of motion testing results for plaintiff's right shoulder as follows: forward flexion 165 degrees (normal 180 degrees), abduction 145 degrees (normal 180 degrees), for her right knee as normal and for her neck as follows: forward flexion 30 degrees (normal 50 degrees), extension 30 degrees (normal 60 degrees), left lateral flexion 30 degrees (normal 45 degrees), right lateral flexion 30 degrees (normal 45 degrees), right lateral rotation 75 degrees (normal 80 degrees), and left lateral rotation 75 degrees (normal 80 degrees). In addition, Dr. Lieberman notes that muscle spasm was found during testing of plaintiff's neck and lumbar spine and that the McMurray test to the right knee was positive. He informs that he provided plaintiff with a home exercise program and advised her to apply ice to the affected areas. Dr. Lieberman reports that on her follow-up visits of April 15 and May 13, plaintiff's range of motion results for her right shoulder and cervical spine were identical to those of the initial visit as were other test results. He indicates that on her June 10th visit, plaintiff's right shoulder forward flexion had improved but that the other results remained the same. Dr. Lieberman states that he advised plaintiff at her last visit that there would be no benefit to additional treatment as she had attained her maximum benefit. He adds that at the last visit, plaintiff continued to manifest right shoulder impingement which would not improve with surgery, limitation of motion of her neck with alteration of right upper extremity sensation, and muscle spasm in her cervical spine and lumbar spine. Dr. Lieberman opines, based on plaintiff's continued manifestations and new developments to her right knee as well as positive radicular testing, to a reasonable degree of medical certainty that plaintiff sustained permanent injuries and that the subject accident was the competent producing cause of her injuries.

Initially, the Court notes that plaintiff failed to submit competent medical evidence revealing the existence of limitations in her lumbar spine that were roughly contemporaneous with the subject accident (*see* ***Joseph v A and H Livery***, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]; ***Quagliarello v Paladino***, 40 AD3d 836, 835 NYS2d 724 [2d Dept 2007]). In addition, plaintiff failed to set forth any objective medical findings from a recent examination (*see* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]). Plaintiff is reminded that a treating physician's opinion on the attainment of maximum medical benefit relates to the issue of "gaps in treatment" and does not obviate the need for the results of a recent medical examination (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Crespo v Aparicio***, 59 AD3d 384, 872 NYS2d 525 [2d Dept 2009]). Thus, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530). Moreover, plaintiff failed to provide any competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Shaji v City of New Rochelle***, 66 AD3d 760, 886 NYS2d 764 [2d Dept 2009]). Furthermore, 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]).

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

Dated: 12-10-14

PETER H. MAYER, J.S.C.