Urena v Rosa
2015 NY Slip Op 31900(U)
September 10, 2015
Supreme Court, Bronx County
Docket Number: 300416/13
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. **300416/13**
Motion Calendar No. 22
Motion Date: 6/15/15

KENIA URENA,

Plaintiff,

-against-

DIANNE ROSA, MALCOME LIMO EXPRESS and LAI YABU AKINBOHUN,

Defendants.

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Defendants Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants Malcolme Limo Express and Lai Yabu Akinbohun move this Court for an Order dismissing plaintiff's complaint on the grounds that plaintiff fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Defendant Rosacross-moves move this Court for an Order dismissing plaintiff's complaint on the grounds that plaintiff fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a) relying on and incorporating the exhibits of defendants Malcolme Limo Express and Lai Yabu Akinbohun . Plaintiff submitted written opposition.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained on July 12, 2012 as the result of motor vehicle accident.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not

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suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, 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 (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

Defendant submits the affirmed report of Dr. Allan Crystal who conducted an orthopedic examination on plaintiff on October 31, 2013. Upon reviewing the plaintiff's medical records, Dr. Crystal conducted range of motion testing and noted normal ranges of motion in the cervical spine, lumbar spine and bilateral shoulders. Dr. Crystal opined that none of the plaintiff's injuries in the cervical spine, left shoulder or lumbar spine were causally related to the subject accident as there was no objective evidence to support this. Rather, Dr. Crystal opined that in each area, plaitniff sufferred from degeneration.

Dr. Michale Setton reviewed the plaintiff's Left shoulder MRI taken on August 12, 2012 and opined that there was no evidence of rotator cuff or labral tear. Dr. Setton opined that there was no causal connection to the recent trauma, noting rather that the plaintiff exhibited hyperthorpic acromioclavicular joint degeneration. Dr. Setton also reviewed the August 12, 2012 cervical spine MRI noting multilevel degenerative disc disease and no evidence of herniation with mild disc bulge with mild spondylosis at C4-C5. Dr. Setton Also reviewed the August 12, 2012 lumbar spine MRI and noted minor multilevel degeneration disc disease at L4-51 and no evidence of disc herniation. There was mild hypertropic Lower Lumbar Face Joint degeneration.

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Plaintiff submits in opposition, the reports as follows:

Dr. Shahid Mian examined the plaintiff between September 25, 2012 and November 13, 2012, performing arthrospcopic surgery on the plaintiff's left shoulder on October 3, 2012. reviewed the MRI' films of the plaintiff and the reports of Dr. Setton. Dr. Mian opined that based upon his review of the reports and the observation during surgery, plaintiff's injuries were not the result of degeneration. Based upon his examination he noted range of motion limitations as compared the norm in the cervical spine, lumbar spine and left shoulder. Dr. Mian opined that the plaintiff's injuries were permanent.

Dr. Eldar Kadymoff examined the plaintiff on July 24, 2012 and noted range of motion limitations in the plaintiff lumbar spine, left shoulder and cervical spine. Based upon the examination, he found the plaintiff partially disabled with a guarded prognosis and recommended physical therapy. Dr. Kadymoff causally related the injuries to the subject accident. Upon review of the plaintiff's MRI's of the cervical spine and lumbar spine. Plaintiff also treated with Advanced Chiropractic Care, P.C, a facility run by Dr. Kadmoff from September 4, 2012 through October 18, 2012, however treatment stopped due to her no-fault benefits being cut off and no other source of funding. When she stopped treatment, she was still experiencing pain in her left shoulder, cervical and lumbar spine.

Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether she sustained a significant limitation to reach the serious injury threshold as the cervical and lumbar spine. Perdomo v. City of New York, 129 A.D3d 585 (1st Dept. 2015). Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether she sustained a permanent consequential limitation to her left shoulder. Plaintiff has not submitted competent medical proof affidavit of Dr. that she could not perform substantially all of her customary daily activities for the first 90 out of 180 days following the accident. *Contra* Coley v. DeLarosa, 105 A.D3d 527 (1st Dept. 2013); Uddin v. Cooper,, 32 A.D.3d 270 (1st Dept.2006). Plaintiff has submitted competent medical proof to address defendants arguments of degeneration. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent that to the extent that plaintiff has failed to raise a triable issue of fact as to whether she was incapable of

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performing all of her usual and customary activities for 90 out of 180 days following the accident. All other aspects of defendant Malcome Limo Express and Lai Yabu Akinbohun's motion are hereby denied. It is further

ORDERED that defendant Rosa's cross-motion for summary judgment is granted to the extent that plaintiff has failed to raise a triable issue of fact as to whether she was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. It is further

ORDERED that defendants Malcome Limo Express and Lai Yabu Akinbohun serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

9/10/15

DATE

HON. WILMA GUZMAN, JSC.