Sugrue v Neff
2015 NY Slip Op 31908(U)
September 10, 2015
Supreme Court, Bronx County
Docket Number: 306847/2012
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

BRENDA MARY SUGRUE and EUGENE RIORDAN,

Plaintiffs,

-against-

JOEL T. NEFF,

Defendant.

Index No. 306847/2012

Present: Hon. Sharon A. M. Aarons

DECISION AND ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion/ Order to Show Cause and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Others:	

Upon the foregoing papers, the foregoing motion and cross-motion are decided as follows:

Defendant moves for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff Brenda Mary Sugrue[1] on the ground of absence of serious injury under Insurance Law 5102 (d). Plaintiff submits written opposition. The motion is granted.

In this personal injury action, plaintiff Brenda Mary Sugrue seeks damages for alleged "serious injury" incurred as a result of a motor vehicle accident which occurred on May 18, 2012. Plaintiff was taken by ambulance to the hospital, complaining of headache and neck pain, and released. She continued to work full-time following the accident. Plaintiff alleges a serious injury under the permanent loss of use, permanent consequential limitation, significant limitation, and

[1]No relief is sought as to plaintiff Eugene Riordan. Reference to "plaintiff" herein indicates plaintiff Brenda Mary Sugrue only.

90/180 day categories set forth under Insurance Law § 5102(d).

In support of the motion, defendant submits the pleadings and bills of particulars; the deposition testimony of the plaintiff with a cover letter of transmittal dated February 17, 2014; and the affirmed report of defendant's expert orthopedic surgeon Dr. Alvin M. Bregman, M.D., dated March 6, 2014. Dr. Bregman performed an examination, with normal results as to the plaintiff's spine and shoulder, and concluded that she suffered from resolved sprains only.[2]

In opposition, plaintiff submits the pleadings and bill of particulars; an uncertified copy of the accident report (MV104A); the plaintiff's deposition testimony; the order of this Court (Aarons, J.) dated September 26, 2014, granting plaintiffs summary judgment as to liability only; uncertified copies of plaintiff's hospital record; and the affirmed report of plaintiff's treating physician Michael Cushner, M.D. Dr. Cushner states that plaintiff received treatment from June 18, 2012 until May 16, 2013, for neck and shoulder pain. He diagnosed a "whiplash injury."

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960].)

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[2]Dr. Bregman stated that he reviewed MRI reports. The plaintiff has not adduced these reports on the instant motion. The reports were stated by plaintiff in her EBT as having resulted in a finding of no abnormalities.

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102 (d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident' " (*Haddadnia v. Saville*, 29 A.D.3d 1211, 1211, 815 N.Y.S.2d 319 [3d Dept. 2006]; *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). The defendant may satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion. (*See Lamb v. Raider*, 51 A.D.3d 430, 859 N.Y.S.2d 4 [1st Dept. 2008]). If a defendant satisfies this burden, the plaintiff must present evidence of (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident and (2) recent examination to establish permanency. There is no requirement that "contemporaneous" quantitative measurements be made. (*Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655, 960 N.E.2d 424 [2011] [permissible to observe and recording a patient's symptoms in qualitative terms shortly after the accident, and later perform more specific, quantitative measurements in preparation for litigation]; *Rosa v. Mejia*, 95 A.D.3d 402, 943 N.Y.S.2d 470 [1st Dept. 2012] ["Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident."])

Defendant's orthopedist's report finding that plaintiff had a full range of motion, as compared to specified normal ranges, and an absence of any deficits established a prima facie case of the absence of serious injury. (*See Malupa v. Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 [1st Dept. 2013]).

In opposition, plaintiff fails to raise an issue of fact as to serious injury. She fails to submit

any evidence of a recent examination to establish permanency. Plaintiff's expert failed to identify the manner in which he performed any testing, so that it is impossible to determine if the testing was based on objective findings, or merely subjective complaints. (*Grimaldi v. Newman & Okun, P.C.*, 105 A.D.3d 580, 963 N.Y.S.2d 220 [1st Dept. 2013] [early range-of-motion flexion tests findings, as to restrictions, were improperly premised upon subjective complaints of pain].) There is no objective finding of injury. The only evidence of limitations, either qualitative or quantitative, are findings of alleged limitations by Dr. Cushner made on July 26, 2012, which was months after the accident, and thus contemporaneous treatment – qualitative or quantitative – is not established. Nor did Dr. Cushner compare his findings with normal ranges of motion. (*Manceri v Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441 [2d Dept. 2005].)

As to the 90/180 category of serious injury, in order to make a prima facie case, the defendant must either point to evidence that the plaintiff in fact performed usual and customary activities (usually by pointing to plaintiff's own testimony), or by submitting medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature. (*Jno-Baptiste v Buckley*, 82 A.D.3d 578, 919 N.Y.S.2d 22 [1st Dept. 2011]; *Fernandez v Niamou*, 65 A.D.3d 935, 885 N.Y.S.2d 486 [1st Dept 2009]; *Ortiz v Ash Leasing, Inc.*, 63 A.D.3d 556, 883 N.Y.S.2d 180 [1st Dept 2009]; *Reyes v Esquilin*, 54 A.D.3d. 615, 866 NYS2d 4 [1st Dept 2008]; *Nelson v Distant*, 308 A.D.2d 338, 764 N.Y.S.2d 258 [1st Dept 2003]). Here, the plaintiff testified in her deposition that she was not absent from work, which does not meet the requirements of the statute. Defendant met his prima facie burden by relying on plaintiff's bill of particulars and deposition testimony (*see Komina v Gil*, 107 A.D.3d 596, 968 N.Y.S.2d 457 [1st Dept. 2013]). Plaintiff's testimony that she returned to work and the absence of proof of a medically determined

injury undercuts any claim that she was disabled from performing substantially all her usual and customary daily activities during said period. (*See Vasquez v Almanzar*, 107 A.D.3d 538, 541, 967 N.Y.S.2d 361 [1st Dept. 2013]).

As the record does not reflect a total loss of use of plaintiff's shoulder, cervical or lumbar spine, plaintiff's claim under the permanent loss of use category should be dismissed. (*See Oberly v Bangs Ambulance*, 96 NY2d 295, 299, 751 NE2d 457, 727 NYS2d 378 [2001]).

Accordingly, the motion is granted only to the extent of dismissing the complaint of plaintiff Brenda Mary Sugrue only. It is hereby,

ORDERED that the complaint of plaintiff Brenda Mary Sugrue only is dismissed, and it is

ORDERED that the defendant shall serve on the plaintiffs a copy of this Order with Notice of Entry.

Dated: September 10, 2015

SHARON A. M. AARONS, J.S.C.