Gomez v Davis
2015 NY Slip Op 31913(U)
September 14, 2015
Supreme Court, Bronx County
Docket Number: 307577/2012
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

MELODY GOMEZ,

Plaintiff,

-against-

BERNARD DAVIS,

Defendant.

Index No. 307577/2012
Present: Hon. Sharon A. M. Aarons

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 and Affidavits Annexed	**1**
Answering Affidavits	**2**
Reply	**3**

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

Defendant moves for summary judgment pursuant to CPLR 3212 dismissing the complaint 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 seeks damages for alleged "serious injury" incurred as a result of a multi-vehicle accident which occurred on April 2, 2011, at the intersection of Bruckner Boulevard and Brook Avenue in Bronx County. Plaintiff alleges a serious injury under the consequential limitation, significant limitation, and 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 unsigned, certified deposition[1] testimony of the plaintiff; a certified record of treatment from Montefiori Hospital; an unaffirmed x-ray report of the plaintiff's cervical spine taken January 9, 2013; and the affirmed report of defendant's orthopedic surgeon Jeffrey Passick, M.D., dated July 23, 2014. In her deposition testimony, the plaintiff indicated that she was taken to the emergency room of Albert Einstein/Montefiori Hospital

[1]The deposition transcript, albeit not signed, is certified by the reporter, and is not challenged as inaccurate. It may thus be considered in support of the motion. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]).

after the accident, with pain in her lower back and shoulder, and then sought medical treatment within one or two weeks subsequently; she missed a few days of work due to the accident. She claimed to have received treatment and physical therapy for three months, and that she subsequently moved to Florida in August, 2012. Defendant's orthopedist, who performed an examination of the plaintiff on July 23, 2014, reviewed, among other things, MRI's of the plaintiff's cervical spine (April 29, 2011) and lumbar spine (June 24, 2011), which revealed a disc herniation at C6-C7, and disc bulges at L4-L5 and L5-S1. He found a full range of motion as compared to specified norms, and concluded that the plaintiff had only resolved strains.

In opposition, plaintiff submits the affirmed MRI reports of plaintiff's cervical and lumbar spine; the uncertified medical records; and the affirmed report of Dr. Peter C. Kwan, M.D., who examined the plaintiff on July 23, 2014. Dr. Kwan found limited range of motion of the cervical and lumbar spine, reviewed the MRI reports of plaintiff's cervical and lumbar spine, and concluded that the plaintiff's had sustained permanent injuries as a result of the accident.

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].)

"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 Rajinder*, 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 found full range of motion on examination, and an absence of deficits. (*See Malupa v. Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 [1st Dept. 2013; *Eichinger v Jone Cab Corp.*, 55 A.D.3d 364, 865 N.Y.S.2d 89 [1st Dept. 2008]). Defendant established prima facie that plaintiff did not sustain a significant or permanent consequential limitation in any of the claimed parts of the body by submitting the affirmed report of their orthopedist finding normal range of motion and normal tests results. (*Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). The burden thus shifts to plaintiff to raise a triable issue of fact. (*Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 [1st Dept. 2014].)

In opposition, plaintiff failed to meet her burden, as she failed to adduce admissible evidence of contemporaneous treatment and limitations – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident. Plaintiff submitted uncertified treatment records post accident, and no affirmation or affidavit from a medical expert establishing qualitative or quantitative limitations of motion contemporaneous with the accident. While the plaintiff submits MRI reports showing cervical and lumbar herniations and bulges post-accident, she fails to adduce admissible evidence of limitations in the months following the accident related to these bulges and herniations. "Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in

significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, supra at 574.) The medical records of plaintiff's treatment submitted were not certified, and even if they were, "the certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury. . . ." (*Irizarry v. Lindor*, 110 A.D.3d 846, 847, 973 N.Y.S.2d 296 [2d Dept. 2013].)

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 N.Y.S.2d 4 [1st Dept. 2008]; *Nelson v Distant*, 308 A.D.2d 338, 764 N.Y.S.2d 258 [1st Dept. 2003]). In the present case, plaintiff's testimony that she was not confined to her home and returned to work shortly after the accident negates any claim based on this category of injury. (*See Vasquez v Almanzar*, 107 A.D.3d 538, 541, 967 N.Y.S.2d 361 [1st Dept. 2013]; *Seck v. Balla*, 92 A.D.3d 543, 938 N.Y.S.2d 549 [1st Dept. 2012] [plaintiff's claim under the 90/180-day prong of § 5102 (d) failed as a matter of law because, according to plaintiff's own deposition testimony and the report of her treating osteopath, she returned to work part-time four days after the accident]).

Accordingly, the motion is granted. It is hereby,

ORDERED that the complaint is dismissed, and it is

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

Dated: September 14, 2015

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