Martinez-Gomez v Esmeldy Auto Corp.
2015 NY Slip Op 31914(U)
September 14, 2015
Supreme Court, Bronx County
Docket Number: 307661/2011
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

SANDRA MARTINEZ-GOMEZ and DIONISIO VELOZ,

Plaintiffs,

-against-

ESMELDY AUTO CORP. and JIMINEZ PAULINO,

Defendants.

Index No. 307661/2011
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**
Cross-Motion and Affidavits Annexed	**2**
Answer	**3**

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

Defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiffs[1] on the ground of absence of serious injury under Insurance Law 5102 (d). Plaintiff on the counterclaim Veloz cross-moves for the same relief. Plaintiff Sandra Martinez-Gomez[2] submits written opposition. The motion and cross-motion are denied.

In this personal injury action, plaintiff Martinez-Gomez seeks damages for alleged "serious injury" incurred as a result of a motor vehicle accident which on March 25, 2011at the intersection of East Tremont Avenue and Washington Avenue in Bronx County. Plaintiff, a back seat passenger, asserts that she has injuries of the right shoulder (tear of the supraspinatus tendon, which was surgically repaired), cervical spine (C5-C6 herniation and C4-C5 bulge), and lumbar spine (pain and strain). Plaintiff alleges a serious injury under the consequential limitation, significant limitation, and 90/180

[1]The defendants herein interposed a counterclaim against plaintiff Veloz ("plaintiff on the counterclaim"). Plaintiff Veloz reported at oral argument of this motion that he settled his own claim as plaintiff, and thus the present motion, to the extent it seeks dismissal of the claim by plaintiff Veloz, is denied as academic.

[2]Unless otherwise indicted, "plaintiff" herein refers to plaintiff Martinez-Gomez only.

day categories set forth under Insurance Law § 5102(d). Plaintiff alleges that while she was able to return to work, she could not do any heavy lifting.

In support of the motion, defendants submits the pleadings and bills of particulars; the unsigned, certified deposition[3] testimony of the plaintiff, the affirmed reports of defendant's neuroradiologist Jeffrey N. Lang, M.D., dated December 7, 2011, reviewing an MRI of the plaintiff's rights shoulder taken May 25, 2011; the orthopedic report of Alan M . Crystal, M.D., dated July 24, 2012; a biomechanical analysis report by Arkady S. Voloshin, Ph. D., dated March 30, 2012; and excerpts of the deposition testimony of the plaintiff. Dr. Lang found that plaintiff's shoulder MRI taken May 25, 2011 indicated tendinitis which pre-dated the accident. Dr. Crystal found that the plaintiff had full range of motion with respect to her shoulder and cervical spine, and noted that none of the plaintiff's treating physicians found evidence of trauma to the plaintiff's shoulder, and that EMG testing was negative. Dr. Voloshin concluded that no reasonable view of the injury-producing forces could have caused a tear of the supraspinatus tendon. Plaintiff's testimony was that she was confined to bed three days post-accident, and three weeks post-surgery.

On the cross-motion, plaintiff on the counterclaim relies of the same evidence and adopts the evidence of the movant-defendants.

In opposition, plaintiff submits the certified treatment records of Mark S. McMahon, M.D., dated October 8, 2013; the narrative report of Andre J. Duhamel, M.D.; the affidavit of the plaintiff; and excerpts of the plaintiff's deposition testimony. Dr. McMahon first examined the plaintiff on May 17, 2011, found limitation of motion in her shoulder, and performed arthroscopic surgery on her right shoulder on June 14, 2011. He attributed the plaintiff's injuries to the accident, as did Dr. Duhamel, who concluded that the plaintiff's injuries were consistent with the mechanism of the injury.

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[3]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]).

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."])

Defendants' experts' findings, which opined that plaintiff had a full range of motion, an absence of deficits, only pre-existing injuries, and that the rear-end collision could not have cause a tear of the

supraspinatus tendon, 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]; *Eichinger v Jone Cab Corp.*, 55 A.D.3d 364, 865 N.Y.S.2d 89 [1st Dept. 2008]).

Plaintiff's evidence, however, which included records of contemporaneous, quantified limitation of motion, together with a recent examination showing continuing limited motion, as supported by sworn MRI reports, raise issues of fact as to serious injury. (*Lavali v. Lavali*, 89 A.D.3d 574, 933 N.Y.S.2d 21 [1st Dept. 2011] [plaintiff's chiropractor's affidavit, together with the affirmed reports of her neurologist and physiatrists, was sufficient to raise a triable issue of fact as to injury to the cervical and lumbar spine]; *Aviles v. Villapando*, 112 A.D.3d 534, 977 N.Y.S.2d 244 [1st Dept. 2013] [plaintiff raised an issue of fact by submitting affirmations by the chiropractor who treated him after his accident and a radiologist].) In particular, plaintiff's physicians' opinions that plaintiff's shoulder and cervical injuries were caused by the accident, in light of her young age and absence of prior history of similar injuries, raised an issue of fact as to causation. (*Yuen v Arka Memory Cab Corp.*, 80 A.D.3d 481, 915 N.Y.S.2d 529 [1st Dept. 2011]).

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]). In the present case, plaintiff further detailed her inability to lift heavy objects, and other limitations. (*See, e.g., Monk v Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 [3d Dept. 2001]). This evidence, supported by plaintiff's treating physicians with contemporaneous medical findings, raised a question of fact concerning whether plaintiff's usual activities were curtailed

"to a great extent rather than some slight curtailment." (*Licari v Elliott*, 57 N.Y.2d 230, 236, 441 N.E.2d 1088, 455 N.Y.S.2d 570 [1982]) as a result of the injuries she sustained in the accident. (*See Badger v Schinnerer*, 301 A.D.2d 853, 854, 754 N.Y.S.2d 399 [3d Dept. 2003]).

Accordingly, the motion and cross-motion are denied as to plaintiff Sandra Martinez-Gomez, and the motion is denied as academic as to plaintiff Dionisio Veloz.

This constitutes the Decision and Order of the Court.

Dated: September 14, 2015

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