Pascocello v Jibone
2016 NY Slip Op 32266(U)
November 3, 2016
Supreme Court, New York County
Docket Number: 156445/14
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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JUNE PASCOCELLO,

Plaintiff(s),

-against-

AUGUSTINE JIBONE and YEVSIF CAB CORP.,

Defendant(s).

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Index #: 156445/14
Mot. Seq: 01

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v. McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361 (1974)*. In deciding summary judgment motions, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*. While plaintiff has the burden of proof, at trial, of establishing a *prima facie* case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a *prima facie* showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. Defendants' failure to make such a showing mandates the denial of a summary judgment motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

An acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot, 57 N.Y.2d 230 (1982); Smith-Carter v Valdez, 2008 NY Slip OP 31231U (Sup. Ct. N.Y.*

2008); Rodriguez v Russell, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Konco v E.T.C. Leasing Corp., 160 A.D.2d 680 (2nd Dept. 1990). Furthermore, a bulging or herniated disc or radiculopathy may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Lewis v White, 274 A.D.2d 455 (2nd Dept. 2000).* However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982); Pommells v Perez, 4 N.Y.3d 566 (2005).*

In this action, plaintiff sufficiently raised triable issues of fact as to whether she sustained a L3-4 mm anterolisthesis with posterior broad-based disc bulge centrally to the right; left-sided L3-4 posterior disc herniation; L4-5 posterior broad-based disc bulge; and/or left L4-5 radiculopathy and a "permanent consequential limitation" and/or "significant limitation" of her lumbar spine as a result of the subject accident on March 20, 2013, with the affirmations of Dr. Robert Diamond dated April 29, 2016 and May 20, 2016, the affirmed reports of Dr. Aric Hausknecht dated July 23, 2013, August 20, 2013, September 17, 2013, April 30, 2015 and April 5, 2016, the affirmed NCV/EMG report dated August 20, 2013 and the affirmed report of Dr. Douglas Schottenstein dated October 18, 2013. *Assaf v Ropog Cab Corp., supra.; Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986).*

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000).*

Based upon the foregoing, those portions of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation" and "permanent consequential limitation" categories are denied.

However, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the"permanent loss of use" category is granted. In Dr. Hausknecht's affirmation dated April 5, 2016, Dr. Hausknecht does not opine that plaintiff has a "permanent loss of use" of her lumbar spine. Instead, he opines that she sustained a "permanent

consequential limitation" of her lumbar spine. As such, plaintiff's claim of sustaining a "serious injury" based upon the "permanent loss of use" category is dismissed.

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez, 77 A.D.3d 403 (1st Dept. 2010).*

Next, plaintiff sufficiently raised a triable issue of fact as to whether she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident, with Dr. Hausknecht's affirmed reports dated July 23, 2013, August 20, 2013 and September 17, 2013, her deposition testimony and her affidavit. *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999).*

Although plaintiff only claims confinement to bed for 2 weeks and to home for 4 weeks immediately after the accident, she also claims that she was not able to return to work as a photographer until April 2015. Dr. Hausknecht's affirmed reports dated July 23, 2013, August 20, 2013 and September 17, 2013 provide contemporaneous competent objective medical evidence substantiating a medically determined injury or impairment to plaintiff's lumbar spine as a result of which he opined that plaintiff was disabled and directed that plaintiff restrict her activities. In his affirmed report dated July 23, 2013, he stated that plaintiff "attempted to contunue working but was having problems bending and lifting her equipment. She did a photo shoot at a wedding approximately 6 weeks ago and since that time has been unable to return to work." He also stated that plaintiff complained of left-sided lower back pain, which was excruciating at times with pain radiating to her left leg causing weakness. He stated that plaintiff has problems with the activities of daily living, particularly difficulty sitting, bending and lifting.On August 20, 2013, Dr. Hausknecht added that she has difficulty sleeping and has been unable to work due to pain and swerlling in her lower back region with radiation to her left leg. On September 17, 2013, Dr. Hausknecht again stated that the plaintiff was not working due to her lower back pain, which radiated to her left hip causing numbness and weakness and difficulty sleeping.

In her affidavit, plaintiff explained the extent of her physical limitations and the activities that she could no longer do, or could not do as well, during the requisite time period as a result of

the subject accident, to wit: "I couldn't really move around a lot... couldn't lift things over 5-10 pounds...couldn't bend, squat or walk around much...couldn't stand or sit for more than 15 minues...couldn't carry all of my equipment to and from the [photography] jobs...couldn't carry [the equipment] around and set it up at the locations." Furthermore, she explained that the wedding referred by Dr. Hausknecht at which she worked as the photographer at her friend's wedding as she had promised before the accident. Plaintiff stated that after the wedding, in the early summer of 2013, she "just wasn't able to work anymore due to serious pain in my lower back."

Plaintiff's deposition testimony indicates that she did not work as a photographer in 2013 after the accident, except for her friend's wedding. In describing her physical limitations from March 2013 to June 2013 during her deposition in April 2015, plaintiff testified that, due to her back pain, she couldn't really bend...walk...sit... [and she] had a hard time sleeping."

As such, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is denied.

As defendants improperly raised the issue of a gap in medical treatment for the first time in their reply papers, that issue is not properly before this Court, and, thus, was not considered. *McNair v Lee, 24 A.D.3d 159 (1st Dept. 2005); Ritt v Lenox Hill Hospital, 182 A.D.2d 560 (1st Dept. 1992).*

The Court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, defendants' summary judgment motion is denied in part and granted in part, as explained herein.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon defendants within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: November 3, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.