

Soto v Diggs

2016 NY Slip Op 32627(U)

December 19, 2016

Supreme Court, Bronx County

Docket Number: 300434/2015

Judge: Julia I. Rodriguez

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

INDEX #300434/2015

DALIA SOTO,

DECISION/ORDER

Plaintiff,

-against-

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

EDWARD A. DIGGS and DON THOMAS BUSES, INC.,

Defendants.

Recitation of papers considered in Defendants' motion for summary judgment on threshold:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

Plaintiff commenced this action after she was struck by Defendants' school bus as she was crossing the street in her motorized wheelchair February 7, 2014. In her Bill of Particulars Plaintiff alleged she sustained injury to her back as a result of being violently thrown to the ground after impact; Plaintiff's left leg was amputated below the knee in 2000, and right leg was amputated above the knee in 2014 due to lupus. Plaintiff claims that she was learning to ambulate with the aid of prosthetic devices, but that the injuries she sustained as a result of the accident prevent her from becoming ambulatory again.

After discovery Defendants seek an order granting summary judgment pursuant to CPLR 3212, and dismissing Plaintiff's complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). In support of summary judgment Defendants submitted the medical affirmations of: (1) **Malcolm D. Reid**, a Diplomate of the American Board of Physical Medicine and Rehabilitation; (2) **John T. Rigney**, a Diplomate of the American Board of Radiology; and (3) **Ashok Anant**, a Diplomate of the American Board of Neurological Surgery.

Dr. Reid conducted a medical evaluation on April 20, 2016. He listed the numerous records he reviewed, indicating Plaintiff's history of: colostomy, left below knee amputation, right above knee amputation, systemic lupus erythematosus, rheumatoid arthritis, peripheral vascular disease, hypertension, vasculitis, diabetes mellitus and osteopenia. At her examination Plaintiff complained of constant low back pain, left shoulder pain, bilateral shoulder pain, impaired bilateral hearing and constant pain in her hands due to lupus; she sat in her motorized wheelchair and stated she was

unable to transfer. Dr. Reid concluded that “given the multitude of pre-existing medical problem(s), coupled with severe debilitating rheumatoid arthritis, it is unlikely that Mrs. Soto would be able to become even a functional household ambulator.”

On November 29, 2015 Dr. Rigney conducted a radiological evaluation of the following studies:

- 1) x-rays of the lumbar spine dated Nov. 7, 2014;
- 2) x-rays of the pelvis dated Nov. 7, 2014;
- 3) MRI scan of the lumbar spine dated Nov. 7, 2014;
- 4) x-ray of the chest dated Jan. 19, 2015;
- 5) MRI scan of the lumbar spine dated Jan. 19, 2015.

On January 4, 2016 Dr. Rigney conducted a radiological evaluation of the following studies:

- 1) x-rays of the right wrist dated Oct. 7, 2014;
- 2) x-rays of the right and left hands dated Oct. 7, 2014;
- 3) x-rays of the right forearm dated Oct. 7, 2014;
- 4) x-rays of the cervical spine dated Oct. 7, 2014;
- 5) x-rays of the chest dated Oct. 7, 2014;
- 6) x-rays of the thoracic spine dated Oct. 7, 2014;
- 7) x-rays of the lumbar spine dated Oct. 7, 2014;
- 8) x-rays of the pelvis dated Oct. 7, 2014;
- 9) x-rays of the lumbar spine dated Nov. 7, 2014;
- 10) x-rays of the pelvis dated Nov. 7, 2014;
- 11) MRI scan of the lumbar spine dated Nov. 7, 2014;
- 12) x-ray of the chest dated Jan. 19, 2015;
- 13) MRI scan of the lumbar spine dated Jan. 19, 2015;

As can be noted hereinabove, Dr. Rigney listed certain studies in both evaluations, and reported similar conclusions. In his Nov. 29th report he concluded:

This patient . . . underwent multiple radiographic examinations at the Jacob Medical Center on the day of the accident . . . none of which reported an acute injury. Among the multiple radiographic examinations was an x-ray . . . of the lumbosacral spine dated 10/11/2014 [sic]. This was said to reveal no visualized fracture. The films from this examination are not available for correlation. . . . X-rays of the lumbar spine performed on 11/7/2014 (one month after the accident in question) revealed a partial compression fracture of L2

which was not reported on the examination performed on the day of the accident in questions. An x-ray of the pelvis performed on 11/7/2014 revealed no evidence of a recent injury. An MRI scan of the lumbar spine on 11/7/2014 revealed a recent nature to the compression fracture of L2. Inasmuch as x-rays at Jacoby Medical Center following the accident in question did not reveal evidence of this compression fracture, this compression fracture is therefore not related to the accident in question. . . .

In his second report dated January 4, 2016 Dr. Rigney reiterated findings from the Nov. 29th report, and added, in pertinent part:

X-rays of the lumbar spine performed on 11/7/2014 (one month after the accident in question) revealed a partial compression fracture of L2 which was not present following the accident in question and is therefore unrelated to the accident in question. This occurred in the interim time between 10/07/2014 and 11/07/2014 for causes unrelated to the accident in question. A repeat x-ray of the pelvis was performed on 11/7/2014 which again revealed no evidence of a recent injury. An MRI scan of the lumbar spine on 11/7/2014 revealed a recent nature [sic] to the compression fracture of L2 vertebra corresponding with the radiographic finding. . . . There is therefore no evidence on this examination that this patient has suffered any injury to the lumbar spine as a result of the accident in question. . . . A follow-up MRI scan of the lumbar spine was performed on 1/19/2015 which demonstrated early healing of the L2 vertebral compression fracture and the interim development of a new L3 vertebral compression fracture which was not present on the x-ray examination performed in Jacobi Medical Center on the day of the accident in question or on the x-rays and MRI scan of the lumbar spine performed on 11/7/2014. This compression fracture occurred between 11/7/2014 and 1/19/2015 for causes unrelated to the accident in question of 10/7/2014.

Dr. Anant conducted a neurological examination on April 28, 2016; Plaintiff remained in her wheelchair as she was not able to get on the examination table. Anant conducted range of motion testing of the cervical and thoracic spines, but ROM testing of the lumbar spine was not possible. Anant reported a full examination of the upper extremities, and that examination of the lower extremities was limited. In his report Anant listed the numerous records he reviewed, including the x-ray images dated 10/7/2014 of the thoracic, lumbar and cervical spines and pelvis. Dr. Anant concluded:

The claimant's examination today indicates that she is a double amputee. This claimant has longstanding comorbidities. These include long term use of steroids with steroid induced diabetes, generalized osteopenia, systemic lupus erythematosus (SLE) and rheumatoid arthritis type of deformity with weakness of the wrists, fingers and hands bilaterally. The claimant developed vasculitis due to lupus that resulted in bilateral lower extremity amputations. The claimant is also hypertensive and has been diagnosed with disorders such as gallstones, recurrent abdominal pain and anemia.

. . . Numerous physical therapy reports from Montefiore Medical Center in 2011 indicate that the claimant was not ambulatory, was dependent for all ADLs and required a wheelchair. . . . The claimant was examined at Jacobi Medical Center after her accident on 10/7/14. There is no documentation of head injury or cervical spine injury. The claimant was found to have some tenderness in the cervical and lumbar regions. Right hip hematoma was noted. She was diagnosed with multiple bruises and discharged. No fractures were documented. . . .

Lumbar spine x-ray on 10/11/14, on date of injury, indicated no fracture or dislocation. My review of the images corroborates this report.

MRI study 11/7/14 showed L2 superior endplate fracture with bone marrow edema indicating that this injury was recent. Additional degenerative changes were noted in the spine.

Follow-up MRI of the lumbar spine on 1/19/15 showed a new compression fracture of L3 vertebra associated with bone marrow edema. Subacute chronic moderate compression fracture of L2 was also noted. Multiple radiology reports indicate that the claimant had generalized decreased bony mineralization. X-rays from 2010 document osteopenia.

In my opinion . . . causal relationship between delayed diagnosis of fracture of L2 and L3 and accident dated 10/7/14 is possible but not proven. Vertebral compression fractures can occur spontaneously in individuals with severe osteopenia. Claimant has significant generalized osteopenia as a result of her chronic illnesses as well as chronic steroid use.

In my opinion . . . the claimant was non-ambulatory for at least two to three years prior to her accident dated 10/7/14. She has significant hand weakness that would impact her ability to hold on to assistive devices like a cane or walk, even if she had

been provided with bilateral limb prosthesis. There is no record of ambulation having been attempted by physical therapy after above-knee amputation. . . . There is no objective evidence of injury to the cervical or thoracic spines.

* * * * *

The issue of whether a claimed injury falls within the statutory definition of a “serious injury” is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff did not sustain a “serious injury.” Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubenscastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dept. 2006).

In opposition to summary judgment, Plaintiff submitted doctors’ affirmations alleging she sustained injury and permanent restrictions as a result of the accident on Oct. 7, 2014. Plaintiff submitted, *inter alia*: (1) the ambulance report and the emergency room chart indicating that Plaintiff complained of injury and pain to her back contemporaneously with the accident; (2) report by radiologist **Siddharth Prakash** in which he opined that the lumbar MRI dated Nov. 7, 2014 showed “an acute moderate compression fracture of L2 with minimal retropulsion of the fracture fragment;” (3) report by Dr. **Mark S. McMahon** who examined Plaintiff in May 2016; and (4) a report by Chiropractor **David Kreshover** who examined Plaintiff on 2/4/2015 and 11/11/2015.

After consideration of Plaintiff’s submission, the Court finds that the differing and/or contradictory medical opinions expressed by the parties’ respective doctors raise issues of fact and credibility, which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, plaintiff’s submission raised material issues of fact and credibility as to whether she sustained a “significant limitation of use of a body function or system,” and/or “permanent consequential limitation of use of a body organ or member.” At this juncture the court declines to dismiss these claims as matter of law. *Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005). Indeed, any deficiencies in Plaintiff’s proof go to the weight of her evidence, and is deferred to the trier of fact. *Cf. Castillo v. Abreu*, 132 A.D.3d 520, 18 N.Y.S.3d 378 (1st Dept. 2015); *Boateng v. Ye Yiyen*, 119 A.D.3d 424, 990 N.Y.S.2d 17 (1st Dept. 2014); *Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 (1st Dept. 2014); *Clementson v. Price*, 107 A.D.3d 533, 967 N.Y.S.2d 357 (1st Dept. 2013); *Angeles v.*

American United Transportation, Inc., 110 A.D.3d 639, 973 N.Y.S.2d 644 (1st Dept. 2013); *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010).

However, the Court finds that Plaintiff failed to meet her burden of rebuttal regarding the 90/180 claim, i.e., that she suffered “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.” Here, at the time of the accident Plaintiff was dependent upon a home health aide, for ten hours a day seven days a week, to assist her in activities of daily living. After the accident her lifestyle continued as before, and Plaintiff did not submit any directive by a medical provider restricting any activity immediately after the accident.

The court further finds that Plaintiff failed to meet her burden of rebuttal that she sustained a fracture of the L2 vertebrae as a result of the accident on 10/7/2014. It is undisputed that on 10/7/2014 Plaintiff underwent multiple radiographic examinations at Jacob Medical Center, including an x-ray of the lumbar spine, which did not reveal an acute injury. Dr. McMahon conceded this when he reported that the x-ray of her lumbar taken on Oct. 7, 2014 “revealed narrowing of L5-S1 with facet hypertrophy.” The first indication of “a partial compression fracture of L2” was made in the lumbar x-ray and MRI taken on 11/7/2014 *one month* post accident of 10/7/2014. Dr. Rigney reported that “this compression fracture occurred between Nov. 7, 2014 and Jan. 19, 2015 for causes unrelated to the accident in question of Oct. 7, 2014.” Dr. Prakash’s finding of the “acute moderate compression fracture of L2” on the Nov. 7, 2014 MRI has no probative value as to causation with respect to the subject accident of Oct. 7, 2014, and inexplicably, he simply ignored the finding on the Oct. 7, 2014 lumbar x-ray.

For the foregoing reasons, Defendant’s motion for summary judgment dismissing the complaint for Plaintiff’s failure to meet the “serious injury” threshold of Insurance Law §5102(d) is **granted** solely to the extent that Plaintiff’s 90/180 claim and claim of L2 fracture are **dismissed**, as those claims were not medically substantiated. Defendants’ motion is otherwise **denied**, as herein above described.

Dated: December 19, 2016


Hon. Julia I. Rodriguez
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