

Santana v American United Transp., Inc.

2017 NY Slip Op 32181(U)

September 20, 2017

Supreme Court, Bronx County

Docket Number: 302310/2014

Judge: Julia I. Rodriguez

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SUPREME COURT STATE OF NEW YORK
 COUNTY OF BRONX TRIAL TERM- PART 27

INDEX # 302310/2014

JOVANCA M. SANTANA,

Plaintiff,

-against-

DECISION and ORDER

AMERICAN UNITED TRANSPORTATION, INC.,
 RAFAEL LORA, SNATCH RECOVERY & TOWING
 CORP. and JOSHUA L. AQUILA,

Defendants.

Present: Hon. Julia I. Rodriguez
 Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion for summary judgment dismissing Plaintiff's complaint for failure to establish serious injury:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion by Defs. American & Lora, Affirmation & Exhibits	1
Notice of Cross-Motion by Defs. by Snatch & Aquila, Affirmation & Exhibits	2
Plaintiff's Affirmation in Opposition & Exhibits	3
Reply Affirmations	4, 5

This action arises out of a two vehicle accident which occurred on January 22, 2014; plaintiff was a passenger in one of the vehicles. In her Bill of Particulars Plaintiff alleged she sustained injury to her neck, back, and right knee.

After discovery Defendants move for summary judgment dismissing the complaint on the ground that Plaintiff cannot meet the serious injury threshold required by Insurance Law §5104(a) and §5102(d). In support of summary judgment Defendants submitted the affirmations of doctors: (1) **Nicholas D. Caputo**, Board Certified in Emergency Medicine; (2) **John Buckner**, Diplomate of the American Board of Orthopedic Surgery; (3) **David A. Fisher**, Licensed Radiologist; (4) **Naunihal Sachdev Singh**, Board Certified Neurologist; (5) **Andrew M. Elmore**, Licensed Psychologist; (6) **Gary S. Bromley**, specialist in Plastic and Reconstructive Surgery; and (6) **Ari Weitzner**, specialist in Ophthalmology.

As an initial matter, the court did not entertain Dr. Caputo's report, as he did not examine Plaintiff, and his opinions, premised upon other doctors' evaluations, is not probative for purposes of summary judgment.

However, Dr. Buckner performed an orthopedic examination on August 24, 2015; in his report he listed the medical records he reviewed. Buckner conducted range of motion testing of the cervical and lumbar spines, both shoulders and knees; he observed normal ranges in all of these body parts. Buckner reported normal muscle strength and motor function of the lower and upper extremities, and all

orthopedic and neurological maneuvers were negative and normal. He diagnosed “no objective evidence of” either a cervical or lumbar spinal injury, or right knee injury; he further diagnosed:

- Arthroscopy, knee, right for synovitis and chondromalacia, pre-existing, unrelated without documentation of appropriate hematologic evaluation or pathology report.
- Congenital spinal dysraphic disorder, per radiographic description, pre-existing unrelated.

Buckner concluded that “after reviewing the medical records and today’s examination ... Plaintiff did not sustain any injury as a result of this accident” because the emergency room records do not indicate she complained of knee pain; while she only complained of neck and back pain, the head CAT scan did not indicate trauma and the back x-ray was negative. Buckner noted that Plaintiff interacted with seven medical providers and was discharged without a collar, cane, sling or other immobilizer, indicating no serious injury occurred as a result of the accident. Buckner opined that Plaintiff “may perform all activities of daily living” and “there is no permanency as a result of this incident.”

Dr. Fisher reviewed the MRIs of the right knee dated 2/9/2014 and 9/8/2014, and of the cervical spine dated 2/19/2014. He reported that both right knee studies were “normal,” indicating that the medial and lateral menisci were intact, with no “joint effusion” or evidence of “bone marrow edema or fracture.” With respect to the cervical MRI, Fisher found that the cervical cord was “normal in appearance” with “no spinal stenosis or fracture” and “no disc herniation or bulge.” Fisher concluded there was “no radiographic evidence of traumatic or causally related injury.”

Dr. Singh conducted a neurological examination on July 22, 2015. Singh examined the cervical and lumbar spines, and reported no restrictions on ranges of motion of these body parts; in addition, there was no “paravertebral muscle tenderness or spasm on the right and left side” upon palpation of either the cervical or lumbar spine. Singh found normal motor and muscle strength and intact sensation of the upper and lower extremities; the tendon reflexes were symmetrical in all four extremities. Singh’s impression was that the “alleged injuries to the cervical and lumbar spine” had “resolved,” in addition to alleged headaches, depression, anxiety and blurred vision, which had also “resolved.” He reported that there “were no objective neurological findings,” and while the “claimant has a false sensory loss over the right side of the body,” same “does not correspond to any neurological lesion and is unexplainable” [sic]. Singh concluded that there was “no medical necessity for further treatment,

diagnostic testing or follow-up in my specialty of neurology.”

Dr. Elmore evaluated Plaintiff on August 11, 2015. He found her mood depressed and agitated, but cooperative. His impression was “Adjustment Disorder with Depressed Mood.” He concluded that “the claimant is capable of normal activities of daily living from a psychological perspective.”

Dr. Bromley evaluated Plaintiff on July 30, 2015; he reported there “are two separate scars located on the medial and lateral aspect of the right knee” which “are flat and blend in extremely well with the surrounding skin and soft tissues.” He found that the scars were “cosmetically acceptable” and did “not interfere with the patient’s ability to participate in activities of daily living.”

Dr. Weitzner performed an ophthalmological examination on July 30, 2015. He reported a normal eye exam with no evidence of an ophthalmologic injury.

* * * * *

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 Dep’t 2006).

In opposition to summary judgment, Plaintiff submitted physical therapy and progress notes from Heights Medical Care, PC, indicating she commenced therapy on 1/31/2014, eight days post-accident, and treated through 4/15/2014. Plaintiff also submitted affirmations by **Andrew Dowd**, who performed right knee surgery on 3/31/2014, and last examined Plaintiff on June 1, 2017. In his recent June report Dr. Dowd stated that the “finding on the operative report [of 3/31/14] included meniscal tear of the medial meniscus as well as anterolateral meniscal tear as well as synovitis and chondromalacia and these were treated at the time.”¹ Dr. Dowd opined that Plaintiff’s right knee injuries were causally

¹ Contrary to the findings of Dr. Fisher, Plaintiff’s radiologist Dr. Robert Solomon reported a partial ACL tear of the right knee on the MRI dated February 19, 2014.


related to the accident.

At the time of the accident Plaintiff was self-employed as a beautician and child caretaker; at her deposition Plaintiff testified she was told by Doctors Dowd and St. Hill to stop working [Transcript pages 10 & 74].

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" and whether 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." 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). Any claim that Plaintiff failed to explain a gap in treatment is similarly deferred to the trier of fact. *Cf. Deloris Brown v. Joseph Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1st Dept. 2011) (Plaintiff offered sufficient explanation for gap in treatment in that her no fault benefits were denied). *And see 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).

For the foregoing reasons, Defendants' motion and cross-motion for summary judgment dismissing the complaint for Plaintiff's failure to meet the "serious injury" threshold of Insurance Law §5102(d) are **denied**.

Dated: September 20, 2017


Hon. Julia I. Rodriguez
Hon. Julia I. Rodriguez