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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 10

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ESPERANZA MEZA-HERNANDEZ,

Plaintiff,

-against-

RAIN PROPERTIES INC. and HORACE C. MORRIS,

Defendants.

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Index No: 20016/2015

DECISION/ORDER

HON. LIZBETH GONZALEZ

This negligence action arises out of a motor vehicle accident that occurred on May 15, 2014. Plaintiff alleges she was struck by a pick-up truck respectively owned and operated by defendants Rain Properties Inc. ("Rain Properties") and Morris. Plaintiff's verified bill of particulars sets forth permanent injuries allegedly sustained to plaintiff's cervical spine and right shoulder and wrist. Defendants move for summary judgment dismissing the complaint on the ground that plaintiff's injuries fail to satisfy the threshold requirements of Insurance Law § 5102. By separate motion, plaintiff Meza-Hernandez seeks summary judgment on the issue of liability.

Defendants' Threshold Motion

A defendant seeking summary judgment on threshold grounds must demonstrate that the plaintiff did not sustain a "serious injury" or that the plaintiff's injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendant meets this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton,* 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46 [1st Dept 2005]).

In establishing that plaintiff sustained no serious injuries described in Insurance Law § 5102(d), to wit, a permanent loss injury, a permanent consequential limitation injury, a significant

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limitation injury, or a 90/180-day injury, as a result of the subject accident (*see Malupa v Oppong,* 106 AD3d 538 [1st Dept 2013]; *Barry v Arias,* 94 AD3d 499 [1st Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], affd 69 NY2d 701[1986]; *Rose v Tall,* 149 AD3d 554 [1st Dept 2017]), defendants Rain Properties and Morris submit a copy of the pleadings and the plaintiff's verified bill of particulars, deposition testimony and uncertified medical records prepared by the FDNY and New York Presbyterian Hospital. Also submitted are the affirmed medical reports of Dr. Lewis M. Rothman, Dr. Michael J. Carciente and Dr. Jay Nathan.

Dr. Lewis M. Rothman, defendants' radiologist, reviewed x-rays and MRIs of plaintiff's right shoulder and wrist and spine. The doctor opined that plaintiff's cervical spine diagnostic films evinced a pre-existing mild chronic degenerative disc disease; her right shoulder MRI revealed no tears; and her right wrist x-ray showed no evidence of a post-traumatic abnormality causally related to the subject accident.

Dr. Michael Carciente, defendants' neurologist, reviewed plaintiff's bill of particulars; records of plaintiff's right shoulder arthroscopic surgery; New York Presbyterian Hospital emergency room records; uncertified medical records from her treating physicians; cervical spine, right shoulder and right wrist MRI reports; an NCV/EMG report; plaintiff's cervical and thoracic spine and right wrist x-ray reports; and various medical bills allegedly relating to the subject accident. Dr. Carciente performed range of motion testing and determined that plaintiff had no restrictions or limitations when compared to normal. The doctor confirmed his quantitative findings with a qualitative assessment of plaintiff's functionality, finding that she sustained no serious injuries and all of her alleged injuries were resolved and no objective neurological findings causally connected to the subject accident.

Dr. Jay Nathan, defendants' orthopedic surgeon, reviewed plaintiff's uncertified medical records and examined the plaintiff's cervical, lumbar and thoracic spine and bilateral shoulders, elbows and wrists, using an objective means of measurement (i.e., a goniometer), with comparisons to normal ranges of motion. In examining plaintiff's right shoulder, Dr. Nathan notes that the plaintiff had slight restrictions in range of motion and mild tenderness but no swelling, ecchymosis or erythema. A minor limitation in flexion was noted as to plaintiff's right wrist. All other findings were found to be normal. Dr. Nathan determined that plaintiff had healed from right shoulder arthroscopic surgery and had resolved right wrist, cervical and lumbar sprains. He concluded his

report by noting that "it is apparent that the injuries sustained and the reported accident is causally related."

In opposition, plaintiff Meza-Hernandez submits an affidavit of merit and the affirmed reports of Dr. Jacob Lichy and Dr. Thomas Kolb, her radiologists; Dr. Thomas A. Scilaris, her orthopedic surgeon; Dr. Orsuville Cabatu, her physiatrist; Dr. David Capiola, her orthopedic surgeon; and certified medical records.

Plaintiff relies upon the affirmed reports and certified medical records of Dr. Capiola, Dr. Cabatu and Dr. Scilaris to establish that plaintiff had qualitative and objective findings of serious injury contemporaneous with the subject accident (*see Perl v Meher*, 18 NY3d 208 [2011]; *Shapiro v Spain Taxi, Inc.*, supra; *Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]); *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]; *Cabrera v Gilpin*, 72 AD3d 552 [1st Dept 2010]).

Dr. Lichy performed an MRI of plaintiff's right shoulder, finding that she sustained a SLAP II tear, joint effusion, partial tear of the suprastinatus tendon and a tear of the superior and posterior labrum. The doctor opined in part that such findings were "indicative of recent trauma. There is no evidence of any significant degenerative or pre-existing condition and it is [his] opinion that the injuries sustained to the right shoulder and the motor vehicle accident that occurred on 5/15/14 are causally related."

Dr. Kolb performed MRIs of plaintiff's cervical spine and right wrist. The doctor opined that plaintiff's cervical spine MRI shows disc bulges impinging upon the thecal sac at C4-C5 and straightening of the cervical curvature. Her right wrist MRI shows a small peripheral tear of the triangular fibro-cartilage, joint effusion and a ganglion cyst. Dr. Kolb opines that, given plaintiff's clinical history, the positive findings for her right wrist, including the formation of the ganglion cyst, are indicative of recent trauma. These conditions, according to Dr. Kolb, are post-traumatic, not pre-existing or degenerative in nature, and are causally related to the subject accident.

Dr. Scilaris performed the arthroscopic surgery on plaintiff's right shoulder. His post-operative diagnosis is as follows: "Right shoulder partial thickness subscapularis rotator cuff tear; [p]artial thickness articular surface supraspinatus rotator cuff tendon tear; [t]ype I anterior superior labral tear; [g]lenoumeral synovitis with impingement."

During a recent examination, Dr. Capiola performed range of motion testing on plaintiff and found that she presented qualitative and quantitative limitations. The doctor reviewed plaintiff's

treatment history, including her right shoulder and right wrist surgical records, noting that plaintiff had no prior accidents or trauma before the subject accident (*see Diaz v Almodovar*, 147 AD3d 654 [1st Dept 2017]).

After a review of the evidence, the Court finds that the findings of plaintiff Meza-Hernandez's treating physicians contradict the findings of defendants' examining physicians on causation as to plaintiff's cervical spine, right shoulder and right wrist injuries (*see Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1st Dept 2017] and *Henchy v VAS Exp. Corp.*, 115 AD3d 478 [1st Dept 2014]; *Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]); *Lopez v American United Transp., Inc.*, 66 AD3d 407 [1st Dept 2009]). Accordingly, there are issues of fact relative to the permanency and/or significance of plaintiff's claimed injuries (*see Encarnacion v Castillo*, 146 AD3d 600 [1st Dept 2017]). Although there is no requirement that plaintiff continue to seek treatment beyond that which is medically efficacious (*see Ramkumar v Grand Style Transp. Enterprises, Inc.*, *supra*; *Pommells v Perez*, *supra*), the plaintiff has no gap in treatment. Plaintiff's medical records sufficiently establish that plaintiff has continuously sought medical treatment for her alleged injuries since the date of the subject accident (*see Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]; *Pommells v Perez*, supra).

Based on the foregoing, defendants Rain Properties and Morris' motion on threshold grounds is DENIED.

Plaintiff's Liability Motion

Plaintiff Meza-Hernandez seeks summary judgment on the issue of liability and to strike the defendants' second affirmative defense alleging culpable conduct and contributory negligence on the part of the plaintiff. In support of her motion, plaintiff submits a copy of the pleadings, verified bill of particulars and relevant portions of both plaintiff's and defendant driver's deposition transcripts.

Ms. Meza-Hernandez testified that she was a pedestrian attempting to cross the street or driveway entrance on West 246th Street at its intersection with Henry Hudson Parkway when defendants' pick-up truck struck the right side of her body. There was a stop sign and crosswalk lines at the location where the accident occurred. She looked both ways for vehicles before crossing the street. As she reached the middle of the street, she was struck by defendants' pick-up truck as it made a left turn into a driveway at the intersection. The plaintiff also testified that she was not using

her cell phone nor headphones at the time of the impact but admitted to wearing a hoodie.

Defendant Morris, the pick-up truck driver, testified that he was driving on the service road of the Henry Hudson Parkway and that the accident occurred as he was attempting to make a left turn into the driveway of the building on West 246th Street. He testified that the pick-up truck was partially through the driveway entrance and that there was a stone path for pedestrians to traverse across the driveway. As defendant Morris proceeded to turn left into the driveway, he testified that he glanced around but did not see Ms. Meza-Hernandez prior to the accident. Mr. Morris had not realized that he struck the plaintiff until after the impact.

Plaintiff relies upon Vehicle and Traffic Law § 1163(a), which states that "[n]o person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided."

In opposition, defendants Rain Properties and Morris contend that plaintiff's affidavit of merit conflicts with her deposition testimony with regard to where and how the accident occurred. Plaintiff initially testified that the accident occurred in the middle of the street, in the crosswalk of a public roadway but states in her affidavit of merit that the accident occurred in the driveway itself - the version of the accident supported by the defendants' evidence. Notably, defendants point out that plaintiff does not allege her freedom from comparative fault in her affidavit.

Defendants argue that plaintiff's deposition testimony describing the location of the accident is completely inconsistent with its actual setting. Defendants rely on Google Map photographs taken in January of 2013, approximately seventeen months before the date of the accident, but which show no stop sign at the intersection and further, that the intersection was actually governed by a traffic light without double lines for a crosswalk. The photographs also show a pedestrian crossing signal that governs pedestrians[1]. However, defendants assert that plaintiff's description is devoid of any

[1]As a general rule, unauthenticated photographs, not in admissible form, shall not be considered (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Stahl v Stralberg*, 287 AD2d 613 [2d Dept 2001]). Although this Court does not consider defendants' submission of the

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mention of a traffic light or crossing signal.

In reply, plaintiff contends that it is irrelevant where the accident occurred because defendants do not dispute that their vehicle came into contact with plaintiff, causing the impact. However, there are issues of fact with regard to plaintiff's own disparate descriptions as to where and how the accident occurred.

After a review of the evidence, the Court finds that the defendants met their shifting burden of proof. Since "[t]he issue of comparative fault is generally a question for the trier of fact" (*Jones v Pinto*, 133 AD3d 634 [2d Dept 2015]; *see Rodriguez v City of New York*, 142 AD3d 778 [1st Dept 2016]; *Maniscalo v New York City Tr. Auth.*, 95 AD3d 510 [1st Dept 2012]), the plaintiff's motion for summary judgment on the issue of liability is DENIED.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

This constitutes the decision and order of the court.

Dated: December 12, 2017

So ordered,

Hon. Lizbeth González, J.S.C.

unauthenticated Google Map photographs, it does note that plaintiff does not object to their depiction of the intersection as it existed on the date of the accident.