Jusino v Cabrera-Reynoso
2017 NY Slip Op 33352(U)
June 30, 2017
Supreme Court, Bronx County
Docket Number: Index No. 21202/2015E
Judge: Mary Ann Brigantti
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 15

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
--X

MEGAN E. JUSINO Index №. 21202/2015E

-against- Hon..**MARY ANN BRIGANTTI**

C I CABRERA-REYNOSO
--X

The following papers numbered 1 to _5_ Read on this motion,**_SUMMARY JUDGMENT**
Noticed on February 27, 2017 and duly submitted on the Motion Calendar of **March 27, 2017:**

	PAPERS NUMBERED	
Notice of Motion- Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits	3,4	
Answering Affidavit and Exhibits	5	
____Reply_______ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Respectfully Referred to: ____________

Dated: ____________

Upon the foregoing papers, defendant C I Cabrera-Reynoso ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Megan E. Jusino ("Plaintiff") for failure to satisfy the "serious injury" threshold as defined by New York Insurance Law Sec. 5102(d). Plaintiff opposes the motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden

shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this matter, Defendant carried his initial burden of proving that Plaintiff did not sustain a "serious injury" within the meaning of the statute as a result of this accident. The sworn medical reports from Defendant's neurologist and orthopedist found, among other things, that Plaintiff had full range of motion in her lumbar spine, thoracic spine, and left foot upon a physical examination, and all other objective testing was either normal or negative. Defendant also provides sworn reports from his expert radiologist Dr. Mark Decker, who reviewed Plaintiff's diagnostic imaging. Dr. Decker opines that Plaintiff's thoracic spine MRI revealed degenerative findings with no evidence to suggest acute traumatic injury. Plaintiff's lumbar spine MRI revealed only some bulging and "subtle central herniation at L4-5 on axial imaging only with no mass effect on the S1 nerve roots or thecal sac." Plaintiff's left foot CT scan revealed no acute fracture or dislocation, but "nonacute posttraumatic ossification within the inferior spring limit" which he states are "longstanding and not causally related to the date of accident of 5/27/2014." The foregoing evidence demonstrated that Plaintiff did not sustain a "permanent consequential" or "significant" limitation category of injury as a result of this accident (*see Jean-Louis v. Gueye*, 94 A.D.3d 504 [1st Dept. 2012]). The existence of positive MRI and/or diagnostic imaging findings, alone, is not evidence of a serious injury, absent evidence of physical limitations resulting from the injury and its duration (*see Thompson v. Abbasi*, 15 A.D.3d 95, 97 [1st Dept. 2005]; *see also Acosta v. Zulu Services, Inc.*, 129 A.D.3d 640 [1st Dept. 2015]).

In opposition to the motion, Plaintiff has sufficiently raised an issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation to her lumbar spine as a result of this accident. At the outset, the Court notes that Defendant's moving papers do not argue that this injury was not causally related to the accident. None of defendant's experts opine that the positive lumbar spine MRI findings are degenerative in nature or non-traumatic. Defendant's radiologist only appears to challenge the severity of the injury. Accordingly, Plaintiff was not required to provide proof of contemporaneous lumbar spine treatment and limitations in order to defeat summary judgment (*see Streeter v. Stanley*, 128 A.D.3d 477 [1st Dept. 2015]). Plaintiff provided a sworn report from her treating doctor, Rafael Abramov, D.O., who recorded a 33% restriction in the lumbar spine upon extension in 2014, and Plaintiff continued to exhibit this 33% restriction upon a recent 2017 examination. Dr. Abramov also reviewed Plaintiff's lumbar spine MRIs which revealed a right lateral herniation at L5/S1. He ultimately concludes that, as a result of this accident, Plaintiff sustained a permanent, partial disability to her lumbar spine, thus raising a triable issue of fact (*see Garner v. Tong*, 27 A.D.3d 401 [1st Dept. 2006]). While the MRI is not sworn, Dr. Abramov's findings are nevertheless admissible because he did not solely rely on unsworn records in rendering his opinion (*see Pietropinto v. Benjamin*, 104 A.D.3d 617, 618 [1st Dept. 2013]).

Plaintiff failed to submit any evidence of range-of-motion limitations to her left foot/ankle, and

accordingly she failed to demonstrate that she sustained a "permanent consequential" or "significant" limitation to that body part. The existence of tears and other positive CT-scan findings, alone, are insufficient to raise an issue of fact absent evidence of significant restrictions (*see Acosta v. Zulu Services, Inc.*, 129 A.D.3d 640). However, because she has sufficiently raised an issue of fact as to whether her lumbar spine injury is "serious" within the meaning of insurance law, she may recover damages for all injuries proximately caused by the accident, even those not meeting the serious injury threshold, such as her left foot/ankle injury (*id.*, citing *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 549 [1st Dept. 2010]). Contrary to Defendant's contentions, Plaintiff sufficiently raised an issue of fact as to whether her left foot/ankle injuries were causally related to this accident. Dr. Abramov reviewed a CT-scan of the left foot/ankle which revealed, among other things, partial thickness tear of the anterior talofibular ligament and calcaneofibular ligament, and partial thickness tear of the spring ligament. While he found no range of motion restrictions, Dr. Abramov discovered crepitus, some tenderness and stiffness, and noted that Plaintiff had no prior injury to that body part before this accident. He ultimately diagnosed Plaintiff with left internal ankle derangement and a torn spring ligament, and concluded that those injuries were causally related to this accident. Although he did not directly address Dr. Decker's opinions as to causation, "by attributing the injuries to a different, equally plausible cause, that is, the accident," Dr. Abramov sufficiently refuted Dr. Decker's opinion, and Dr. Abramov's opinion is entitled to equal weight (*see Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1st Dept. 2011]; *citing Linton v. Nawaz*, 62 A.D.3d 434 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]; *Jallow v. Siri*, 133 A.D.3d 1391, 1392 [1st Dept. 2015]). Again, Dr. Abramov did not solely rely on unsworn records in rendering his conclusions. Furthermore, contrary to Defendant's contentions, Dr. Abramov sufficiently explained Plaintiff 's cessation of treatment after February 11, 2015, as he opined at the time that Plaintiff had reached maximum medical improvement and was recommended home exercises (*see Mercado-Arif v. Garcia*, 74 A.D.3d 446 [1st Dept. 2010]). While the doctor made a similar claim after Plaintiff's June 24, 2014 examination, he also noted at the time that Plaintiff would be re-evaluated after being seen by a podiatrist. Plaintiff was then evaluated by a podiatrist, Dr. Steven M. Yager, who recommended continued physical therapy. Plaintiff therefore continued therapy until she was discharged by Dr. Abramov on February 11, 2015.

Regarding her alleged thoracic spine injury, however, Plaintiff failed to raise an issue of fact as to causation. It does not appear that Dr. Abramov ever examined Plaintiff's thoracic spine, and he therefore failed to competently refute Dr. Decker's non-conclusory opinion that positive MRI findings in that body part were degenerative in nature and unrelated to the accident. Accordingly, Plaintiff's claims related to alleged thoracic spine injuries must be dismissed.

Defendant has also sufficiently demonstrated entitlement to dismissal of Plaintiff's "90/180 day" injury claim, as Plaintiff admitted in her verified bill of particulars that she was only confined to her bed for

one week, and confined to her home for 10 days after this accident. (*see Fernandez v. Hernandez*, 2017 N.Y. Slip. Op. 05026 [1st Dept. June 20, 2017]).

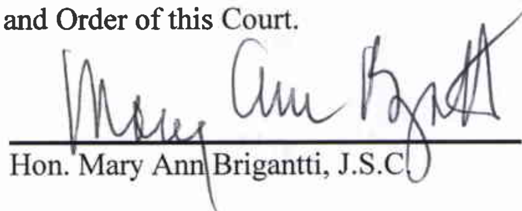
Accordingly, it is hereby

ORDERED, that the branches of Defendant's motion seeking dismissal of Plaintiff's "90/180 day" injury claim, as well as any alleged injuries to the thoracic spine, are granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that the remaining branches of Defendants' motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 6/30, 2017



Hon. Mary Ann Brigantti, J.S.C.