Diaz v USA Logistix Corp.
2018 NY Slip Op 31297(U)
May 16, 2018
Supreme Court, Bronx County
Docket Number: 300967/2014
Judge: Julia I. Rodriguez

[* 1]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

----------X **Index No. 300967/2014**

Flerida A. Diaz,

Plaintiff,

-against- **DECISION and ORDER**

USA Logistix Corporation et al., Hon. Julia I. Rodriguez

Defendants. Supreme Court Justice

----------X

Recitation as required by CPLR 2219 (a), of the papers considered in review of the motion for summary judgment of defendants Mensch Management and Manuel A. Guerrero, on ground that Plaintiff did not sustain a "serious injury" pursuant to Insurance Law 5102 (d) and other relief:

Papers	Numbered
Not. Of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation & Exhibit	3

This action arises from a motor vehicle accident which occurred on December 13, 2013; Plaintiff was a passenger in a taxi owned by defendant Mensch Management and operated by defendant Manuel A. Guerrero. In her Bill of Particulars, plaintiff alleges she sustained injuries to her cervical spine, thoracic spine, lumbar spine and right knee as a result of the accident.

After discovery defendants Mensch Management and Manuel A. Guerrero move for summary judgment dismissing the complaint on the ground that plaintiff cannot establish that she sustained a "serious injury" as defined in §5102 (d) of the Insurance Law. In support of summary judgment, defendants submitted, *inter alia*, the medical reports of: (1) **John H. Buckner, M.D.**, a Board Certified Orthopedist and (2) **Audrey Eisenstadt, M.D.,** a Board Certified Radiologist. Defendants also submitted plaintiff's medical records and her deposition testimony.

Dr. Buckner reviewed plaintiff's medical records and performed an orthopedic examination on Sept. 11, 2017. Buckner conducted range of motion testing in all affected body parts and found no objective evidence of injury to the cervical spine, thoracic spine, lumbar spine or right knee. Buckner reported "no palpable spasm, visible deformity or visible paraspinal muscle asymmetry in her cervical spine," and a negative Spurling's test and that "Lhermitte's phenomenon is negative." Buckner reported that the "muscles of her lumbar spine demonstrate normal reciprocating function with side bending, rotational movement and with gait," and that "Straight leg raising is negative; Lasegue's sign negative McNabb's test is negative and the FABER maneuver is negative." Buckner reported a normal thoracic spine examination "including all dependent functions of muscle strength,

sensation, and reflex and . . . no pathologic reflexes." With respect to the knees, Buckner reported "full extension of both knees with flexion to 135 degrees - bilaterally; McMurray's sign is negative; Apley's test is negative; the drawer signs are negative; Lachman's test is negative and pivot shift is negative." Buckner concluded that plaintiff "may perform all activities of daily living and her usual and customary work - as she has been, without causally-related restrictions."

Dr. Eisenstadt reviewed MRI examinations of plaintiff's cervical spine, lumbar spine and right knee performed on January 24, 2014, one month and eleven days after the accident. Eisenstadt reported "no acute posttraumatic osseous, ligamentous or intervertebral disc changes causally related to the 12/13/13 incident" and only degenerative changes upon reviewing the cervical spine MRI. Eisenstadt reported an "entirely normal" lumbar spine MRI examination with no posttraumatic changes. Eisenstadt's impression of the right knee MRI examination was "Degenerative joint disease femoropatellar joint space. No osseous, ligamentous, tendinous or meniscal pathology is seen posttraumatic in origin." Eisenstadt observed "no posttraumatic changes."

At her deposition, plaintiff testified that she missed only two weeks of work immediately following the accident.

* * * * * * * * *

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); *Rubensccastro 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, *inter alia*, the medical report of **Kenneth McCulloch, M.D.,** a Board Certified Orthopaedic Surgeon. McCulloch reviewed plaintiff's medical records immediately after the accident and noted findings of reduced ranges of motion of the cervical spine, lumbar spine and right knee; that plaintiff received physical therapy from December 20, 2013 through June 24, 2014; and that, On March 17, 2014, plaintiff underwent arthroscopic surgery "in the form of right knee arthroscopic partial lateral meniscectomy,

chondroplasty of the patella and major synovectomy." McCulloch first examined plaintiff on August 6, 2014, at which time he found "she had a positive effusion, positive medial and lateral joint line tenderness to palpation, positive tenderness of the pes anserinus and a positive McMurray test." McCulloch examined plaintiff on a monthly basis through June of 2015 and reported ongoing "pes bursitis/tendinitis" and "signs and symptoms consistent with meniscus tear as a result of the trauma from the 12/13/13 accident." Upon examining plaintiff on June 15, 2015, McCulloch's assessment was that plaintiff had "ongoing inflammation and pain in the right knee, particularly with flexion weightbearing activities" and "recommended to continue with conservative treatment including physical therapy, medical management, activity modification and local modalities." Most recently, McCulloch examined plaintiff on February 21, 2018 and noted that "[i]n addition to physical therapy and medical management, she had received a corticosteroid injection to the right knee 1 week prior to this visit." McCulloch also reported loss of range of motion in the right knee "with MRI evidence of nonhealing meniscal pathology." McCulloch "discussed repeat surgical intervention for the right knee, in the form of, right knee arthroscopic meniscal debridement." McCulloch concluded that the right knee injury is "directly causally related to the accident" and that plaintiff "sustained a permanent partial disability" as a result of the accident.

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). Cf. *Castillo v. Abreu*, 132 A.D.3d 520, 18 N.Y.S.3d 378 (1st Dept. 2015); *Boateng v. Ye Yiyan*, 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, the Bill of Particulars states that plaintiff was confined to bed for 5 days after the accident; moreover, plaintiff did not rebut defendants' claim that plaintiff returned to work full time performing all her usual activities after the accident.

For the foregoing reasons, the motion by defendants Mensch Management and Manuel A. Guerrero 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 is **dismissed,** as that claim was not medically substantiated. Defendants' motion is otherwise **denied**, as herein above described.

Dated: Bronx, New York
May 16, 2018

Hon. Julia I. Rodriguez, J.S.C.