Gupta v Oliveira
2018 NY Slip Op 34293(U)
August 20, 2018
Supreme Court, Nassau County
Docket Number: Index No. 605829/16
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 12**
NEHA GUPTA,	
Plaintiff(s),	**INDEX # 605829/16**
	Motion Seq. 1, 2, 4
-against-	**Motion Date 5.25 / 3.30 & 6.14.18**
JOAQUIM OLIVEIRA, ROSA OLIVEIRA, JAVIER A. SANCHEZ and KIRANDEEP KAUR,	**Submit Date 7.17.18**
Defendant(s).	
----------X	

The following papers were read on this motion:

	Documents Numbered		
	MS 1	MS 2	MS4
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	18	30	51
Answering Affidavit	64	45	83
Reply Affidavit	81,84	88	87

This personal injury action arises out of a three-vehicle collision that occurred on July 3, 2014 on the eastbound Long Island Expressway (I-495) near exit 43.

By motion sequence no. 1, defendants Javier A. Sanchez and Kirandeep Kaur move pursuant to CPLR 3212 for an order granting summary judgment in their favor on the issue of liability and further on the basis that the plaintiff did not sustain a "serious injury" within the meaning of New York Insurance Law Section 5102(d). Additional aspects of motion sequence no. 1 pertaining to the failure to provide discovery have been mooted by plaintiff's compliance with outstanding discovery.

By motion sequence no. 2, defendants Joaquim Oliveira and Rosa Oliveira (the Oliveira defendants) cross-move to join in the Sanchez/Kaur defendants' motion on the basis of a lack of "serious injury." Also, by motion sequence no. 3, the Oliveira defendants moved pursuant to CPLR 3126 for an order striking plaintiffs' complaint for failing to comply with outstanding discovery and for failure to appear for an independent medical examination. Motion sequence no.

3 has been withdrawn. By motion sequence no. 4, the Oliveira defendants move independently, with additional supporting evidence for summary judgment on the basis of a lack of "serious injury."

Summary Judgment by Sanchez and Kaur (Motion Sequence No. 1)

In support of their motion on the issue of liability, movants Sanchez and Kaur submit a police accident report reflecting plaintiff's statement that the Oliveira vehicle struck her vehicle in the left rear, causing her vehicle to spin out of control and strike the Sanchez/Kaur vehicle, which then lost control and overturned. Movants also attach the deposition testimony of co-defendant Joaquim Oliveira, as well as the deposition transcript of the plaintiff.

Joaquim Oliveira testified that at the time of the accident, he was the driver of a Ford Explorer registered in the name of his wife Rosa Oliveira. It was about 5:00 or 6:00 in the evening and the weather was clear. He was traveling on the Long Island Expressway, which is a four lane road, including an HOV lane. He entered the first, far right lane, and then went to the middle lane, where he drove for about 20 minutes until the accident occurred. Traffic was moving continuously, his highest rate of speed was 50 or 60 miles per hour. He felt one impact with another vehicle that he did not see prior to the accident, not even a split second before. The vehicle that he collided with was in the right lane coming next to him. He believes the vehicle was changing to the middle lane. He hit the left driver's side of the other car. He believes the other vehicle was traveling faster in an attempt to pass him. He did not notice a turn signal on the other car. The car he collided with then hit another vehicle, which overturned.

The plaintiff, Neha Gupta testified that the accident occurred around 4-4:30 p.m. and the weather was sunny and dry. She was in the right lane when she entered the Long Island Expressway and she changed lanes after about two to three minutes to the middle lane. Traffic was moving normally. She was in the middle lane for 10 to 12 minutes. Her foot was on the gas at the time of the collision, which occurred when the car on her left hit the rear end of her driver's side. Plaintiff testified that her car then spun out of control and hit a third vehicle to her left, which vehicle then spun. Prior to the impact occurring, she did not see the SUV that struck the rear end of her driver's side nor did she hear any screeching tires or horns honking.

> "It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving

> party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993])."

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; *see also Fairlance Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

> "'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle.' (*Nsiah–Ababio v. Hunter*, 78 AD3d 672, 672 [2d Dept 2010]); see Vehicle & traffic Law §1129[a] [other citations omitted]. Accordingly, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision[citations omitted]."

(*Ortiz v. Hub Truck Rental Corp.*, 82 AD3d at 726; *see also Fajardo v City of New York* ,95 AD3d 820 [2d Dept 2012]).

Here, the movants Sanchez/Kaur have established through the relevant testimony a *prima facie* entitlement to judgment as a matter of law on the issue of negligence. Indeed, plaintiff only opposes the aspects of the instant motion regarding the issue of "serious injury" and the Oliveira co-defendants submit no opposition on the issue of liability. Thus, regardless of any disputed liability as between the plaintiff and the Oliveira defendants, no party raises evidence suggesting negligence on the part of the Sanchez/Kaur defendants in the happening of the accident. Accordingly, the court will grant motion sequence no.1 on the issue of liability and need not consider the Sanchez/Kaur motion concerning whether the plaintiff has sustained a serious injury.

Summary Judgment by the Oliveira Defendants (motion sequence no. 2 and motion seq. no. 4)

Motion sequence nos. 2 and 4 both pertain to the issue of whether the plaintiff has sustained a "serious injury" as a result of the accident. As motion sequence no. 4 identifies additional evidentiary materials following plaintiff's examination by defendants' expert witness, the court will treat these motions together, focusing on the submission appended to motion sequence no. 4.

By her verified bill of particulars, plaintiff alleges that she sustained injuries to her cervical spine with corresponding disc herniation, injuries to her lumbar spine with disc bulges and flattening of the thecal sac, and right knee joint effusion consistent with anterior cruciate ligament strain. Plaintiff further alleges pain, trauma, loss of range of motion, loss of function to neck, back, bilateral hips, bilateral legs, right knee, ankle and toes. Plaintiff thus alleges injuries falling within the sixth, seventh, eighth and ninth statutory categories of the New York State Insurance Law. Plaintiff further contends that she was confined intermittently to home and bed since the time of the accident. She states that she was totally incapacitated from her employment from July 21, 2014 to August 31, 2014, a period of about six weeks.

Pursuant to Article 51 of the New York State Insurance Law, "serious injury" is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of his/her usual and customary daily activity for not less than 90 days during the 180 days immediately following the occurrence of the injury. (*See* McKinney's Consolidated Laws of New York, Insurance Law § 5102 [d]).

To meet the threshold for serious injury, the law requires that the claimed limitation be more than minor, mild, or slight and that the claim be supported by proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*Licari v. Elliott,* 57 NY2d 230 [1982]; *see also Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation will be deemed "insignificant" within the meaning of the statute. (*Licari*, 57 NY2d 230; *Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept. 2000]).

"The mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration." (*Rivera v Bushwick Ridgewood Props. Inc.*, 63 AD3d 712 [2d Dept. 2009]; *Smeja v Fuentes,* 54 AD3d 326 [2d Dept. 2008]; *see Sharma v Diaz*, 48 AD3d 442 [2d Dept. 2008]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45 [2d Dept. 2005]).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member, function, or system" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 353 [2002]). In addition, an expert's *qualitative* assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an *objective* basis, and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*). Thus, whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature

of an injury based on the normal function, purpose, and use of a body part. (*Dufel v. Green*, 84 NY2d 795, 798 [1995]).

In *Perl v. Meher*, 18 NY3d 208 [2011], the Court of Appeals held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination but may be conducted much later, even in connection with litigation. Thus, a plaintiff need not show quantitative, i.e. range of motion testing, contemporaneous with the accident or injury. (*Id.* at 218). Nonetheless, "a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident." (*Id.* at 217-218; *see also Rosa v. Mejia*, 95 AD3d 402 [1st Dept 2012] ["*Perl* did not abrogate the need for at least a qualitative assessment of injuries soon after the accident."]).

Finally, "[w]hile a cessation of treatment is not dispositive – the law surely does not require a record of needless treatment in order to survive summary judgment – a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so." (*Pommells v. Perez,* 4 NY3d 566, 574 [2005]; *see also Ramkumar v. Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]; *Browne v. Covington*, 82 AD3d 406 [2d Dept 2011]; *Wright v. Rodriguez*, 49 AD3d 532 [2d Dept 2008]).

At deposition, plaintiff testified that she felt several impacts as a result of the initial collision. She was thrown around inside her vehicle, and she lost a couple of weeks of work as a result of the accident, and at the direction of her physician, because she was unable to drive due to serious pain in her neck and lower back. She was treated by a chiropractor and physical therapist for pain in the neck, lower back and right knee three times a week for three to four months. She additionally treated at multiple facilities but stopped treatment after no-fault insurance was exhausted. She did not check if her private insurance would cover further treatment. She treated for a total of four to five months. She was involved in a second accident in January 2015 that aggravated the pain to these areas and caused injury to her left shoulder. As a result of the subject accident, plaintiff states that she cannot wear heels at all, and has difficulty doing household chores, dressing, driving and walking long distances. She goes to the gym twice per week to do basic stretching and treadmill.

In support of this motion, the Oliveira defendants submit the affirmed medical report of orthopedic surgeon Steven A. Renzoni, M.D., who examined the plaintiff on March 8, 2018. He states that the plaintiff reported a course of conservative management following the accident, which had not been helpful. Her current complaints consist of pain in her neck, low back, and right knee. She denied any history of prior accidents or injuries. Dr. Renzoni reviewed the relevant records including MRI reports of the plaintiff's lumbar spine, cervical spine, right knee, and left shoulder. He performed a physical examination, including range of motion testing with the aid of a hand-held goniometer, with values compared to the American Medical Associations "Guidelines to the Evaluation of Permanent Impairment," 5th edition, published by the American

Medical Association. However, Dr. Renzoni explained that range of motion testing is "an objective measurement of the claimant's subjective efforts."

Dr. Renzoni's examination of plaintiff's cervical spine revealed no muscle spasm or tenderness upon palpation, range of motion was normal in all aspects with the exception of flexion, which showed a 5 degree restriction. Lumbar spine examination showed no muscle spasm upon palpation and no tenderness and range of motion was normal in all aspects. Examination of the plaintiff's right knee showed no swelling or tenderness, range of motion of flexion was limited by 10 degrees. Dr. Renzoni's diagnosis was cervical spine, lumbar spine and right knee sprain/strain, all resolved. Dr. Renzoni determined that the diagnosis is correct and was not supported by any objective findings. Indeed, Dr. Renzoni stated that "decreased ranges of motion of subjective complaints of pain were not supported by any positive, objective, correlative findings." As to a causal relationship, he stated that the diagnosis is casually related to the injury and accident. In addition, Dr. Renzoni stated that the length and frequency of the plaintiff's treatment was appropriate and was related to the accident of record.

Defendants also submit the radiological review by Jessica F. Berkowitz, M.D. of the MRI of plaintiff's lumbar spine that was performed on August 13, 2014. According to Dr. Berkowitz, the plaintiff has a minimal disc bulge at L4-5, with no evidence of an acute traumatic injury to the lumbar spine and no causal relationship between the claimant's alleged accident and the findings of the MRI examination. Dr. Berkowitz also reviewed the MRI of plaintiff's cervical spine performed on August 27, 2014. Dr. Berkowitz found a very small central disc herniation at C5-6 and states that similar disc herniations to the C5-6 are common findings in the general population and are unlikely to be related to an acute traumatic injury. Dr. Berkowitz further found no causal relationship between the claimant's alleged accident and the findings on the MRI examination. MRI examination of the plaintiff's right knee performed on August 20, 2014 was unremarkable in Dr. Berkowitz's opinion. Dr. Berkowitz notes her disagreement with the testing facility reports on these issues.

Considered alone, defendant's proof establishes that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d).

Having made a prima facie showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was indeed sustained (*Pommels*, 4 NY3d 566 [2005]; *Grossman,* 268 AD2d 79).

In opposition, plaintiff submits a sworn narrative report from Tim Canty, M.D. as well as certified records from several other treating physicians, radiologists and physical therapists. Certified but unsworn and unaffirmed records of plaintiff's treating physicians cannot be considered by the court as they are of no evidentiary value in this department. (*Duke v. Saurelis*, 41 AD3d 770 [2d Dept 2007]; *Furrs v. Griffith*, 43 AD3d 389 [2d Dept 2007]). However, the

court will consider those records which are properly affirmed or sworn. And the court may also consider the radiological reports of plaintiff's treating physicians because they were considered and disagreed with by the moving defendants' own radiology expert. (*See Williams v. Clark*, 54 AD3d 942 [2d Dept 2008]; *Gibson v. Tordoya*, 44 AD3d 1000 [2d Dept 2007]). In any event, as to the MRI reports, plaintiff submits the affirmation of Paul Bonheim, M.D., who states that he reviewed the MRIs of plaintiff's cervical spine and right knee and attests to the accuracy of the information provided in his resulting reports, as well as the affirmation of Ron Mark, M.D. attesting to the accuracy of his review of plaintiff's lumbar spine MRI.

On July 23, 2014, shortly following the accident, plaintiff reported to Dan Acaru, M.D. Plaintiff reported lower back stiffness, soreness, and pain of a constant nature, radiating across the lower back and to the extremities. Dr. Acaru found moderate pain and decreased range of motion in plaintiff's thoracic and lumbar spine. Dr. Acaru referred the plaintiff to physical therapy three times per week and indicated marked disability of 75-99% but indicated that the plaintiff had returned to work normal work duties since the accident and had a guarded prognosis.

Plaintiff also submits the affirmed narrative report of Dr. Canty of the Comprehensive Spine & Pain Center of New York upon an examination conducted on April 12, 2018. Dr. Canty states that plaintiff first presented to his office on August 22, 2017 for evaluation of her neck and lower back injuries that she sustained after a motor vehicle accident on July 3, 2014. On the date of his examination, the plaintiff reported pain to the lower back radiating down the calves and thighs, as well as sharp pain to the neck, which was not associated with numbness and tingling. The plaintiff also reported a motor vehicle accident in January 2015, which exacerbated the injuries to the neck and lower back caused in the subject accident. She underwent conservative treatment including physical therapy over the course of weeks with reported moderate resolution of pain prior to the second accident but pain had returned by the April 2018 examination.

Dr. Canty's physical examination on April 12, 2018 showed tenderness and spasm of plaintiff's lumbar and cervical spine with reduced ranges of motion in all aspects when measured with the aid of a goniometer. Dr. Canty also noted the MRI of plaintiff's cervical spin showed C5-6 central disc herniation and small annual tear which abuts the ventral dura and cord. MRI of the plaintiff's lumbar spine demonstrated disc bulges at L4-5 and L5-S1 levels. Finally MRI of the plaintiff's right knee demonstrated a joint effusion focally around the anterior cruciate ligament consistent with anterior cruciate ligament strain.

Dr. Canty's conclusions include injuries to the cervical and lumbar spine which continue to cause plaintiff to have chronic pain, which injuries are permanent in nature and will require further treatment, including possible injections and radio-frequency ablation, and/or surgery. Dr. Canty opines that the plaintiff's prognosis for a full recovery is poor, and as a result of her injuries, the plaintiff has pain and a loss of function in performing her activities of daily living. He further concludes that the mechanism of injury is related to the accident of July 3, 2014.

On August 13, 2014, Ron Mark, M.D. reviewed the MRI of plaintiff's lumbar spine, finding L4-5 and L5-S1 disc bulges with flattening of the thecal sac. An August 20, 2014 MRI of plaintiff's right knee as read by Dr. Paul Bonheim showed joint effusion around the anterior cruciate ligament consistent with strain. Dr. Bonheim also read the August 27, 204 MRI of plaintiff's cervical spine and found C5-6 defect associated with a central disc herniation and small annual tear, which abut and deflect the ventral dura and cord.

On this record, the court finds evidence demonstrating the existence of material issues of fact that plaintiff has in fact sustained a "serious injury" under the seventh and eighth statutory categories. Dr. Acaru's examination of the plaintiff shortly after the accident, coupled with the opinion of defendant's own examining physician, Dr. Renzoni raises an issue of fact as to a causal connection between the subject accident and plaintiff's injuries. Moreover, plaintiff' physician Dr. Canty acknowledges a subsequent accident and indicates that it caused an exacerbation of plaintiff's injuries.

The MRI examinations conducted shortly after the accident constitute independent diagnostic proof to support plaintiff's subjective complaints and plaintiff's physician Dr. Canty performed multiple range of motion tests finding significant limitations to the cervical and lumbar spines. Taken together, these observations as to actual limitations of movement qualify as objective evidence of a serious injury. (*See Grossman*, 268 AD2d 79). Finally, plaintiff provides an adequate explanation for cessation of formal treatment and Dr. Canty indicates that additional treatment is warranted. Based on conflicting medical affidavits submitted by the parties, the motion must be denied. (*See Ocasio v. Zorbas*, 14 AD3d 499 [2d Dept 2005]).

However, with respect to the ninth (90/180) category of "serious injury," according to her own testimony and the notes from her visits with Dr. Acaru shortly after the subject accident, plaintiff had returned to work and continued physical therapy within six weeks of the accident and was not confined to bed or home for 90 or more days. Therefore, there is no competent medical evidence here establishing that the plaintiff "was unable to perform substantially all of her daily activities for not less than 90 out of the first 180 days as a result of the subject accident" (*Picott v. Lewis*, 26 AD3d 319, 321 [2d Dept 2006]; *see also Williams v. Perez*, 92 AD3d 528 [1st Dept 2012] ["The evidence that plaintiff missed less than 90 days of work in the 180 days immediately following the accident and indeed otherwise 'light duty' is fat[al] to the 90-180 claim."]; *Barzey v. Clarke*, 27 AD3d 600, 601 [2d Dept 2006] [affirming summary judgment where "there was no competent medical evidence to support a claim that the plaintiff was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident."]).

Finally, with respect to the sixth statutory category of "serious injury," there is no supporting medical evidence of a permanent loss of use of a body organ or member, function, or system. (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001] ["We hold that to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total.])

Accordingly, for the foregoing reasons, it is hereby

ORDERED, that the motion for summary judgment on the issue of liability on behalf of the Sanchez/Kaur defendants (motion seq. no. 1) is **granted**; and it is further

ORDERED, motions for summary judgment by the Oliveira defendants (motion seq. nos. 2 and 4) are **denied** with respect to the seventh and eighth categories of "serious injury" pursuant to Insurance Law § 5102(d) and is **granted** with respect to the sixth and ninth statutory categories.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 20, 2018

ENTER:

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