Butta v Rosaro
2018 NY Slip Op 34358(U)
May 16, 2018
Supreme Court, Nassau County
Docket Number: Index No. 606777-16
Judge: Jerome C. Murphy
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

JEANETTE BUTTA,

Plaintiff,

-against-

FELIPE ROSARO and FANTASTIC TRANS CORP.,

Defendants.

TRIAL/IAS PART 14
Index No.: 606777-16
Motion Date: 3/8/18
Sequence No.: 001
MD
DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....1
Memorandum of Law in Support.....2
Affirmation in Opposition and Exhibit.....3
Reply.....4

PRELIMINARY STATEMENT

Defendants bring this application for an order pursuant to the CPLR § 3212, granting defendants summary judgment and dismising the complaint of the plaintiff on the grounds that there are no triable issue of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(c) and 5102(d) and granting such other further relief as the Court deems just and proper. Plaintiff has submitted opposition to this application and a reply was submitted by defendants.

BACKGROUND

This is a personal injury action in which plaintiff claims to have sustained personal injuries. The accident occurred on September 18, 2013, at the intersection of East Sunrise Highway and Liberty Avenue, Freeport, New York. Plaintiff's vehicle was struck on the passenger side by the vehicle owned by Fantastic Trans. Corp., and operated by Felipe Rosario. Plaintiff was returning

from physical therapy which she was receiving for pre-existing neck and back pain.

In support of the motion to dismiss for failure of plaintiff to sustain a "serious injury" within the meaning of Insurance Law § 5102, defendant submits reports of four medical providers: Ronald A. Paynter, M.D.; Salvatore Corso, M.D.; Vladimir Zlatnik, M.D., and David A. Fisher, M.D.

Dr. Paynter, a Board Certified Emergency Medicine physician, performed a review of the South Nassau Communities Hospital Emergency Records. According to his review of the records, he finds them inconsistent with the injuries alleged in the Bill of Particulars. He determines from a review of the records that there is no evidence of significant injury to Ms. Butta as a result of the motor vehicle accident.

Dr. Salvatore Corso, a Board Certified Orthopedist, examined plaintiff on September 5, 2017. With the use of a goniometer, he found ranges of motion to be within normal limits, except for a slight decrease in the cervical spine, which he regards as clinically insignificant as they are unsupported by the remainder of the examination, and were either due to guarding/restriction or simply normal for plaintiff. He conducted a variety of specialized tests, which he found to be normal.

Dr. Vladimir Zlatnik, a Board Certified Neurologist examined the plaintiff on September 5, 2016, and concluded that the alleged injuries to the cervical spine, thoracic spine, and lumbar spine have resolved, with no disability evident. Using a goniometer, Dr. Zlatnik found certain ranges of motion to be decreased, but notes that these decreases were at least partially self-restricted. A series of tests of plaintiff's cervical spine were found to be normal.

Dr. David A. Fisher, a Board Certified Radiologist, reviewed plaintiff's MRI studies of the lumbar and cervical spine, and found them to reveal only preexisting degenerative changes, inluding spinal stenosis, with no traumatic findings. He opined hat there was no causal relationship between the claimed injuries and the accident.

Plaintiff submits a chronological report from her treating physician, Benjamin R. Cohen, M.D. He evaluated Ms. Butta on March 14, 2014.. She reported a history of chronic back and leg pain. She complained of pain in her lower back, radiating down the posterior aspect of both legs to the bottom of her feet, and numbness and tingling from the knees into both anterior and posterior aspect of both legs. She had undertaken physical therapy with limited success. She had decreased range of motion of the lumbar spine and pain with extension. The MRI of March 12, 2014 at

Zwanger Persiri showed a grade 1-2 spondylolisthesis of L4 on 5, which moved during flexion and grade 1 subluation of C4 on C5, causing moderate stenosis without cord compression.

He reports having seen her pre-accident, on August 9, 2013, at which time she had complaints of back pain with radiation into both legs, with a 10-12 year history. Most of the pain was in her legs, and had numbness and tingling in both legs.

On April 11, 2014, he performed an L3 to L5 laminectomy with bilateral far lateral disdiscectomy on the left at L3-4, L4-5, transforatuinal interbody fusion with placement of cage spacer and L3-L5 posterior stabilization and posterolateral fusion using local autograft, allograft and iliac crest bone graft harvest.

He saw Ms. Butta approximately monthly thereafter, until May 8, 2015, after which she and her husband moved to Indiana, and was lost to follow-up. Reported Cervical and Lumbar Range of Motion Studies with a goniometer were found to be limited. Dr. Cohen reports that as a result of the motor vehicle accident, Ms. Butta sustained traumatic cervical and lumbar injuries with radiculopathy. She was status post L3-5 laminetomy, with posterior stabilization and fusion with residual post-operative cramping to her legs and intermittent back pain. There is evidence on EMGs of ongoing radiculopathy, and traumatic cervical and lumbar motion restrictions, and MRI and x-ray findings as described.

As to his prognosis, he notes that she acknowledges pre-existing complaints of back and leg pain with a history of moderate to severe lumbar stenosis. But at the time of the accident, she was participating in physical therapy, and making progress. Three years post-surgery, she continued to have back and leg pain and spasm, which limit her ability to sit or stand for significant lengths of time. She has limited range of motion to the lumbar and cervical spine, and Dr. Cohen opines that the injuries and ongoing significant functional impairment are causally related to the automobile accident of September 18, 2013.

DISCUSSION

The standards for seeking recovery for non-economic injuries sustained as a result of a motor vehicle accident are governed by the provisions of Insurance Law §§ 5102(d) and 5104(a). The former defines "serious injury" as follows:

> (d) "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss

> of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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.

The latter limits the entitlement of a person claiming to be injured as a result of an automobile accident to seek recovery for non-economic loss, except in the case of a serious injury. It states as follows:

> (a) Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. The owner, operator or occupant of a motorcycle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, shall not be subject to an action by or on behalf of a covered person for recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

A defendant may raise an issue as to the seriousness of the plaintiff's injuries by sworn statements of their own examining physician, or the unsworn reports of the Plaintiff's treating physician (*Pagano v. Kingsbury,* 182 A.D.2d 268 [2d Dept. 1992]). If sufficient to raise the serious injury issue, the burden shifts to the Plaintiff to submit prima facie evidence in admissible form to support the claim (*Licari v. Elliot,* 57 N.Y.2d 230 [1982]). To suffice, the affirmation or affidavit must be based upon the physician's own examinations, tests, and observations and record review, and not simply on the plaintiff's subjective complaints (*Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345 [2002]).

Death, dismemberment, and loss of a fetus are self-explanatory, but some of the other definitions of "serious injury" are not.

Significant limitation of use of a body function or system

"In order to prove the extent or degree of physical limitation, and expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury." *Id.* at 348, citing *Dufel v. Green,* 84 N.Y.2d 795 (1995), and *Lopez v. Senatore,* 65 N.Y.2d 1017 (1985). "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Id.*

Under certain circumstances, even where the plaintiff has established by competent evidence that they sustained serious injuries, Courts may consider additional factors, such as an unexplained gap in treatment, intervening medical problem, or a preexisting condition such as may interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez,* 4 N.Y.3d 566 [2005]). But the mere existence of a preexisting condition does not automatically preclude a determination of serious injury. Where such conditions are quiescent, and the patient is asymptomatic, the aggravation of those conditions by the trauma of an automobile collision, if supported by the requisite objective findings, may constitute serious injury (*Mack v. Pullum,* 37 A.D.3d 1063 [4th Dept. 2007]; *Talcott v. Zurenda,* 48 A.D.3d 989 [3d Dept. 2008]; (*Bolowske v. Eastman Kodak Co.,* 288 A.D.2d 851 [4th Dept. 2001]).

Significant Disfigurement

Not all scarring constitutes a "serious injury." "(A)n injury is disfiguring if it alters for the worst plaintiff's natural appearance. A disfigurement is significant if a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the object of pity or scorn." It is not based upon the plaintiff's subjective assessment of the level of disfigurement (*Pecora v. Lawrence,* 41 A.D.3d 1212, 1213 - 1214 [2007]).

Fracture

A fracture, to constitute a serious injury, must be of a bone, not, for example of cartilage (*Catalon v. Empire Storage Warehouse, Inc.,* 213 A.D.2d 366 [2d Dept. 1995]). But even a hairline fracture of a bone is sufficient to constitute a serious injury (*Poma v. Ortiz,* 2 A.D.3d 616 [2d Dept. 2003]).

Permanent loss of use of a body organ, member, function, or system

A person claiming under this element of serious injury must establish a permanent loss of use, and the loss must be total (*Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295[2001]). *See also,* (*Beutel v. Guild,* 28 A.D.3d 1192 [4th Dept. 2006]; *Ellithorpe v. Marion,* 34 A.D.3d 1195 [4th Dept. 2006]).

Permanent Consequential Limitation of Use/Significant Limitation of Use

The affirmation of the plaintiff's physician, based upon six physical examinations over the course of 17 months beginning shortly after the accident, which included findings of limited ranges of motion in the cervical and lumbar spine, and right elbow, which assigned specific percentages and compared them to the normal range was adequate to meet the minimal standard to substantiate a claim of "serious injury."(*Silva v. Vizcarrondo,* 31 A.D.3d 392 [1st Dept. 2006]). The limitation must be more than slight and be supported by medical proof based on credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler,* 79 N.Y.2d 678 [1987]; *Licari v. Elliot,* 57 N.Y.2d 230 [1982]).

In *Picott v. Lewis,* 26 A.D.3d 319, the finding by the defendant's examining physician that the "range of motion of the lumbosacral spine showed complaints of pain beyond 70 degrees of flexion, 20 degrees of extension, 40 degrees of right and left lateral bending and rotation" was determined adequate to raise a triable issue of fact as to whether the plaintiff sustained a "significant limitation of use of a body function or system."

90/180 Days

To prevail on the claim of serious injury under this subsection, the plaintiff must establish:

1. An injury which is objectively determinable and measurable (*Atkinson v. Oliver,* 36 A.D.3d 552 [1st Dept. 2007]);

2. The plaintiff must have been unable to perform "substantially all" of his usual daily activites. In *Uddin v. Cooper,* 32 A.D.3d 270 (1st Dept. 2006) the Court held that merely missing three months of work was insufficient, since there were no allegations of inability to perform other daily activities. Where the plaintiff acknowledged that approximately one month after the accident she was able to return to school, take her final exams, and receive an Associate's Degree, she failed to raise a triable issue of fact under the 90/180 day category (*Shamsoodeen v.*

Kibong, 41 A.D.3d 577 [2d Dept. 2007]). The limitations of the usual daily activities must be "to a great extent rather than some slight curtailment." (*Licari v. Elliot,* 57 N.Y.2d 230, 236 [1982]).

The Court of Appeals has acknowledged that "serious injury" claims remain a source of significant abuse, and that many courts, including theirs, approach claims that soft tissue injuries are "serious" with a " 'well-deserved skepticism.' " (*Perl v. Meher,* 18 N.Y.3d 208, 214 [2011]). The Court there confronted three matters involving plaintiffs Joseph Perl, David Adler, and Sheila Travis, all of whom sought to establish that their injuries, resulting from an automobile collision, were serious within the meaning of the Insurance Law.

The first matter was the review of the Appellate Division Second Department's reversal of an order of Supreme Court, Kings County, which denied defendant's motion to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The second was an appeal by permission of the Court of Appeals, also from an order of the Second Department, which reversed the judgment of the Supreme Court, Rockland County entered upon a jury verdict in favor of plaintiff and, in effect the denial of defendant's CPLR § 4401 motion for judgment as a matter of law. The third appeal, also by permission of the Court of Appeals, was from a First Department affirmation of an order of Supreme Court Bronx County, which granted defendant's motion for summary judgment.

The reviews considered three relevant categories of "serious injury" listed in the standard definition: "permanent consequential limitation of use of a body organ or member"; "significant limitation of use of a body function or system"; and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from preforming 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" (Insurance law § 5102 [d]). *Id.* At 215.

The plaintiffs in those actions relied on one or both of the first two categories, claiming permanent and significant limitations of their use of a bodily organ or system. Travis also relied on the third category, claiming disability from "substantially all" of her "usual and customary daily activities" for at least 90 out of the 180 days following her accident.

Perl and Adler offered testimony that their ability to function had been significantly

limited since the accidents. Perl, age 82, stated that he could no longer garden, carry packages while shopping, or have marital relations. Adler, a school teacher testified that she could not move around easily, could not read for a long time and could not pick up his children. The Court noted that it had previously determined that such subjective complaints were insufficient to support a claim of serious injury, and there must be objective proof.

Both Perl and Adler were examined by Dr. Bleicher, who testified in each case that he had examined the injured plaintiff shortly after the accidents; that he performed a number of clinical tests, named but not described, which were positive, indicating some deviation from the norm; that he observed difficulty in moving and diminished strength; and that the range of motion was impaired. He did not quantify the range of motion on the initial examination, except to say that Perl's was "less than 60% of normal in the cervical and lumbar spine." In each case, however, he examined the plaintiffs several years later, using instruments to make specific, numerical range of motion measurements.

In *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002), the Court noted that in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury; but an expert's qualitative assessment of a plaintiff's condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

While finding the original observations of Dr. Bleicher detailed, it was debatable whether they had an objective basis or were simply a recording of the patients' subjective complaints. But under the quantitative prong of *Toure,* Bleicher's later, numerical measurements were sufficient to create an issue of fact as to the seriousness of Perl's and Adler's injuries.

The Court rejected the arguments of defendants that the quantitative measurements were required to be contemporaneous to the accident and based on recent findings. This was the rationale of the Appellate Division determinations in *Perl* and *Adler.* The Court concurred with the dissenters in the Appellate Division to the effect that the requirement of creating a contemporaneous numerical measurement would have the perverse effect of eliminating legitimate claims because plaintiff sought out physicians who were primarily interested in

treating their conditions, as opposed to creating a record for litigation.

Defendant in *Perl* also raised the issue of causation, pointing to plaintiff's radiologist who noted that Perl's injuries were "degenerative in etiology and longstanding in nature, preexisting the accident." This was insufficient to overcome plaintiff's submission of another radiologist's affidavit that while some of the injuries "are consistent with degenerative disease, a single MRI cannot rule out the possibility that the patient's soft tissue findings are . . . a result of a specific trauma." The conflicting statements of treating and examining physicians constituted a question of credibility, which is not capable of resolution by the Court.

The claim of Travis, however, did not survive. Travis relied upon the claim that she had a "medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence." The court determined that Travis' subjective description of her injuries, insufficient under *Toure* to defeat summary judgment, does not show that there were 90 of the 180 days after the injury in which she was disabled from "substantially all" of her usual activities. The reports of her doctor were silent on what activities she could and could not perform until, 111 days after the accident, she was found able "to perform the essential functions of her job," though with "restrictions." The record failed to reveal any "medically determined injury" that would bring Travis within the "90/180" provision of the statute.

In this case, plaintiff has raised a factual issue as to whether or not she has sustained an exacerbation of a prior existing condition which constitutes a serious injury. In addition, plaintiff 's claim that the 8" surgical scar on his back, as a result of the laminectomy presents a factual question for determination by a jury, and precludes an award of summary judgment (*Chmiel v. Figueroa,* 53 A.D.3d 1092 [4th Dept. 2008]. In *Kilmer v. Strek,* 35 A.D.3d 1282 (4th Dept. 2006), however, a surgical scar from surgery to repair cervical disc herniation was determined not to be a "serious injury" where the condition requiring the surgery was pre-existing, and defendant failed to meet their burden on the issue whether the need for surgery was causally related to the acident.

Defendant's motion to dismiss the complaint for failure of plaintiff to have suffered a serious injury is denied.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 16, 2018

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.

ENTERED
MAY 25 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE