Richmond v Nieves
2018 NY Slip Op 34370(U)
October 31, 2018
Supreme Court, Nassau County
Docket Number: Index No. 608005/16
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**
DIANA RICHMOND,	
Plaintiff,	**INDEX # 608005/16**
-against-	**Mot. Seq. 2**
	Mot. Date 8.6.18
ANGEL L. NIEVES,	**Submit Date 10.10.18**
Defendant.	MOD
--X	

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed........................	24
Answering Affidavit	41
Reply Affidavit..	

Defendant Angel L. Nieves moves pursuant to CPLR 3212 for an order granting summary judgment in his favor on the grounds that the plaintiff did not sustain a serious injury within the meaning of New York Insurance Law § 5102 (d).

This action arises out of a motor vehicle accident that occurred on September 16, 2016. By her bill of particulars and supplemental bill of particulars, plaintiff alleges injuries to her cervical spine, including radiculopathy, decreased range of motion, head spasms and pain. Plaintiff further alleges injury to her shoulders, nose and "whole body." Plaintiff alleges that she has been intermittently confined to bed and home since the accident and was totally disabled for "more than" one week. Plaintiff alleges that she remains partially disabled to date as a result of the accident.

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]). By her bill of particulars, plaintiff alleges serious injuries falling within the seventh, eighth, and ninth statutory categories.

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]).

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."]).

Additionally, "to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total." (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

In support of this motion, defendants submit the emergency room records from Winthrop Hospital which indicate that the plaintiff did not complain of an injury to the head or cervical spine on the date of the accident. Rather, the emergency room physician noted an abrasion on

plaintiff's left forearm. Three days later, plaintiff returned to the emergency room and was diagnosed with pain and spasm in her neck and arm and instructed to refrain from work until 9/26/16.

In addition, defendant submits a Doctor's Narrative Report from a New York Worker's Compensation Board examination by Dr. Bradley Wasserman demonstrating that the plaintiff sustained a prior work related injury to her neck and shoulders on June 4, 2013 and an MRI of plaintiff's cervical spine in July of 2013, which, as interpreted, showed mild degenerative spondylitic change without cord compression or focal herniation.

Moreover, defendant relies on the October 17, 2016 report of plaintiff's treating physician, Dr. Marc Ponzio which indicates although the plaintiff was complaining of neck pain that was electric in nature, she had a full range of motion four weeks post-accident. Defendant likewise submits Dr. Ponzio's October 31, 2016 report which showed no tenderness on palpation or other abnormalities of plaintiff's cervical spine. Similar results were ascertained on November 14, 2016, with normal range of motion noted. Nerve conduction tests performed on plaintiff's upper extremities by Dr. Sunil Butani on August 25, 2017 were normal.

Finally, defendant submits the January 2, 2018 report of Dr. John Killian, who examined the plaintiff on November 2, 2017. At the time of examination, plaintiff complained of right sided neck pain into the region of the right scapular.

Dr. Killian reviewed medical records from plaintiff's treating providers. Dr. Killian specifically noted that in September of 2016, Dr. Ponzio diagnosed plaintiff with cervical and cervicothoracic radiculopathy and recommended physical therapy. In addition, Dr. Killian noted that plaintiff attended physical therapy through May of 2017 and was seen for continued complaints of pain through November of 2017. Dr. Killian reviewed the MRI report of plaintiff's cervical spine conducted on November 1, 2016 which indicated a posterior disc bulge favoring the left at C3-4 and a posterocentral disc herniation at C4-5 as well as a posterior disc herniation at C5-6.

On examination, Dr. Killian found no palpable muscle spasms in plaintiff's cervical spine, no sensory deficits, and no clinical signs of radiculopathy. Range of motion testing, conducted visually and measured with a goniometer "when possible," and compared to published normal values was normal in all planes with some complaints of pain and tenderness upon full flexion. Dr. Killian concluded that there were no objective findings including restricted motion or muscle spasm. Based on his examination, Dr. Killian concluded that the plaintiff has recovered fully from the injuries allegedly sustained in the subject accident. She is able to work at her normal capacity and perform all of her usual activities of daily living without restriction.

In opposition, plaintiff limits the categories of serious injury under which she is claiming to the seventh, eighth, and ninth categories. Plaintiff submits unsworn medical records from her treating physicians, certified only by a records custodian. (*Sanchez v. Oxcin*, 157 AD3d 561 [1st

Dept 2018]; *Hargrove v. New York City Transit Auth.*, 49 AD3d 692 [2d Dept 2008]). However, selected reports of plaintiff's treating doctor were relied upon by the defendant and may be considered by the court. (*Pech v. Yael Taxi Corp.*, 303 AD2d 733 [2d Dept 2003]). The court notes that the October 31, 2016 report of Dr. Ponzio indicates that the plaintiff's current problems were radiculopathy to the cervical and cervicothoracic region and he recommended an MRI for the evaluation of radicular symptoms (numbness) to plaintiff's cervical and thoracic spine. He did not indicate evaluation of range of motion on this visit but did state that there was a causal relationship to the motor vehicle accident. Dr. Ponzio's November 14, 2016 report noted slow improvement of plaintiff's pain that continued to radiate from her neck to her back. He recommended continued physical therapy and once again indicated a causal relationship to the subject accident.

In addition, although plaintiff states that her deposition is annexed to her opposition papers, no deposition is attached. Plaintiff submits an affidavit, however, wherein she states that she still experiences consistent pain in her neck, back, and right side, which is producing a persistent tightness and results in tingling throughout her neck and back. She states that she missed two months of work as a result of the accident and her daily activities were limited. When she finally returned to work after this accident, she could not do as much at work and had to have student radiology technicians move the machine around as she was unable to push or pull the machine due to its considerable weight. Since the accident, she has been unable to go to the gym whereas prior to the accident, she went to the gym every day. She states that she was confined to her bed for approximately ten days after the accident and to her bed for approximately one month thereafter. She still experiences pain 80% of the time and utilizes over the counter treatments to alleviate some of the pain. She also takes a nerve blocking medication. Before the accident, she would easily perform all household tasks, such as laundry, cooking, cleaning, vacuuming and general duties required to maintain her household. Now these tasks are virtually impossible. She states that these limitations were present in the three months immediately following the accident.

With respect to the seventh and eighth statutory category, the court finds that the defendant has failed to establish a prima facie case. Although defendant attaches early reports from plaintiff's treating physicians which suggest no restriction in range of motion, they are at least sufficient to establish that the plaintiff had continuing complaints of pain and radicular symptoms. Combined with the plaintiff's MRI evidencing disc herniations, this is some objective evidence of a serious injury and does not eliminate all questions of fact on the issue. (*See Taccetta v. Scotto*, 287 AD2d 707 [2d Dept 2001]). Moreover, Dr. Killian's own range of motion testing is inadequate to support summary judgment as he does not detail the methods used to ensure objective measurement and he noted plaintiff's complaints of pain on full flexion. (*See Beazer v. Webster*, 70 AD3d 587 [1st Dept 2010]; *Lamb v. Rajinder*, 51 AD3d 430 [1st Dept 2008]; *Junco v. Ranzi*, 288 AD2d 440 [2d Dept 2001]).

However, the defendant has satisfied his prima facie burden with respect to the ninth statutory category. The evidence, including plaintiff's own bill of particulars, establishes that the

plaintiff missed 60 days of work due to the subject accident and was confined to home for about 30 days. Although plaintiff states that she experienced limitations in daily activities for ninety days following the accident, this is insufficient to defeat summary judgment of the 90/180 category of serious injury as limitations must be of "substantially all" daily activities and must be "medically determined." Plaintiff has not submitted evidence in admissible form to support such a claim. (*Picott v. Lewis*, 26 AD3d 319, 321 [2d Dept 2006]; *see also 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."]; *Itkin v. Devlin*, 286 AD2d 477 [2d Dept 2001]).

Contrary to plaintiff's contention, defendants addressed the ninth statutory category in their motion papers (*see Meisler Affirmation in Support* at ¶¶ 23-26). Accordingly, plaintiff's claim of "serious injury" based on injury of a non-permanent nature that prevents her from performing substantially all of the material acts which constitutes her usual and customary daily activity for not less than 90 days during the 180 days immediately following the occurrence is dismissed.

For the foregoing reasons, the defendants' motion for summary judgment is **granted** with respect to the ninth category of serious injury and is otherwise **denied**.

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

Dated: Mineola, New York
October 31, 2018

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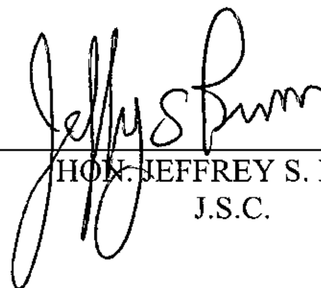

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