

Grace v American United Transp.
2019 NY Slip Op 30795(U)
February 25, 2019
Supreme Court, Bronx County
Docket Number: 301394/16
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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CHRISTINE GRACE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 301394/16

AMERICAN UNITED TRANSPORTATION, INC., et.
al.,

Defendants.
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John R. Higgitt, J.

Upon the November 6, 2018 notice of motion of defendant American United Transportation, Inc. (“defendant”) and the affirmation and exhibits submitted in support thereof; plaintiff’s January 23, 2019 affirmation in opposition; and due deliberation; defendant’s motion to dismiss the complaint on the ground that plaintiff did not sustain a “serious injury” in the subject motor vehicle accident is granted in part.

This action relates to a December 7, 2015 motor vehicle accident involving the taxi owned by defendant, in which plaintiff was a rear-seated passenger. Plaintiff alleges that as a result of the accident she suffered injuries to her right shoulder, left knee, and cervical and lumbar spine. Plaintiff asserts that her injuries satisfy one or more of the following Insurance Law § 5102(d) “serious injury” categories: permanent loss, permanent consequential limitation, significant limitation, and 90/180-day injury.

The defendant submits the affirmed reports of Dr. John H. Buckner (orthopedic surgeon), Dr. Michael J. Carciente (neurologist) and Dr. Eric L. Cantos (radiologist), and the transcript of plaintiff’s February 21, 2018 deposition testimony.

Dr. Buckner examined plaintiff on April 30, 2018, performed objective testing, and measured range of motion with the use of a goniometer or inclinometer. Although he does not compare the results of plaintiff’s range of motion testing to “normal” guidelines he notes that plaintiff’s cervical

spine, lumbar spine, right shoulder and left knee examinations were all normal and demonstrated no objective evidence of injury (*see Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]). Dr. Buckner performed manual motor testing on the lower extremities, finding symmetric and normal results in all major muscle groups.

Dr. Buckner reviewed plaintiff's medical records and her cervical, lumbar, left knee and right shoulder MRI reports, interpreted by plaintiff's radiologist, Dr. Thomas M. Kolb.¹ Dr. Buckner contends that plaintiff's records show evidence of degenerative conditions and no trauma. Specifically, Dr. Buckner contends that plaintiff's December 7, 2015 cervical spine CT Scan showed mild degenerative changes and that plaintiff's cervical spine MRI showed mild degenerative changes consisting of a disc herniation, with impingement. As to the lumbar spine, Dr. Buckner avers that plaintiff's lumbar spine x-ray showed mild degenerative disease, but no signs of injury² and that plaintiff's lumbar spine MRI showed degenerative changes consisting of a disc bulge with impingement and narrowing in the inferior aspect of the left-sided neural foramen.

As to the right shoulder, Dr. Buckner notes MRI findings of hypertrophic changes at the acromioclavicular joint, a normal marrow signal, partial rotator cuff tears, and joint and bursal effusion. He opines that these are degenerative changes. Dr. Buckner also opines that the need for extensive intra-articular and subacromial debridement, noted in plaintiff's March 1, 2016 right shoulder surgery operative report, was related to degenerative disease.

Finally, as to the left knee, Dr. Buckner contends that MRI finding of a meniscus tear, a partial tear of the medial collateral ligament and joint effusion demonstrate evidence of mild degenerative

¹ Plaintiff's cervical and lumbar MRIs were performed on February 13, 2016, the right shoulder MRI was performed on December 22, 2015 and the left knee MRI was performed on February 20, 2016. Dr. Kolb's MRI reports are not submitted by any party.

² Dr. Buckner notes only the following lumbar spine x-ray findings: vertebral body heights and alignment are maintained, intervertebral disc spaces are maintained, and that the sacroiliac joints are patent.

osteoarthritis and do not suggest trauma.

Dr. Carciente performed a neurological examination of plaintiff on April 18, 2018, also finding normal results, no objective evidence of radiculopathy, and no correlation between the findings allegedly found in the cervical and lumbar spine MRI reports and plaintiff's examination. Dr. Carciente found no evidence of an ongoing neurological injury, disability or permanency.

Dr. Cantos reviewed plaintiff's lumbar spine MRI films, finding evidence of mild lower lumbar degenerative changes and no disc herniations. Dr. Cantos opines that there is no evidence of a disc herniation or fracture that could be attributed to the accident and there are underlying mild generalized degenerative changes attributable to aging. Dr. Cantos also reviewed plaintiff's right shoulder MRI films, finding evidence of a subacromial spur, impingement in the region of the rotator cuff, tendinopathy/tendinosis, mild fibrillation and small partial tears within both tendons, and subcortical edema in the humeral head near the rotator cuff attachment. Dr. Cantos concludes that the hypertrophic bony changes and resultant rotator cuff impingement could not have ensued in the short time frame between the accident and the study, therefore he opines that plaintiff had ongoing and preexisting impingement syndrome and degenerative changes prior to the accident. It is unclear whether Dr. Cantos' opinion of degeneration also relates to the tears noted.

The moving defendant sustains its prima facie burden through the affirmed report of its experts who examined plaintiff finding normal orthopedic and neurological examinations, and no objective evidence of permanent injury (*see Castro v DADS Natl. Enters, Inc.*, 2018 NY Slip Op 07262 [1st Dept 2018]; *Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Sone v Qamar*, 68 AD3d 566, 566 [1st Dept 2009]). Defendant's experts further opined that any positive imaging results were caused by degenerative conditions unrelated to trauma caused by the accident (*see Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]; *Hessing v Carroll*, 161 AD3d 462 [1st Dept 2018]).

In opposition, plaintiff submits an affidavit sworn to on January 22, 2019, and the affirmations of her radiologist, Dr. Kolb, and orthopedic surgeon, Dr. Randall V. Ehrlich.

Dr. Kolb examined plaintiff's right shoulder, left knee, cervical spine, and lumbar spine MRI films and concluded that plaintiff sustained the following injuries: right shoulder partial rotator cuff tears; a left knee tear of the posterior horn of the medial meniscus, a partial tear of the medial collateral ligament, and joint effusion; a disc herniation at C5-C6 impinging on the thecal sac; and a bulging disc at L5-S1 impinging on the anterior epidural fat and narrowing the inferior aspect of the left-sided neural foramen.

Dr. Ehrlich reviewed plaintiff's medical records, MRI films, his operative reports, and re-examined plaintiff on December 5, 2018. Dr. Ehrlich initially examined plaintiff's right shoulder on February 3, 2016, after plaintiff had completed a full course of formal supervised physical therapy, finding active and passive range of motion reduced in all planes, positive Neer impingement sign, positive Hawkins impingement test and a positive crossarm adduction test. Dr. Ehrlich's review of plaintiff's MRI confirmed right shoulder partial tears with acromioclavicular joint arthropathy. Dr. Ehrlich concluded that arthroscopic surgery was medically necessary and performed surgery on March 1, 2015 during which he found an anterior labral tear and severe glenohumeral capsular post-traumatic contracture. His recent examination of plaintiff's right shoulder revealed continuing restriction in active and passive range of motion.

Dr. Ehrlich examined plaintiff's left knee initially on September 7, 2016 after plaintiff had commenced a course of formal supervised physical therapy with minimal improvement. His review of plaintiff's February 2016 left knee MRI found tears, with effusion. His examination revealed active and passive range of motion reduced, and positive tenderness to palpation at the medial joint line and peripatellar area. He also noted a positive McMurray, Steinmann bounce and patellofemoral grind test. Dr. Ehrlich performed left knee arthroscopy on November 22, 2016

finding a Grade 4, out of 4, chondral injury as well as tears of both menisci. His recent examination of plaintiff's left knee revealed reduced active and passive range of motion, tenderness to palpation, crepitus, weakness, an effusion, and positive provocation tests.

Dr. Ehrlich opines that plaintiff's MRI and physical examinations were consistent with traumatic internal derangement of the right shoulder and a traumatic intra-articular meniscal and chondral damage to the left knee necessitating surgery. Dr. Ehrlich concludes based upon the plaintiff's history and his objective findings that plaintiff sustained significant and permanent injuries to her left knee and right shoulder as a result of the accident. Dr. Ehrlich recommends further treatment of her traumatically induced left knee chondral injury, and opines that she will require a left total knee replacement in her lifetime.

Plaintiff's submissions are sufficient to raise a triable issue of fact as to whether she sustained a permanent consequential or significant limitation of use of her right shoulder and left knee as a result of the subject accident (*see Liz v Munoz*, 149 AD3d 646, 646-647 [1st Dept 2017]). Plaintiff's orthopedic surgeon observed tears in plaintiff right shoulder and left knee upon his review of plaintiff's MRIs and from his findings during arthroscopic surgeries. Furthermore, he measured limitations in range of motion both before surgery and over two years later and found decreased range of motion, tenderness and weakness in both the shoulder and knee. Finally, Dr. Ehrlich's opinion that such injuries were traumatic in nature and causally related to the accident is based on the plaintiff's history, his own treatment of plaintiff, his review of the MRI films, and his observations during surgery, and is therefore sufficient to raise an issue of fact as to causation (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Holloman v American United Transp. Inc.*, 162 AD3d 423, 424 [1st Dept 2018]; *Barreras v Vargas*, 151 AD3d 620, 621 [1st Dept 2017]; *Liz v Munoz*, 149 AD3d at 646-647). Plaintiff was not required to demonstrate anything further with regard to causation as the defendant failed to establish that plaintiff's own medical records showed

evidence of degeneration (*see Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *cf. Sanchez v Oxcin*, 157 AD3d 561, 562 [1st Dept 2018] [plaintiff not required to address causation with respect to cervical injury based upon the defendant's orthopedist's opinion, because the orthopedist's relied upon and annexed MRI reports that failed to include any degenerative findings]). In this regard, Dr. Buckner selectively quotes portions of plaintiff's MRI reports and medical records without annexing copies of such evidence and conclusory attributes all of the findings to degeneration disease including findings of "traumatic injuries," normal marrow signal, and intact ligaments. Moreover, the moving defendant's experts acknowledge the presence of tears in the knee and shoulder and there is no evidence of such preexisting conditions.

However, plaintiff fails to raise a triable issue of fact as to whether she sustained serious injuries as a result of her alleged cervical and lumbar spine injuries and whether such injuries were causally related to the accident. Plaintiff submits neither quantified results of range of motion testing or a qualitative assessment of any limitations in use of her cervical or lumbar spine resulting from injuries causally related to the accident, nor evidence of recent limitations in use of her cervical or lumbar spine to raise an issue of fact as to permanency (*see Callahan v Shekman*, 149 AD3d 454, 455 [1st Dept 2017]). Indeed, as to the neck and back, "the record is devoid of any competent evidence of plaintiff's treatment [or the] need for treatment' that would warrant the denial of defendant's motion" (*Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012] [changes in original], quoting *Thompson v Abbasi*, 15 AD3d 95, 97 [2005]).

As to her 90/180-day claim, plaintiff alleges that she was confined to her bed and home intermittently following the accident and for approximately two weeks following her March 1, 2016 surgery, and that she missed approximately two weeks of work. Plaintiff testified that she can no longer play softball, braid hair, and that following the accident she missed only three days of work. Plaintiff continued to work until her March 2016 shoulder surgery after which she missed

three and a half weeks of work. Defendant met its prima facie burden as to the 90/180-day claim by submitting plaintiff's bill of particulars and deposition testimony, where she admits that she had not been confined to her bed and home for the requisite period of time after the accident (*see Moreira v Mahabir*, 158 AD3d 518, 519 [1st Dept 2018]). Plaintiff submits no opposition to dismissal of her 90/180-day claim.

Plaintiff did not sustain a permanent loss of use as such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584).

Accordingly, it is

ORDERED, that the aspects of the motion of defendant seeking summary judgment dismissing plaintiff's claims (1) under the permanent loss of use and 90/180-day categories of Insurance Law § 5102[d] and (2) under the permanent consequential and significant limitation categories of Insurance Law § 5102(d) with respect to her cervical spine and lumbar spine are granted; and it is further

ORDERED, that the motion of defendant is otherwise denied.

This constitutes the decision and order of the court.

Dated: February 25, 2019



John R. Higgitt, A.J.S.C.