

Ellana v Perez

2019 NY Slip Op 31865(U)

May 14, 2019

Supreme Court, Queens County

Docket Number: 710303/2017

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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AMANDA ELLANA,

Index No. 710303/2017

Plaintiff,

Motion

Date: April 24, 2019

-against-

Motion Cal. No.: 9

BRENDA L. PEREZ, CHARISSE C. ELEMOS
and MEGHAN A. MCDOWELL,

Motion Sequence No.: 4

Defendants.
-----X

The following efile papers numbered 53-61, 79-83, 89-90 fully submitted and considered on this motion by defendant Charisse C. Elemos seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 dismissing plaintiff Amanda Ellana’s claims on the basis that plaintiff did not sustain a serious injury under Insurance Law §5102.

	Papers <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 53-61
Affirmation in Opposition-Affidavits-Exhibits....	EF 79-83
Reply Affirmation-Affidavits-Exhibits.....	EF 89-90

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY

This negligence action arises from a multi-vehicle motor vehicle accident which occurred on November 12, 2016 on the Westbound Grand Central Parkway at or near the Clearview Expressway. Plaintiff Amanda Ellana (hereinafter “Ellana”) commenced this action against defendants Brenda L. Perez (hereinafter “Perez”), Charisse C. Elemos (hereinafter “Elemos”) and defendant Meghan A. McDowell (hereinafter “McDowell”), alleging that she sustained serious injuries in the accident as a result of their *inter alia* negligent and careless operation and/or ownership of their vehicles. Now, Elemos seeks summary judgment against Ellana on the grounds that she failed to sustain a serious injury as defined under the Insurance Law. A Note of Issue was filed on December 13, 2018, and this motion has been made timely. In support of the motion, in addition to the pleadings, Elemos submitted plaintiff’s verified bill of particulars dated October 5, 2017; plaintiff’s deposition transcript; report of Dr. Edward A. Toriello dated August 23, 2018; and

the report of Dr. Melissa Sapan Cohn dated March 3, 2018.

Ellana alleged in her verified bill of particulars that as a result of the accident, she sustained serious injuries to her neck, back, left shoulder and post-concussion syndrome. She claimed that following the accident she was confined to her bed and/or home for two weeks. She contended that as a result of the accident she sustained a serious injury under the permanent consequential loss of use of a body organ, member, function or system; significant limitation of use of a body function or system and/or the 90/180 day categories of the Insurance Law.

Plaintiff Amanda Ellana's Deposition Testimony

Ellana gave sworn testimony in this matter on July 12, 2018. As a result of the accident she testified that she lost consciousness for a few seconds, and was bleeding from an injury to her forehead. She sustained injuries to her head, neck, back and left shoulder, and did not have any prior injuries to these areas of her body. She went to the Emergency Room the next day because she was still experiencing pain. She went to work only one day the week following the accident, but returned to work after the accident and her job duties did not change. In total, she was confined to her home following the accident for about a week following the accident. She underwent physical therapy, acupuncture and Magnetic Resonance Imaging ("MRI") of her neck, back and her left shoulder were performed. She stated that she was told by a physician that she had a torn rotator cuff in her left shoulder and a herniated disc in her neck and back. She also saw a pain management specialist. She said that she does not really drive since the incident, could no longer exercise or run like she used to, and was still was experiencing pain in her alleged cites of injury. She did not have an MRI taken of her head.

Independent Medical Examination Report of Dr. Edward A. Toriello

Dr. Edward A. Toriello, Board Certified in Orthopedic Surgery, performed an independent orthopedic examination of Ellana on August 23, 2018. He reviewed various medical records and the verified bill of particulars. He noted in his report that plaintiff lost a week from work following the accident. According to the doctor "range of motion is a subjective finding under the voluntary control of the individual being tested. Variables such as body habitus, age, conditioning as well as the claimant's efforts may affect the observed results." Range of motion testing was performed with a goniometer and was the following (the Court only states the results related to plaintiff's claims of injury in her verified bill of particulars):

Cervical Spine- bilateral lateral bending 45 degrees (45 degrees normal); bilateral rotation 80 degrees (80 degrees normal); flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal);

Lumbar Spine-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); bilateral lateral bending 25 degrees (25 degrees normal); straight leg raise 70 degrees (70-90 degrees normal);

Left Shoulder- flexion 180 degrees (180 degrees normal); extension 40 degrees (40 degrees normal); abduction 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); internal rotation 80 degrees (80 degrees normal); external rotation 90 degrees (90 degrees normal).

In Dr. Toriello's opinion, Ellana sustained cervical strain, which was resolved; low back strain which was resolved, and left shoulder contusion which was resolved.

Independent Medical Examination Report of Dr. Melissa Sapan Cohn

On March 3, 2018, Dr. Melissa Sapan Cohn, Board Certified in Neuroradiology, reviewed the MRI taken of Ellana's left shoulder at Kolb Radiology on January 7, 2017. In the doctor's opinion, the impression was low lying acromion process and supraspinatus tendinosis versus partial interstitial tearing. The acromion process in her opinion was due to chronic wear and tear and did not represent an acute traumatic related injury. She also reviewed the MRI of Ellana's lumbosacral spine taken at the same facility on January 7, 2017. In her opinion, plaintiff had minimal disc bulging at L5-S1, which were mild degenerative changes, and no evidence of acute trauma. Additionally, the doctor reviewed the MRI of Ellana's cervical spine taken on January 8, 2017 at Kolb Radiology. The doctor's impression was straightening of the normal cervical lordosis, which could reflect muscle spasm or alternatively, the result of the positioning of the patient's neck within the cervical coil which was necessary to perform the MRI. In her opinion this was a normal MRI.

DISCUSSION

Summary judgment, a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980].) The Court finds that Elemos has established her entitlement to judgment as a matter of law, now requiring the Ellana to come forward with evidence to raise a triable issue of fact. (*Id.*)


In opposition, Ellana submitted, the affirmations of Board Certified Radiologist Thomas M. Kolb, and Board Certified Physiatrist Dr. Joyce Goldenberg, and her affidavit dated April 11, 2019. Dr. Kolb stated that the MRI of the plaintiff's left shoulder revealed a partial rotator cuff tear involving both the supraspinatus tendon and the infraspinatus tendon, and no degenerative changes; the MRI of the cervical spine revealed a posterior disc herniation at C3-C4 impinging on the thecal sac and a posterior disc bulge at C4-C5 impinging on the thecal sac, and no degenerative changes; and the MRI of the lumbar spine revealed a bulging disc impinging on the anterior epidural fat at L5-S1, and no degenerative changes were seen. Ellana explained any alleged gap in treatment in her affidavit. Dr. Goldenberg discussed plaintiff's contemporaneous range of motion deficits in her neck, left shoulder and back upon initial examination on December 5, 2016. Range of motion testing was performed with a goniometer or inclinometer. Dr. Goldenberg performed an examination on

March 26, 2019, and in her opinion, plaintiff had range of motion deficits in her cervical spine, left shoulder and lumbar spine, which in Dr. Goldenberg's opinion, were caused by the subject accident of November 12, 2016, which was the sole competent producing cause of Ellana's injuries, and that Ellana's injuries included a permanent partial loss of use of her cervical and lumbar spine and left shoulder. The Court finds plaintiff's documentary evidence was sufficient to raise a triable issue of fact (*see Perl v Meher*, 18 NY3d 208 [2011]; *Fernandez v Noshcese*, -AD3d-, 2019 NY Slip Op 03320 [2d Dept 2019]).

Therefore, the motion by defendant Charisse C. Elemos seeking an Order pursuant to Civil Practice Law and Rules 3212 dismissing plaintiff Amanda Ellana's claims on the basis that plaintiff did not sustain a serious injury under Insurance Law §5102 is denied.

This constitutes the decision and Order of the Court.

Dated: May 14, 2019



Hon. Chereé A. Buggs, JSC

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY