Reynoso v Tradore
2019 NY Slip Op 32131(U)
May 13, 2019
Supreme Court, Bronx County
Docket Number: 27279/2016E
Judge: John R. Higgitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14
---X
ARMINDA REYNOSO,

Plaintiff,

- against -

IDRISSA TRADORE,

Defendant.
---X

DECISION AND ORDER

Index No. 27279/2016E

John R. Higgitt, J.

Upon defendant's July 9, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's November 13, 2018 affirmation in opposition and exhibits submitted therewith; defendant's November 16, 2018 affirmation in reply; and due deliberation; defendant's motion for summary judgment on the ground that plaintiff did not sustain a "serious injury," as defined in Insurance Law § 5102(d), in the subject May 25, 2016 motor vehicle accident is granted.

Plaintiff alleges that, as a result of such accident, she sustained injuries to her left shoulder, and the cervical, thoracic and lumbar aspects of her spine. Plaintiff alleges aggravation of any preexisting degenerative changes to the claimed body parts. Plaintiff alleges "serious injury" under the categories of significant disfigurement, permanent loss of use, significant limitation, permanent consequential limitation and a 90/180-day injury

Defendant submitted the affirmed expert reports of an orthopedic surgeon, Shanker Krishnamurthy, M.D., a neurologist, Michael J. Carciente, M.D., and a radiologist, Scott A. Springer, D.O., and the transcript of plaintiff's December 5, 2017 deposition testimony.

On February 22, 2018, Dr. Krishnamurthy examined plaintiff, finding that she had full ranges of motion in her cervical and lumbar spine, with no paraspinal spasm or tenderness. All provocative testing of the cervical and lumbar spine, including straight-leg raising, was negative. Dr. Krishnamurthy's neurological examination yielded normal results without deficits in muscle testing, sensation or reflexes in the upper and lower extremities. Dr. Krishnamurthy's examination of

plaintiff's thoracic spine revealed spasm or tenderness, but no deformity. His shoulder examination revealed a negative drop arm test and no findings of impingement, but his range-of-motion testing revealed deficits in abduction bilaterally.[1] Dr. Krishnamurthy diagnosed plaintiff with status post low back, left shoulder and cervical spine strains, and status post anterior cervical discectomy and fusion C5-C6. Dr. Krishnamurthy also reviewed plaintiff's medical records and diagnostic studies. He concluded that plaintiff's cervical spine findings are chronic, preexisting and not causally related to the accident; that plaintiff's lumbar spine MRI showed chronic degenerative changes; and that plaintiff had no left shoulder or lumbar spine residual findings.

Dr. Carciente reviewed plaintiff's medical records and diagnostic studies and performed a neurological examination on April 11, 2018. Dr. Carciente's examination revealed no objective evidence of an ongoing neurological injury, disability or permanent injury. His examination of plaintiff's spine revealed no tenderness or evidence of paraspinal spasm. Dr. Carciente found no correlation between the findings in the cervical spine and left shoulder MRI reports and his examination.

Dr. Springer reviewed plaintiff's June 1, 2016 cervical spine and left shoulder MRIs. In the cervical spine, Dr. Springer noted the presence of mild generalized disc space narrowing, and disc bulges and canal stenosis at the C4-C5 and C5-C6 levels. He opined that such findings were chronic in nature, related to degeneration and not the result of trauma. In the left shoulder, he noted findings of moderate hypertrophic change and narrowing of the acromioclavicular joint, which he deemed degenerative findings typical of arthritis and not the result of trauma.

This evidence is sufficient to demonstrate prima facie that plaintiff did not sustain a "serious injury" to her left shoulder, neck and back as a result of the accident (*see Hayes v Gaceur*, 162 AD3d

[1] Dr. Krishnamurthy's range-of-motion measurements demonstrated the following results bilaterally: elevation 0-160 degrees (normal extension [sic] is 50 degrees), abduction 0-150 (normal is 170 degrees), external rotation 0-70 (normal is 60 degrees), and internal rotation L1-L2 (normal is 80 degrees).

437, 438 [1st Dept 2018]; *Andrade v Lugo*, 160 AD3d 535, 535-536 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573, 573-574 [1st Dept 2017]; *Hernandez v Cespedes*, 141 AD3d 483, 484 [1st Dept 2016]; *Michels v Marton*, 130 AD3d 476, 476-477 [1st Dept 2015]).

Defendant also contends that plaintiff's lumbar spine injuries are related to a prior motor vehicle accident. In this regard, plaintiff testified that she was in an accident in May 2015, as a result of which she injured her back, had MRIs performed, received physical therapy for three months and brought a lawsuit.[2]

In opposition, plaintiff submitted records from CitiMedical I, PLLC and Regina Moshe, M.D.; MRI reports from CitiMed Diagnostic; records from Todd Koppel, M.D., dated June 15, 2016 and July 13, 2016; an operative report, dated October 6, 2016, related to an anterior cervical discectomy and fusion performed by Drs. Donald Cally and Branko Skovrlj; and the affirmed report of Dr. Douglas Schwartz, a physician board-certified in physical medicine and rehabilitation and medical acupuncture, who examined plaintiff on July 31, 2018.[3] These submissions fail to raise a triable issue of fact as to whether, as a result of the accident, plaintiff sustained a permanent consequential or significant limitation of use of her left shoulder and the cervical, thoracic and lumbar aspects of her spine.

With regard to plaintiff's lumbar and thoracic spine, plaintiff submitted no evidence of contemporaneous limitations, a recent physical examination demonstrating current limitations or evidence of causation (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Lee v Rodriguez*, 150 AD3d 481, 482 [1st Dept 2017]; *Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012]; *Thompson v Abbasi*, 15

---

[2] While defendant asserts that there is an unexplained cessation in plaintiff's treatment based upon her testimony that she ceased medical treatment related to injuries sustained in the subject accident in October 2016, plaintiff also testified that she did not continue treatment because "insurance stopped the payments." This provided a reasonable explanation for any gap in treatment (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907 [2013]).

[3] With the exception of the affirmed reports of Drs. Schwartz and Cally, plaintiff's submissions are not in admissible form; however, defendant raised no objection to plaintiff's submissions on such basis.

AD3d 95, 97 [2005]). It is undisputed that plaintiff sustained a prior lumbar spine injury. Following the subject accident plaintiff made no complaints of lower back injury and received no treatment for a lower back injury. Because plaintiff did not offer a fact-based medical opinion ruling out the prior accident as a cause of the alleged lumbar spine injuries, she failed to raise a triable issue as to causation (*see Pines v Lopez*, 88 AD3d 545, 546 [1st Dept 2011]; *Rose v Citywide Auto Leasing, Inc.*, 60 AD3d 520, 520 [1st Dept 2009]).

Plaintiff failed to raise a triable issue of fact as to her alleged left shoulder injury because her experts fail to dispute or address the findings of preexisting degeneration noted in plaintiff's own records (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]). In this regard, plaintiff's June 1, 2016 MRI showed evidence of mild hypertrophy, with no evidence of internal derangement. On June 15, 2016 plaintiff's physician diagnosed plaintiff with left shoulder arthropathy. As noted, defendant's experts deemed these findings preexisting and arthritic in nature. Dr. Schwartz offers no opinion as to the cause of plaintiff's alleged left shoulder injury. Moreover, plaintiff presents no recent evidence of limitations of her left shoulder, and therefore cannot demonstrate that she sustained a permanent consequential limitation of use of her shoulder (*see Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018]).

As to the cervical spine, on June 1, 2016 plaintiff's treating physician, Dr. Cally, measured full cervical spine ranges of motion, with some discomfort, and no muscle spasm. Dr. Cally diagnosed plaintiff with cervical radiculopathy and C5-C6 disc osteophyte complex with significant left-sided foraminal stenosis. Dr. Schwartz's recent findings of cervical spine range-of-motion restrictions is rendered speculative by his failure to reconcile his findings with earlier conflicting findings of normal range of motion (*see Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]). Moreover, with the exception of her initial treatment on May 16, 2016, plaintiff's record is devoid of any quantified or qualified evidence of limitations in the use of the cervical spine (*see Hernandez v Cespedes*, 141

AD3d 483, 484 [1st Dept 2016]). Evidence that plaintiff underwent cervical spine surgery, without any evidence of limitations before or after surgery, is not sufficient to raise a triable issue of fact (*see Hernandez v Cespedes*, 141 AD3d 483, 484 [1st Dept 2016]; *Mulligan v City of NY*, 120 AD3d 1155, 1156 [1st Dept 2014]; *Soho v Konate*, 85 AD3d 522, 522 [1st Dept 2011] [objective evidence of contemporaneous limitations, as a result of the accident, is a prerequisite to establishing "serious injury" even where the plaintiff has undergone surgery]). "Subjective expressions of pain alone will not suffice to establish serious injury" (*Noble v Ackerman*, 252 AD2d 392, 395 [1st Dept 1998]).

It is obvious that plaintiff did not sustain a permanent loss of use. 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, 585 [1st Dept 2010]). Further, the record shows no evidence that would support plaintiff's claim that she sustained "significant disfigurement," within the meaning of Insurance Law § 5102(d), as a result of the subject accident (*see Fernandez v Hernandez*, 151 AD3d 581, 582 [1st Dept 2017]).

With respect to her claim of "serious injury" under the 90/180-day category, plaintiff alleges that, following the accident, she was confined to her bed and home for approximately 30 days and incapacitated from employment and household duties for approximately 180 days. Plaintiff testified that she returned to work two days following the accident, but then stopped working in July 2015 due to pain related to the subject accident. Plaintiff testified that her decision to limit her activities and to stop working was not at the direction of a doctor. This evidence establishes, as a matter of law, that plaintiff did not sustain a 90/180-day injury (*see Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013]; *Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]; *Barhak v L. Almanzar-Cespedes*, 101 AD3d 564, 565 [1st Dept 2012]). In opposition, plaintiff failed to substantiate her claimed loss of work with proof that her inability to work was medically determined (*see De La Rosa v Okwan*, 146 AD3d 644, 645 [1st Dept 2017]). In any event, an absence from work for a period of

90 days is not determinative of a plaintiff's 90/180-day claim *(see Reyes v Se Park*, 127 AD3d 459, 461 [1st Dept 2015]; *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]). Here, plaintiff's averments that she was unable to dance, play basketball, cook, or perform household chores fail to establish that she was prevented from performing *substantially all* of her customary daily activities within the relevant period (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v Quin*, 50 AD3d 530, 530 [1st Dept 2008], *lv denied* 11 NY3d 704 [2008]; *see also Perl v Meher*, 18 NY3d 208, 220 [2011]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

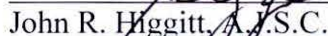
Accordingly, it is

ORDERED, that the defendant's motion seeking summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: 5/13/19



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