

Betancur v Vesely

2019 NY Slip Op 34262(U)

April 30, 2019

Supreme Court, Orange County

Docket Number: Index No.: EF010005-2017

Judge: Craig Stephen Brown

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
INGRID H. BETANCUR,

Plaintiff,

-against-

DECISION & ORDER

GENEVIEVE F. VESELY,

Index No.: EF010005-2017

Defendant.
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Defendant Genevieve F. Vesely moves for an order, pursuant to CPLR 3212, dismissing the plaintiff's complaint against her.

The following papers were read:

Notice of Motion - Affirmation of Elliot Gaztambide, Jr., Esq. - Annexed Exhibits	1 - 3
Stephen J. Cole-Hatchard, Esq.'s Affirmation in Opposition - Affirmation of Steven K. Jacobs, M.D., Ph.D	4 - 5
Reply Affirmation of Elliot Gaztambide, Jr., Esq. - Affidavit of Service	6 - 7

Upon the foregoing papers it is hereby ORDERED that the moving defendant's motion for summary judgment is granted to the extent that plaintiff's 90/180 day claim and permanent loss of use of a body organ, function, or system claim are dismissed. All other requested relief is denied.

The instant personal injury action arises out of a motor vehicle accident which occurred on November 9, 2016 on Little Britain Road in the Town of New Windsor, Orange County, New York. It is undisputed that the vehicle operated by the plaintiff Ingrid H. Betancur was rear-ended by defendant Genevieve F. Vesely's vehicle. Plaintiff Ingrid H. Betencur, claiming serious

injury as defined by New York State Insurance Law, commenced this action on December 7, 2017.

Defendant has submitted in support of her motion for summary judgment an affirmation from her expert orthopedist, Robert Hendler, M.D. Dr. Hendler examined the plaintiff on November 13, 2018 and reported that, "From my physical examination and review of the submitted medical records, and if the history stated by Ms. Betancur is correct, at the time of the accident of record she may have sustained a cervical and lumbosacral sprain, with possible temporary exacerbation of pre-existing degenerative joint disease and degenerative disc disease in the cervical spine area, and a possible mild contusion of the left shoulder, which have all resolved. Physical examination of her neck and back at this time is completely normal. There are no positive objective tests, such as a neurologic deficit, asymmetric reflex or decreased sensation in a dermatomal type pattern, that would clinically correlate with a herniated disc in the neck or low back, or a cervical or lumbar radiculopathy. Based on a normal physical examination, it is my opinion that there is no present disability, and she will have no permanent findings in her neck or low back that would be causally related to the accident of record"

(Affirmation of Robert C. Hendler, M.D., page 4).

Dr. Hendler further opines that, "With regard to her [plaintiff's] left shoulder, physical examination at this time is completely normal. Based on a normal examination it is my opinion that there is no present disability, and she will have no permanent findings in her left shoulder that would be causally related to the accident of record. No further causally related orthopedic treatment is indicated for the involved areas. The overall prognosis is considered good. She is able to work and perform all activities of daily living" *(Affirmation of Robert C. Hendler, M.D., page 4).*

However, the plaintiff, in opposition to the motion for summary judgment, has submitted proof in admissible form that she sustained a serious injury. The plaintiff has submitted, *inter alia*, an affirmation from neurologist Steven K. Jacobs, M.D., PhD. Dr. Jacobs examined the plaintiff on January 18, 2017, March 12, 2018, and May 7, 2018. Dr. Jacobs states that, "I last saw Ms. Betancur [on] May 7, 2018. The patient was complaining of severe neck pain. She had not improved with physical therapy, analgesics or anti-inflammatory agents and had noted progressive weakness in her arms. On examination the patient had persistent weakness and sensory loss in the upper extremities consistent with C6 and C7 cervical radiculopathy. I reviewed an MRI of the cervical spine performed on April 13, 2018. This demonstrated a herniated disc spur complex at C5-6 with severe left-sided neuroforaminal stenosis. There was also compression of the spinal cord at this level. At the C6-7 level the patient had a herniated disc spur complex with severe bilateral stenosis as well as spinal cord compression. As the patient had not improved [with] conservative care I recommended anterior cervical discectomy and fusion at C5-6, C6-7" (*Affirmation of Steven K. Jacobs, M.D., PhD.*, pages 1-2).

In addition, Dr. Jacobs affirmed that, "I believe that the herniated disc at the C5-6 and C6-7 level is causally related to the motor vehicle accident that occurred on 11/9/16. I am not aware of any diagnostic study i.e., a CT scan of the cervical spine or an MRI of the cervical spine indicating that the patient had herniated discs at C5-6 and/or C6-7 prior to this accident. On a permanent basis the patient should not be required to lift anything over 25 pounds or bend or stoop excessively in order to minimize the possibility of further herniating the disks at C5-6 and/or C6-7. The patient has a 25% loss of range of motion of the cervical spine on forward flexion by goniometer measurement. I believe that this loss of range of motion is now permanent in nature. It is important to note that the patient has two components or pathology in her cervical

spine. The first is pre-existing degenerative disc disease at C5-6 and C6-7 which was not causing the patient any type of symptoms as she was never seen by a doctor complaining of neck pain prior to this motor vehicle accident. However, following the motor vehicle accident on 11/9/16 the patient developed a second component of pathology in her cervical spine. Specifically, she incurred herniated discs at C5-6 and C6-7. It is these herniated discs that led to the patient becoming symptomatic with severe neck pain and significant weakness and sensory loss in the upper extremities. The patient will require ACDF at C5-6 and C6-7 with decompression of her spinal cord and fusion with interbody cages at C5-6 and C6-7" (*Affirmation of Steven K. Jacobs, M.D., Ph.D.*, page 2).

The plaintiff has proffered evidence which "raises issues of material fact as to whether she sustained a 'permanent consequential limitation of use of a body organ or member' or a significant limitation of use of a body function or system" (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 352 [2002]; see also *Trigg v. Gradischer*, 6 AD3d 525 [2nd Dept., 2004]; *Fabiano v. Kirkovian*, 306 AD2d 373 [2nd Dept., 2003]; *Pulo v. Schait*, 302 AD2d 441 [2nd Dept., 2003]; *Negrete v. Hernandez*, 2 AD3d 511 [2nd Dept., 2003]; *Paul v. Allstate Rentals, Inc.*, 22 AD3d 476 [2nd Dept., 2005]; *Collado v. Pineda*, 31 AD3d 684 [2nd Dept., 2006]; *Yu v. C & A Seneca Construction*, 40 AD3d 630 [2nd Dept., 2007]). Accordingly, the defendant's motion for summary judgment dismissing plaintiff's claim of a significant or permanent consequential limitation of use must be denied (see also, *Perez v. Vasquez*, 71 AD3d 531 [1st Dept., 2010]).

Finally, the "plaintiff's claim that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the subject accident was unsupported by" the record (*Irizarry v. Chen*, 40 AD3d 925 [2nd Dept., 2007] citing *D'Alba v. Yong - Ae Choi*, 33 AD3d 650, 651, 823 NYS2d 423; *Murray v. Hartford*, 23 AD3d 629, 629-

630, 804 NYS2d 416; see, also, *Collazo v. Anderson*, 103 AD3d 527 [1st Dept., 2013]). In addition, the record is devoid of evidence of any permanent loss of use of a body organ, function, or system. Thus, the portion of defendant's motion seeking the dismissal of these claims must be granted.

This matter is scheduled for a jury trial on June 11, 2019 at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 30, 2019
Goshen, New York



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