

Shury v Lamberti

2019 NY Slip Op 34853(U)

January 29, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 607834-15

Judge: Denise F. Molia

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Index No.: 607834-15

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

VONETTA SHURY,
Plaintiff,

- against -

MATTHEW LAMBERTI, COMPLETELY CUSTOM
CONSTRUCTION INC., and "JOHN DOE" a
fictitious name for the unknown driver,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 4/4/17
SUBMISSION DATE: 11/30/18
MOTION SEQUENCE NO.: 002 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated February 14, 2017 (002); Affirmation in Support dated February 14, 2017; Exhibits A through E annexed thereto; Defendants' Memorandum of Law; Affirmation in Opposition dated August 2, 2017; Exhibits A, through O annexed thereto; Reply Affirmation dated August 14, 2017; Exhibit A annexed thereto; Supplemental Affirmation in Opposition dated August 10, 2017; Exhibits Q and R annexed thereto; Notice of Motion dated December 19, 2017 (003); Affirmation in Support dated December 19, 2017; Exhibits A through M annexed thereto; Affirmation in Opposition dated January 8, 2018; and upon due deliberation; it is

ORDERED, that the motion by defendants (002), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of defendants and dismissing the Complaint, is denied.

The underlying action was brought for personal injuries allegedly sustained by the plaintiff as a result of an automobile accident that occurred on February 4, 2015. In moving for summary judgment to dismiss the Complaint, the defendants contend that the plaintiff's Bill of Particulars and Supplemental Bill of Particulars essentially allege "soft tissue" injuries.

The defendants have referenced the deposition testimony offered by the plaintiff on April

20, 2016, and offered the following synopsis:

“On February 4, 2015, she was involved in a motor vehicle accident as the operator of a 2008 Toyota. (P. 8). She was not bleeding as a result of the accident. (. 35). She did not ask responding officers for medical attention or an ambulance. (P. 38). She went home after the accident and then went to the ER the following day with complaints of pain to her neck and left shoulder. (Pp. 56-57). An X-ray was performed and she was discharged with a shoulder sling. (P. 58). She received one pain injection at the hospital. (P. 58).

She first sought physical therapy on February 5, 2015 where she began a course of treatment. (Pp. 59-61). She drove herself three times a week. (P. 64).

After she stopped physical therapy, she sought pain management treatment with Dr. Goodstein for her neck and left shoulder with her No-Fault insurance in the fall of 2015. (P. 78). She received two cervical epidurals. (P. 83). Dr. Goodstein referred her to a second pain specialist, Dr. Root, who gave her a pain injection to her left shoulder. (P. 85). She has no future appointments with him (P. 86). She ceased treatment with Dr. Goodstein in December 2015. (P. 82). She did not treat with an orthopedist in connection with this accident. (P. 70). She was also not recommended for surgery. (P. 103).

She was employed as a home care nurse where she visited patients in their home. (P. 51). She drove to and from work and carried supplies in a nursing bag. (P. 51). She missed one day of work as a result of this accident (p. 88). She was given accommodations at work for one month and was not required to lift heavy objects. (P. 90). She went back on regular duty thereafter. (P. 90).

She was not confined to her home or bed as a result of this accident. (P. 90). She is unable to run or work out with a kettle ball as a result of this accident. (P. 92). She has difficulty with things like putting lotion on her back, operating her driver’s side door, reaching for objects in the refrigerator and cupboards, and sleeping on her left side. (P. 94).

She testified that she is from Guyana and flew back to get married after this accident. (P. 99).”

Defendants have also submitted the independent orthopedic examination of the plaintiff conducted by Dr. Robert Weiss on May 24, 2016. As a result of his examination, Weiss

compared the plaintiff's range of motion to what is considered to be normal and found a full range of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, left shoulder, left elbow, and left wrist/hand. Weiss conducted several objective tests leading to the impression that the plaintiff's cervical spine sprain and left shoulder and arm sprain were both resolved. He concluded that there was no evidence of an accident related orthopedic disability. Although the plaintiff contends that Weiss's testimony should be deemed incompetent and/or incredible because his licenses in California and New Jersey have either been cancelled or expired, the Court will consider his report for the purposes of this motion.

Based on the foregoing medical reports, the defendants contend that the plaintiff has primarily suffered "soft tissue" injuries and failed to demonstrate that she sustained a "serious injury" as defined by Insurance Law §5102(d), thereby entitling them to summary judgment and a dismissal of the Complaint.

In opposition to the motion, the plaintiff has submitted various medical reports and records. While acknowledging that some of the reports are unaffirmed and/or uncertified as the result of having insufficient time to obtain affirmations/certifications, the plaintiff has requested that for the purposes of this motion the Court give consideration to such records as true copies pursuant to the best evidence rule. In the interests of justice and determining this motion on the merits, and in the absence of a sufficient reason not to do so, the Court shall consider such reports and records as such.

After the subject accident, the plaintiff testified at her deposition that she initially treated at Brookhaven Hospital on February 5, 2015, complaining of neck and left shoulder pain. Not having insurance that would have permitted her to see her primary care physician, Shury began a course of physical therapy that was covered by her no-fault insurance. In addition to her physical therapy for complaints involving her left shoulder, neck, lower back and right knee, the plaintiff testified that she underwent chiropractic treatment and received acupuncture approximately three times per week for approximately three months. Shury also stated that she underwent a needle EMG to her upper and lower extremities, resulting in a finding of radiculopathy in the left shoulder region.

The plaintiff testified that in the autumn of 2015, she ceased her physical therapy and began to treat with Dr. Mark L. Goodstein at ProHealth Care Associates, LLP, who advised her that she had bulging discs and radiculopathy in her neck, and recommended that she undergo a cervical/thoracic translaminal epidural spinal injection, which she did on December 1, 2015. Due to ongoing impingement syndrome, Dr. Goodstein referred plaintiff to Physical Medicine Rehabilitation Glen Cove to consult with Dr. Barry Root, M.D., a pain management physician. Shury stated that Dr. Root diagnosed her with tendinitis and gave her a cortisone injection to her left shoulder in an attempt to alleviate her pain. When that was unsuccessful, the plaintiff testified that she decided to seek further treatment with Dr. Goodstein throughout 2016. From the Summer to Fall of 2016, Shury also commenced a course of regular treatment at Professional Care Physical Therapy and Rehabilitation, P.C.

During the early part of her treatment, the plaintiff underwent three MRI's at New Age

Medical. The MRI of her right knee on February 14, 2015 revealed medial suprapatellar plica present. The MRI of her cervical spine on March 7, 2015 revealed focal central bulging of the disc at the C4-5 level and central broad-based bulging of the disc at the C5-6 level. The April 18, 2015 MRI revealed bulging discs at the L3-4 and L4-5 levels.

In the original and supplemental Verified Bills of Particulars, the plaintiff has identified the following damages, *inter alia*: painful restriction of motion of the left shoulder; painful restriction of range of motion of the right knee; left C5-C6 radiculopathy, impingement of the left shoulder; toradol 60mg injection to the right buttocks; spasms and restrictions of range of motion to lumbar spine. In support of these claims, the plaintiff has submitted the records from the examination that she underwent at Nassau Queens Medical, P.C., on February 11, 2015.

Range of motion testing at that time indicated the following limits: (1) as to the cervical spine, 20% loss in flexion, 50% loss in extension, 25% loss in rotation to both the left and right, 50% loss in both left and right lateral bending; (2) as to the lumbar spine, 33.3% loss in flexion, 50% loss in extension, 50% loss in rotation to both the left and right, 50% loss in both left and right lateral bending; (3) as to the left shoulder, 22% loss in adduction, 55.5% loss in abduction, 50% loss in both internal and external rotation; (4) as to the left knee, 11.1% loss in flexion, 20% loss in both internal and external rotation; (5) as to the right knee, 33.3% loss in flexion, 40% loss in both internal and external rotation. Moderate to severe spasm of the bilateral paraspinal were also found to be present.

With regard to her post-accident physical condition, the plaintiff testified that she has experienced loss of upper body and arm strength thereby restricting her daily activities, and is not limited in her basic body movements such as extended standing and turning of the head. She further asserts that in her capacity as a home health aide, she has been provided with an accommodation following her accident so that she would not have to engage in certain physical activities (*e.g.*, standing, bending, lifting) which have now become difficult for her.

The plaintiff was further examined by Dr. Root on May 15, 2017, May 30, 2017 and July 11, 2017. In his report, Dr. Root made the following diagnoses: chronic cervical-brachial syndrome with features of cervical radiculopathy (noting the positive EMG testing and MRI with bulging discs at C4/5 and C5/6 as well as features of post-traumatic left shoulder impingement syndrome and down-sloping acromion), right knee pain, low back pain with bulging discs at L3/4 and L4/5. Dr. Root opined that these limitations were of a permanent nature and all causally related to the plaintiff's accident of February 4, 2015.

With respect to the issue of damages, the defendants have failed to make out a prima facie case of entitlement to judgment as a matter of law. The plaintiff has submitted the medical reports of her treating physicians who have opined that the plaintiff has sustained permanent injuries that are causally related to the subject accident. Even assuming *arguendo* that defendants' submissions are sufficient, the medical testimony and the affidavits of plaintiff's treating physicians raise issues of fact as to whether the plaintiff's injuries were significant and permanent, and causally related to the subject accident, or a prior accident, as suggested by the defendants. Accordingly, the plaintiff has met her burden of demonstrating the existence of a

triable issue of fact as to whether she suffered a serious injury within the meaning of Insurance Law section 5102(d) (see, Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345).

The foregoing constitutes the Order of this Court.

Dated: January 29, 2019



HON. DENISE F. MOLIA A.J.S.C.