Arango v Paguay
2020 NY Slip Op 33395(U)
October 1, 2020
Supreme Court, Kings County
Docket Number: 508182/2017
Judge: Reginald A. Boddie

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 1st day of October 2020.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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ALEJANDRO ARANGO,

Plaintiff,

-against-

SEGUNDO R. PAGUAY AND CITY RECYCLING CORP.,

Defendants.

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Cal. No. 1, 2 MS 2, 5

DECISION AND ORDER

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
MS 2	Doc # 23-31, 77-80
MS 5	Doc # 63-75, 83

Upon the foregoing cited papers, the motion and cross-motion for summary judgment, pursuant to CPLR 3212 and Insurance Law § 5102 (d), on the ground of failure to meet the serious injury threshold are decided as follows:

Plaintiff was involved in an automobile accident November 15, 2015, on the Long Island Expressway at or near its intersection with Maurice Avenue, in the County of Queens, City and State of New York. Plaintiff alleged injuries to her cervical and lumbar spine and right knee, and that she cannot lift heavy items or stand or sit for long periods of time. She also alleged intermittent pain in the back, neck and knees. Plaintiff states while at work or home performing household activities, when the pain starts, she has to rest.

Defendant Paquay moved for summary judgment, pursuant to CPLR 3212, and argued plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Defendant City Recycling Corporation (City Recycling) cross-moved for the same relief. Plaintiff opposed.

As a preliminary matter, the note of issue in this case was filed on November 29, 2018. City Recycling's cross-motion for summary judgment was filed on September 6, 2019. The cross-motion is untimely since it was not filed within sixty days after the filing of the note of issue, November 29, 2018, in compliance with the Kings County Supreme Court rules. Moreover, no good cause was alleged or established to excuse such late filing (*Brill v City of New York*, 2 NY3d 638 [2004]). Therefore, this motion is denied as untimely.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Further, in a "serious injury" threshold motion for summary judgment, as here, defendants must initially submit competent medical evidence establishing that plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 AD3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether there exists an issue of fact in the case on such issue (*see Barr v Albany County*, 50 NY2d 247, 267 [1980]).

In support of its motion for summary judgment, defendant Paquay produced the affirmation of Dr. Mark Decker, a radiologist, who reviewed the MRI films of the plaintiff. Dr. Decker opined that the MRI films of plaintiff's cervical and lumbar spine evidence degenerative disc disease at C2-C3 and C3-C4 with loss of signal, degenerative disc disease at C4-C5 and C5-C6 with loss of disc signal and broad bulge, and degenerative disc disease at L1-L2 and L2-L3 with subtle loss of signal, and is not causally related to the accident. Dr. Decker further opined the MRI of the knee showed joint effusion and thickened medial plica not related to the accident. Defendant also offered an report from Dr. Pierce Ferriter, a board certified orthopedic surgeon, who opined that plaintiff was 24 years old; 5'5" tall, 160 pounds, at the time of his examination on December 17, 2018, and was alleged to complain of pain in the neck, back and right knee. Dr. Ferriter averred she had normal ranges of motion in the cervical and lumbar spine and knees, that the orthopedic tests performed were normal, and that the cervical sprain/strain in her cervical and lumbar spine and knees were resolved. He opined she is capable of functional use of her examined parts for daily activities including work. The defendant here also argued plaintiff testified she joined a gym subsequent to the accident and during the month of the deposition went to the gym four times, was able to use a treadmill and weights to exercise, and did not present any testimony demonstrating she would qualify under the 90/180 provision of the Insurance Law. The court finds defendant met its prima facie burden of proof, thus shifting the burden of proof to plaintiff.

In opposition to this motion, plaintiff offered an additional affirmation seeking to supplement the deposition, in which she alleged she still suffers pain in the right knee, neck and back, cannot sit or stand for long periods of time, lift heavy items or drive long periods of time, has difficulty performing household chores, and stopped treating because she could no longer afford to pay. Plaintiff also proffered the affirmation of Dr. Shahid Mian who examined plaintiff

on June 20, 2018, and March 18, 2019, and reviewed the MRI of her right knee. Dr. Mian opined "the MRI's of plaintiff's cervical spine reveals herniations at C4-5 and C5-6 discs, bulging L1-2, L2-3, L3-4 and L5-S1 in the lumbar spine and a tear of the medial meniscus in the right knee that is causally related to her accident of 11/10/15 and is not due to degeneration or a pre-existing condition." Dr. Mian found plaintiff's range of motion in the left shoulder to be limited, the range of motion in her knee to be 120/150, the cervical spine was measured as 25/45 flexion and 20/45 extension, 20/45 lateral and 60-65/80 rotation. He opined, "[t]he patient's injuries are causally related to the accident of 11-10-15. Considering the longevity of complaints, positive clinical findings, and MRIs, permanency is expected in neck, back, left shoulder, and right knee. Surgery right knee is recommended."

Plaintiff also produced the affirmation of Dr. Harold Tice, a radiologist, dated March 23, 2016, who reviewed plaintiff's MRI of the right knee and opined that plaintiff had mild joint effusion and intrasubstance tear peripheral margin posterior horn medial meniscus. Plaintiff also presented the affirmed reports of Dr. Gaston Sterlin, dated December 10, 2015, and Dr. Jean Claude Pernier, dated November 4, 2016, from Greene Avenue Medical PC. In the affirmed report dated December 10, 2015, Dr. Sterlin noted plaintiff had limited range of motion in the cervical and lumbar spine and knees and ordered MRIs. In the interim, he diagnosed plaintiff with cervical and lumbosacral sprain/strain with limited range of motion and right knee sprain/strain with limited range of motion. In the November 4, 2016 report, Dr. Pernier indicated plaintiff was receiving physical therapy three times weekly due to symptomatic pain in the neck, back and knees and was still complaining of pain after three months of physical therapy. He reviewed the MRIs and proffered she has herniations in the cervical spine at C4-C5 and C5-C6 and bulging discs at C7/T1, C2-3 and C3-C4, L1-L2, L5-S1, right knee intrasubstance tear and joint effusion.

Accordingly, on this record, the court finds defendant met its prima facie burden of establishing plaintiff did not suffer a serious injury as to shift the burden of proof to plaintiff. Plaintiff, in opposition, produced sufficient admissible evidence to establish triable issue of fact. Therefore, the motion for summary judgment (MS 2) is denied and the cross-motion for summary judgment (MS 5) is denied as untimely.

E N T E R:

Hon. Reginald A. Boddie
Justice, Supreme Court