Zakora v Kai-Peng Tang
2021 NY Slip Op 30560(U)
February 24, 2021
Supreme Court, Kings County
Docket Number: 515363/2018
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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SVETLANA ZAKORA and YURIY FEDOTOV,

Plaintiffs,

– against –

ALEX KAI-PENG TANG,

Defendant.

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Index No.: 515363/2018
Motion Date: 02/17/2021
Motion Seq.: 01

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 12-19 and 23-32 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, defendant Alex Kai-Peng Tang moves for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint pursuant to Insurance Law § 5104(a) on the ground that the plaintiff did not sustain a serious injury as defined under Insurance Law § 5102(d). For the reasons set forth below, Motion 01 is denied.

This action arises out of a motor vehicle accident that occurred on Avenue P near the intersection at East 12th Street in Brooklyn, New York on or about October 18, 2017. In her verified bill of particulars, Ms. Zakora claims that, inter alia, she has suffered the following permanent injuries: focal posterior central L1-L2 disc herniation with extrusion of disc material along the anterior epidural space in the L-spine; posterior central C3-C5 disc herniation with compression of ventral thecal sac and partial effacement of ventral subarachnoid space in the C-spine; and productive hypertrophic changes of the acromioclavicular joint with impingement of the rotator cuff in both the right and left shoulders.

In support of its motion, the defendant offers the pleadings, the signed deposition transcript of the plaintiff, and the medical reports of Dr. Dorothy Scarpinato and Dr. Stephen Lastig. Dr. Scarpinato, a board certified orthopedist, examined the plaintiff approximately two years after her accident. Dr. Scarpinato states that she reviewed several documents, including the verified bill of particulars, physical therapy notes from the plaintiff's treating physicians, MRI reports, and the IME reports of an acupuncturist, a chiropractor, and another orthopedist. In a report dated October 17, 2019, Dr. Scarpinato stated that she performed range of motion testing with the use of an inclinometer and/or a goniometer and utilized the A.M.A. "Guides to the Evaluation of Permanent Impairment" as a reference for normal ranges of motion. Dr. Scarpinato found normal ranges of motion in both the cervical and lumbar spine, but found

limited ranges of motion in the "bilateral shoulders" with forward elevation to 120 degrees (180 degrees normal), backward elevation to 40 degrees (40 degrees normal), abduction to 120 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), external rotation to 90 degrees (up to 90 degrees normal) and internal rotation to 80 degrees (80 degrees normal). Dr. Scarpinato also claims that the plaintiff "resisted" testing of the shoulders and attributes the limited range of motion in the shoulders to this resistance, claiming that this limitation is not causally related to the accident. However, Dr. Scarpinato also states that, assuming the medical history provided was accurate, and based on the medical records provided and her examination, "there is a causal relationship between the claimant's initial complaints" of pain and the accident of record. Furthermore, though Dr. Scarpinato acknowledges that she reviewed the Electromyography (EMG) and Nerve Conduction Velocity (NCV) tests and that the plaintiff received injections, she does not discuss how, if at all, the results impacted her findings.

Defendant also offers the report of radiologist Dr. Lastig, who reviewed the MRIs of the plaintiff. Reviewing the MRI of the right shoulder, Dr. Lastig found tendinosis at the supraspinatus, infraspinatus, and subscapularis tendons, and capsular hypertrophy and bony spurring at the acromioclavicular joint that impinges upon the supraspinatus musculotendinous junction. In the lumbar spine, Dr. Lastig found multilevel disc degeneration most pronounced at the L2-L3 level, mild degenerative spondylosis, and smooth annular bulges at the L2-L3 to L5-S1 levels and attributed these injuries to degeneration. In the left shoulder, Dr. Lastig stated that he found tendinosis at the supraspinatus, infraspinatus, and subscapularis tendons, but "no evidence of a full-thickness rotator cuff tear." Dr. Lastig also examined the MRI of the cervical spine, and stated that the annular bulges therein were attributable to degeneration and unrelated to the accident. Notably, while Dr. Lastig did state that injuries to the cervical spine, lumbar spine, and left shoulder were unrelated to the accident, Dr. Lastig did not comment on whether any injury to the right shoulder was causally related to the accident.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendant has the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of the defendant's examining physician(s), or plaintiff's sworn testimony, or by the affirmed reports of the plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendant's medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Here, the defendant failed to meet his prima facie burden as to the category of a significant limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a "serious injury." *Partlow v Meehan*, 155 AD2d 647, 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); *see Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648. Using objective testing, the defendant's own medical expert, Dr. Scarpinato, recorded a decreased range of motion of the plaintiff's shoulders. Considering the report of Dr. Scarpinato, defendant's own doctor, which finds decreased range of motion in the plaintiff's shoulders, in tandem with the plaintiff's testimony, in which she states that she has difficulty performing everyday activities such as house cleaning, lifting heavy items, and turning patients in the course of her nursing duties at work, the Court cannot conclude that the defendant is entitled to judgment as a matter of law under the Insurance Law. *See Holtz v Y. Derek Taxi*, 12 AD3d 486 (2d Dept 2004) (defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within Insurance Law § 5102(d) where one of the defendant's examining physicians reported finding limitations of range of motion of plaintiff's cervical spine); *see also Servones v Toribio*, 20 AD3d 330 (1st Dept 2005); *Meyer v Gallardo*, 260 AD2d 556 (2d Dept 1999). Moreover, Dr. Scarpinato found a causal relationship between the plaintiff's complaints of pain and the subject accident.

Furthermore, since the defendant failed to meet its prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 (1985); *Fils-Aime v Colombo*, 152 AD3d 493 (2d Dept 2017); *Scinto v Hoyte*, 57 AD3d 646 (2d Dept 2008).

To the extent that the defendant argues the absence of a specific serious injury category outlined in plaintiff's verified bill of particulars is fatal to her case, this argument is unavailing. In any event, none of the cases cited by the defendant support the contention that the alleged omissions in the bill of particulars entitles defendant to summary judgment as a matter of law. The defendant is still required to meet his prima facie burden, which he has not done.

Finally, regarding the defendant's argument that there has been a gap in treatment, plaintiff testified she continues to treat at home and perform exercises she learned in order to mitigate pain, and that she plans to return to physical therapy as a result of ongoing issues. This constitutes a sufficient explanation for the plaintiff's "gap" in treatment. *Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2d Dept 2007); *Black v Robinson*, 305 AD2d 438 (2d Dept 2003).

In light of the foregoing, the defendant's motion for summary judgment is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) is DENIED.

This constitutes the decision and order of the Court.

DATED: February 24, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.