

Impastato-Hernandez v Weibert
2021 NY Slip Op 33107(U)
November 23, 2021
Supreme Court, Queens County
Docket Number: Index No. 708647/2019
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

CHRISTINA IMPASTATO-HERNANDEZ, Index No.: 708647/2019

Plaintiff, Motion Date: 11/18/21

- against - Motion No.: 61

BRETT N. WEIBERT and WAGER CONTRACTING Motion Seq.: 2
CO., INC.,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

Notice of Motion-Affirmation-Exhibits.....EF 41 - 50
Affirmation in Opposition-Exhibits.....EF 51 - 57
Papers Numbered

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on November 13, 2018. As a result of the accident, plaintiff alleges that she sustained serious injuries to her right shoulder, right knee, cervical spine, lumbar spine, and thoracic spine.

Plaintiff commenced this action by filing a summons and complaint on May 16, 2019. Defendants joined issue by service of an answer on July 3, 2019. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on September 30, 2020 and testified that she was involved in the subject accident. Immediately following the accident, she missed three days from work and another three weeks starting April 15, 2019. As a result of the accident, she has difficulty sitting, standing, sleeping, and lifting. She can no longer throw a baseball.

Sheldon P. Feit, M.D. reviewed the MRIs of plaintiff's cervical spine taken on December 29, 2018, lumbosacral spine taken on December 29, 2018, right shoulder taken on January 26, 2019, and thoracic spine taken on January 25, 2019. Dr. Feit concludes that the MRIs reveal pre-existing degenerative change. No posttraumatic changes were identified. There are no abnormalities causally related to the subject accident. Regarding the shoulder, Dr. Feit opines that the impingement on the supraspinatus muscle at the acromioclavicular joint is entirely degenerative, and there is no evidence of any rotator cuff tear or fracture.

John C. Killian, M.D. performed an independent orthopaedic examination on plaintiff on November 4, 2020. Plaintiff presented with current complaints of pain in both sides of her neck with occasional radiation to the right shoulder and down to the elbow and wrist. She has pain from the middle to lower part of her back on both sides. Dr. Killian identifies the records reviewed prior to rendering his report. Dr. Killian performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, thoracolumbar spine, right shoulder. All other objective testing performed was negative. Dr. Killian concludes that plaintiff has fully recovered from all alleged injuries. There were no positive objective physical findings to confirm plaintiff's subjective complaints. Plaintiff has no impairment or disability from the alleged injuries. Plaintiff is able to work at her normal capacity and perform all of her usual activities of daily living without restrictions.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body organ, member, function or system. Defendants also contend that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of her usual daily activities.

In opposition, plaintiff submits the affirmation of Jeffrey Perry, D.O. Dr. Perry initially examined plaintiff on December 24, 2018. Upon initial examination, Dr. Perry conducted range of motion testing and found limited ranges of motion in plaintiff's cervical spine and lumbar spine. Dr. Perry concludes that the subject accident caused significant limitation of motion in plaintiff's cervical spine, thoracic spine, and lumbosacral spine. The injuries and limitations are permanent in nature and were directly caused by the subject accident.

Craig Selzer, D.C. submits an affidavit, affirming that plaintiff first presented to him on January 12, 2019. Upon initial examination, Dr. Selzer conducted range of motion testing and found limited ranges of motion in plaintiff's cervical spine and lumbar spine. On January 29, 2019, range of motion testing of plaintiff's right shoulder revealed decreased range of motion. Additional testing performed was positive. Dr. Selzer opines that the subject accident caused significant limitations of motion in plaintiff's cervical spine, thoracic spine, lumbosacral spine, and right shoulder. The injuries and limitations are permanent in nature and were directly sustained from the subject accident.

Marc Katzman, M.D. reviewed the MRIs of plaintiff's cervical spine and thoracic spine. The MRIs reveal, inter alia, disc bulging.

Pradeep Albert, M.D. reviewed the MRI of plaintiff's right shoulder and found supraspinatus tendinopathy, shallow bursal fraying, infraspinatus tendinopathy without tear, and acromioclavicular arthritis, and bursitis.

David Weissberg, M.D. submits an affirmation, affirming that plaintiff first visited his office on January 21, 2019. During the initial evaluation, range of motion tested was restricted in plaintiff's cervical spine, lumbar spine, and right shoulder. Other objective testing performed was positive. Dr. Weissberg performed arthroscopic surgery on plaintiff's right shoulder on April 15, 2019. Dr. Weissberg opines that the injuries and limitations are permanent in nature and were directly sustained in the subject accident.

Most recently, Brian Haftel, M.D. examined plaintiff on October 19, 2021. Objective testing performed was positive. Range of motion testing of plaintiff's cervical spine, lumbar spine, and right shoulder revealed restricted ranges of motion. Dr. Haftel concludes that the restrictions of motion are post-traumatic. The subject accident caused, aggravated, precipitated and/or exacerbated plaintiff's injuries. The accident caused

significant limitations of motion in plaintiff's cervical spine, thoracic spine, lumbosacral spine, and right shoulder. Plaintiff's injuries and limitations are permanent in nature and were directly sustained in the subject accident.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, this Court finds that plaintiff raised triable issues of fact as to whether she sustained a serious injury by submitting the physician's affirmations, attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneously to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

Accordingly, and for the reasons stated above, it is hereby ORDERED, that defendants' motion is denied.

Dated: November 23, 2021
Long Island City, N.Y.



Robert J. McDonald
ROBERT J. MCDONALD
J.S.C.