Meade v Holahan
2021 NY Slip Op 33470(U)
September 30, 2021
Supreme Court, Westchester County
Docket Number: Index No. 52533/2019
Judge: Sam D. Walker

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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KENNETH C. MEADE and
STACY DETHOMASIS-MEADE,
Plaintiff,

DECISION and ORDER
Index No. 52533/2019
Seq # 2 & 3

-against-

CINDY A. HOLAHAN, JOSE GUAMAN MORA, and
GUAMAN MORA GENERAL SERVICES, LLC,

Defendants.

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JOSE E. GUAMAN and MAGDALENA CHUQUI,
Plaintiff,

Index No. 60075/2019

-against-

CINDY A. HOLAHAN,
Defendant.

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The following papers were read on the motion and cross-motion[1] (Sequence# 2 & 3) for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment in favor of the defendants, Cindy Holahan, and Jose Guaman ("Guaman"), dismissing Magdalena Chuqui's verified complaint:

Notice of Motion/Statement of Material Facts/Affirmation in Support/Exhibits A-G
Affirmation in Opposition/Exhibits A-D
Notice of Cross-Motion/Statement of Material Facts/Affirmation in Support/Exhibits A-E
Reply Affirmations

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[1]The attorney for Guaman acknowledged that the cross-motion is untimely, but requests leave of Court for the motion be accepted, since the defendant was permitted to amend her answer to include a counterclaim against Guaman. Prior to this, there was no counterclaim against Guaman and therefore, it was unnecessary for him to file a motion for summary judgment in this action. Given the procedural history, the Court grants leave of Court for the untimely motion to be heard.

Factual and Procedural Background

This action arises out of a motor vehicle accident, which occurred on December 15, 2018, on the Interstate 95, at or near the 5 mile marker in the City of New Rochelle, Westchester County, New York State. The plaintiffs commenced the action on July 3, 2019, by filing a summons and verified complaint. By Order dated November 26, 2019, this Court granted a motion to consolidate this action with Index No. 52533/2019 (Meade v Holahan) for the purpose of a joint trial.

The bill of particulars alleges the following serious injuries for Magdalena Chuqui ("Chuqui"):
Internal derangement of left knee; cervical radiculopathy; lumbosacral radiculopathy; cervical sprain/strain; lumbar sprain/strain; left knee sprain/strain; limitation of motion; depression; headaches; anxiety; fear; emotional upset and shock.
She was operated on at Montefiore New Rochelle Hospital; was confined to bed for a period of approximately two weeks except for necessary and essential excursions for required purposes; was confined home for a period of approximately five weeks except for necessary and essential excursions for required purposes.

The movants, by their attorneys, now file the instant motion pursuant to CPLR 3212 granting summary judgment in their favor, dismissing the complaint as to allegations made by Chuqui, arguing that she has not suffered a permanent consequential limitation or significant limitation, because objective medical evidence demonstrates that the alleged injuries were minor and have healed, leaving no residual loss of motion; Chuqui does not meet the threshold under the 90/180 category; and Chuqui has failed to establish any other category of serious injury, such as loss of use and significant disfigurement[2].

In opposition, Chuqui, by her attorney, argues that the motion must be denied on procedural and substantive grounds, because the motions fail to dispute the existence of Chuqui's tear of the left knee and herniating and bulging discs with impingement in the cervical, thoracic and lumbar spine and other injuries that she sustained as a result of the subject accident and that those injuries were proximately caused by that accident. The attorney further argues that the medical reports submitted in support of their motions are insufficient and inconsistent as to causation and sets forth positive findings.

In reply, the movants' attorneys argue that the opposition papers are untimely and should not be considered. Substantively, the attorneys argue that the entire extent of Chuqui's treatment following the accident was confined to physical therapy, acupuncture and chiropractic adjustments, that Chuqui was unemployed as of the date of the accident and was less than diligent in attending to therapy. The independent medical examination

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[2]The attorney for Guaman has adopted the arguments of Cindy A. Holahan's attorney.

("IME") performed with a goniometer, revealed normal range of motion of the cervical spine, shoulders, elbows, wrists, knees and the lumbar spine. The attorney further argues that they also submitted the reports of th radiologist, who reviewed the MRI studies, showing no evidence of trauma.

The attorneys argue that Chaqui's opposition papers are insufficient to overcome the submissions and that their physician's affirmation is conclusory and makes no mention of any evidence of trauma on any of the films.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(NY Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. (NY Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, Chuqui did not suffer death, dismemberment, significant disfigurement, fracture, loss of a fetus, or permanent loss of use of a body organ, member, function or system. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Chuqui claims a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In support of the motion, the movants submit the report of Richard D. Semble, M.D., an orthopedic surgeon who conducted an independent orthopedic surgery examination of Chuqui on August 20, 2020.

Dr. Semble reports that the range of motion testing was performed with the aid of a goniometer and reports normal range of motion for cervical spine, with no tenderness or spasm; full range of motion for both shoulders, elbows and wrists. He reports that her thoracic spine is non-tender in the midline and paravertebral area; and her lumbar spine demonstrates tenderness in the right iliolumbar area. She describes radiating pain in the posterior thigh to the lateral calf. He reports no palpable spasm and flexion of 80/80°, extension of 20/20°.

Dr. Semble's impression is that, Chuqui sustained a cervical sprain, there is no objective residuals, it has resolved; she sustained a thoracolumbar sprain, there no objective residuals, it has resolved; there was a left knee injury, there is no objective residual, it has resolved; there was a questionable left wrist injury, there is a normal exam

with no objective residuals, it has resolved; there was a left shoulder injury, there are no objective residuals, it has resolved; and the above diagnoses are causally related to the date of the accident. Dr. Semble states that Chuqui is not in need of any further causally related treatment, she is not in need of any prescription medications, she can work at her normal job as a housekeeper, and there is no need for household help, special transportation or durable medical equipment.

The movants also submit the reports of Jessica F. Berkowitz, M.D., a diagnostic radiologist, who performed an independent radiology review of Chuqui's cervical spine, left knee, left shoulder, and thoracic spine. Dr. Berkowitz provided impressions for each review and found that Chuqui's injuries were not causally related to the subject accident.

In opposition, Chuqui submits the report of Hank Ross, M.D., an orthopedic surgeon, Marc Katzman, M.D., a radiologist and Regina Moshe, M.D., to rebut the doctors' opinions in their reports. However, upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the movants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to Chuqui suffering a permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

Dr. Semble states in his report that Chuqui sustained a cervical sprain, a thoracolumbar sprain, a left knee injury, a questionable left wrist injury, and a left shoulder injury, which were all resolved, but were all causally related to the date of the accident. Therefore, since the movants' own expert conceded that, based on the physical examination and the medical records reviewed, that the resolved injuries were causally related to the subject accident, the burden does not shift to Chuqui to raise a triable issue of fact regarding causation or to explain any gaps in treatment (*Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept 2019]).

Further, Dr. Berkowitz's report is conclusory and speculative and her opinions are not provided within a reasonable degree of medical certainty. Additionally, she did not provide a report for Chuqui's lumber spine and her opinion conflicts with Dr. Semble, who found that Chuqui's injuries were causally related to the subject accident.

However, with regard to any claims of alleged injuries that prevented Chuqui from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injuries, such is denied.

To sustain impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment, the plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]).

Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). Chuqui did not offer any medical evidence to support a claim that she were unable to perform substantially all of their usual and customary activities under this category and her bill of particulars states that neither were confined to bed as a result of the accident, but both were confined to bed for a period of approximately two weeks and was confined home for a period of approximately five weeks. Such does not meet the requirement for this category. Therefore, there is no evidence to show that Chuqui sustained an injury in this category.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the motion for summary judgment is denied in part and granted in part.

The parties are directed to appear before the Settlement Conference Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2021

HON. SAM D. WALKER, J.S.C.