Prudente v Pinto
2021 NY Slip Op 33514(U)
April 15, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609991/19
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:
Hon. Carmen Victoria St. George
Justice of the Supreme Court

KATIE R. PRUDENTE,

Plaintiff,

-against-

REBECCA D. PINTO,

Defendant.

Index No.
609991/19

Motion Seq:
001 Mot D
Decision/Order

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The motor vehicle accident giving rise to this action occurred on March 12, 2019, when it is alleged that the defendant failed to stop at a stop sign and made a left turn into the front driver's side of plaintiff's vehicle. Defendant moves this Court for an Order granting summary judgment dismissal of the complaint on the basis that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the requested relief.

Plaintiff claims that she has suffered injuries to her neck, back, left shoulder, and right wrist, including aggravation of prior injuries, pain, SLAP tear to the left shoulder requiring arthroscopic surgery in August 2019, and bulging and herniated discs. Plaintiff specifically claims injuries under the following categories of Insurance Law § 5102 (d): 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of a body organ or member; 3) significant limitation of use of a body function or system, and 4) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

As a proponent of the summary judgment motion, the defendant herein has the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys.***, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (***Franchini v Palmieri***, 1 NY3d 536, 537 [2003]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 AD3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (***Oberly v. Bangs Ambulance Inc.***, 96 NY2d 295, 299 [2001]).

In support of her motion, the defendant submits, *inter alia*, the pleadings, plaintiff's deposition transcript, and the reports of her examining/reviewing physicians. It is this Court's determination that, at least as to the permanent loss of use and 90/180 categories of injury that the defendant has sustained *her prima* facie burden.

Plaintiff's own deposition testimony and July 24, 2019 Bill of Particulars establish that she did not sustain a medically determined injury that prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]); furthermore, her testimony also demonstrates that she has not permanently and totally lost the use of any body organ, member, function or system.

Plaintiff's Bill of Particulars alleges that she was not confined to the hospital as a result of this accident, and that she was confined to home and bed for two days following the accident.

Plaintiff testified at deposition that she is an assistant principal at a public school in Nassau County, working five days per week, approximately nine hours per day, plus one or two evening events a week. At the time of the accident she was also employed in the same capacity. Although she testified that she experienced immediate pain in her left shoulder, back and right wrist immediately after the collsion, the plaintiff did not experience bleeding from any part of her body, and she did not lose consciousness ay any point. Plaintiff also declined the offer of an ambulance made by the police officer who responded to the accident scene. Both vehicles involved in the accident were towed from the scene, and plaintiff was picked up by her father-in-law. Plaintiff went home after the accident. After a few hours, plaintiff felt more pain in her neck, shoulder, wrist and back, and she had a headache, but she took an over-the-counter pain reliever and used ice on her body.

The next day, March 13, 2019, plaintiff sought medical treatment at an orthopedist's office. Plaintiff was prescribed a regimen of physical therapy, attending two to three times per week. Later that same day, plaintiff also sought treatment at a chiropractor's office that she had treated with prior to the accident, for her mid-back area. When plaintiff presented to the chiropractor on March 13, 2019, she complained of pain in her left shoulder, neck and back. X-rays taken on that day did not show evidence of any fractures. Plaintiff continued to receive chiropractic treatments and she continued with physical therapy, albeit at different facilities than those with which she originally treated.

Although plaintiff had surgery on her left shoulder in August 2019, and was still treating at the time of her deposition on October 23, 2019, plaintiff acknowledged that no doctor ever told her that she was disabled. In terms of being confined to bed or home immediately after the accident, plaintiff testified that it was for "[t]he first few days and then for weeks after the shoulder surgery. I would say two weeks."

In terms of things that she cannot do since the accident, plaintiff testified that she cannot put her hair in a ponytail or blow dry her hair, cannot go to the gym, pick up her children, and do "physical activity." She explained that "physical activity" means "working out, doing yoga, riding a bicycle, playing around maybe roughly with my kids. Running, golfing." Regarding things in which she is limited, plaintiff testified that she can drive, work with minimal limitations, and go to social events with family and friends. When asked how she is limited in these activities, plaintiff answered that it depends upon the event. She can go camping as part of Scout activity, but cannot stay overnight "because of sleeping is difficult (sic)." She further testified that she is able to make the forty-minute drive to work every day, arriving at 7 a.m. and finishing at approximately 4 p.m. Part of her duties include standing in the lobby of the high school building for a half-hour each morning to greet students and teachers as they enter the building.

Plaintiff was asked if anything has changed at work since the accident, and she answered that her "work attire has had to adapt," meaning that she wears flat or comfortable shoes instead of heels, and she has had to get clothes that have buttons that are easier to put on since she does

not have full range of motion in her left shoulder. She also testified that she has to stand up frequently and walk around or she will be in pain. Yet, plaintiff has managed to go to Ocean City, Maryland in July 2019, by car, which is a four-hour drive, and to Switzerland, since the subject accident. Plaintiff traveled to Switzerland by plane in mid-August 2019, which was approximately a nine-hour flight. Plaintiff testified that she did not make any special requests of the airline when she and her husband flew to Switzerland.

Plaintiff's own deposition testimony is insufficient to demonstrate that she was prevented from performing substantially all of her customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]). Her testimony also demonstrates that she has not suffered a total loss of use of any body part as a result of the subject accident.

Thus, the defendant has established her *prima facie* entitlement to summary judgment as a matter of law as to the permanent loss of use and 90/180 categories of injury.

On the other hand, defendant has failed to establish her *prima facie* entitlement to summary judgment as a matter of law as to the permanent consequential limitation and significant limitation categories of injury. The affirmed report of David Benatar, M.D., defendant's examining orthopedic physician, sets forth various range-of-motion measurements obtained upon examination of the plaintiff on May 22, 2020. Dr. Benatar fails to include in his report the source of the normal range-of-motion values to which he compares the values obtained upon examination of the plaintiff; therefore, Dr. Benatar has failed to provide an objective basis for his measurements, impressions, and opinions.

Even if the Court were to consider Dr. Benatar's report, he found range-of-motion deficiencies in plaintiff's cervical and lumbar spine areas, as well as in plaintiff's left shoulder, that are considered consequential and significant within the meaning of the amassed caselaw. The limitations as computed by the values enumerated in Dr. Benatar's report range from 17 % to 67% in the plaintiff's cervical and lumbar spine areas, and 22% to 44% losses in various planes of plaintiff's left shoulder (*cf.* ***Lively v. Fernandez***, 85 AD3d 981 [2d Dept 2011] [the 12% limitation in plaintiff's rotation of her cervical spine was insignificant within the meaning of Insurance Law § 5102 [(d)]; ***McLoud v. Reyes***, 82 AD3d 848 [2d Dept 2011] [12% limitation in range of motion noted by plaintiff's treating physician insignificant within meaning of the no-fault statute]; ***Whitfield-Forbes v. Pazmino***, 36 AD3d 901 [2d Dept 2007] [10° deficit in cervical spine rotation out of 80° normal was insignificant]; ***Trotter v. Hart***, 285 AD2d 772 [3d Dept 2001] [20 % loss of use of cervical spine does not establish a significant or consequential injury]; ***Waldman v. Dong Kook Chang***, 175 AD2d 204 [2d Dept 1991] [15% limitation in the range of motion of plaintiff's cervical spine and back is minor within the meaning of the statute]). Thus, Dr. Benatar's impressions that plaintiff's cervical and lumbar sprains, for example, are "objectively resolved" are unsupported by his own findings.

As to the left shoulder, Dr. Benatar's impression and discussion are unclear. He acknowledges that plaintiff had pre-accident left shoulder surgery, although that took place in 2001, and he acknowledges that plaintiff underwent shoulder surgery post-accident, as well as

that plaintiff exhibited decreased range of motion in her left shoulder, but he states that it is "subjective in nature, not an objective finding." Dr. Benatar fails to address whether the subject accident aggravated a pre-existing condition in plaintiff's left shoulder. In fact, nowhere in his discussion of his findings does he affirmatively state that the findings are not causally related to the subject accident; rather he attributes his findings to the blanket statement that "range of motion throughout is subjective."

The reports of defendant's radiological expert, Darren Fitzpatrick, M.D., are also unavailing. Dr. Fitzpatrick apparently did not review the MRI reports of plaintiff's lumbar and thoracic spine areas reviewed by Dr. Benatar; therefore, the disc bulge, disc herniation and a radial tear noted in those reports are unattributed either to the subject accident or to something else, which raises a question of fact in and of itself. Dr. Fitzpatrick reviewed only the studies of plaintiff's left shoulder, right wrist, and cervical spine. Raising a further contrast to Dr. Benatar's report is Dr. Fitzpatrick's impression that the cervical spine findings are attributable to mild to moderate degenerative disc disease, whereas Dr. Benatar's impression is that the cervical sprain/strain is "objectively resolved," indicating that the cervical spine finding is not necessarily degenerative in nature.

Regarding the study of plaintiff's left shoulder, Dr. Fitzpatrick does not use the same terminology used in his other two reports: "No traumatic injury." Dr. Fitzpatrick, instead, characterizes the articular surface tear of the infraspinatus as "degenerative-type tearing of the rotator cuff" that "*usually* do[es]not have an inciting event" (emphasis added), although he states that he does not see the hallmarks of an acute tear. Dr. Fitzpatrick next discusses his impression of the "degeneration of the glenoid labrum. No detached tear." He states as to that impression that "[t]ears of the labrum are usually not of a traumatic etiology unless there is a history or imaging findings of shoulder dislocation or acute avulsive injury of the superior labrum by the biceps tendon." Of course, it is undisputed that the plaintiff had a left shoulder dislocation in 2001, for which she underwent surgical intervention. This fact was even noted by Dr. Benatar in his report. Dr. Fitzpatrick either did not know about plaintiff's prior shoulder dislocation in 2001, or he ignored this fact in writing his report concerning plaintiff's left shoulder. Accordingly, Dr. Fitzpatrick's impression concerning plaintiff's shoulder fails to establish *prima facie* that the injury is not causally related to the subject accident.

In light of these determinations, the Court need not consider plaintiff's opposition concerning the permanent consequential and significant limitation categories of injury, but only plaintiff's permanent loss of use and 90/180 claims.

Plaintiff's affidavit submitted in opposition serves to confirm that she has not suffered a permanent loss of use of any body organ, member, function, or system. Moreover, her medical evidence also submitted in opposition confirms this fact.

The medical summary from plaintiff's orthopedic surgeon, Dr. Weissberg, does not contain any medical determination supporting plaintiff's 90/180 claim. His general and conclusory statement that, "[h]er shoulder issues may cause her difficulties with certain activities of daily living as well as sporting type activities" not only fails to speak to the statutory period of

time immediately after the subject accident, but even if it did, it is non-specific and apparently tailored to meet the statutory requirement.

Similarly, nothing in Dr. Haas's report and annexed records support plaintiff's 90/180 claim. Writing on November 23, 2020 that plaintiff "has in the past and will continue to suffer from limitations in sitting, standing, kneeling, squatting, [and] lifting" is insufficient to raise a question of fact as to this particular claim of injury.

The defendant's summary judgment threshold motion is granted as to the permanent loss of use and 90/180 categories of injury, but it is denied as to the permanent consequential and significant limitation categories of injury.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 15, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]