

Chavarria v Andrijevic
2021 NY Slip Op 33556(U)
April 23, 2021
Supreme Court, Westchester County
Docket Number: Index No. 51730/2019
Judge: Alexandra D. Murphy
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To commence the statutory time period 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. ALEXANDRA D. MURPHY, J.S.C.**

----- X
MICHELLE CHAVARRIA,

Plaintiff,

Index No. 51730/2019

– against –

Motion Seq. 1 & 2

ANDRIJANA ANDRIJEVIC,

Defendants.

DECISION & ORDER

----- X
In an action to recover damages for personal injuries as a result of a motor vehicle accident (1) the defendant move for summary judgment dismissing the complaint on the grounds that the plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102 (motion sequence #1); and (2) the plaintiff cross-moves for partial summary judgment on the issue of liability (motion sequence #2):

Papers Considered

NYSCEF Doc. No. 14-23; 25-31; 33-44

1. Notice of Motion/Affirmation of Moira A. Doherty, Esq./Exhibits A-F;
2. Notice of Cross Motion/Affirmation of Robert H. Wolff, Esq./Exhibits A-E;
3. Affirmation of Robert H. Wolff, Esq. in Opposition to Motion/Exhibits A-F;
4. Affirmation of Moira A. Doherty, Esq. in Opposition to Cross Motion;
5. Reply Affirmation of Moira A. Doherty, Esq.;
6. Reply Affirmation of Robert H. Wolff, Esq./Exhibits A-B.

Factual and Procedural Background

This action arises out of a motor vehicle accident that occurred on October 19, 2018, on Willow Drive near the intersection of Meadow Lane in New Rochelle. Plaintiff was traveling west on Willow Drive intending to stop at a stop sign when her vehicle was struck head-on by defendant's vehicle.

Deposition Testimony

Plaintiff testified, at an examination before trial, that Willow Drive is a two-lane street with one lane in each direction. Plaintiff was proceeding on Willow Drive toward a stop sign. She was driving at approximately five miles per hour. Defendant was making a left turn onto Willow Drive from Meadow Lane when the accident occurred. Plaintiff testified that when she observed defendant's vehicle, defendant had her head down.

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Plaintiff attempted to steer to the right but was unable to avoid the accident. Plaintiff's vehicle was struck on the left front side. She described the impact as hard.

Plaintiff testified that after the impact, her head struck the headrest "pretty hard." She felt pain on the left side of her neck and her left shoulder. A week later, plaintiff was examined by an orthopedist who recommended physical therapy. Plaintiff testified that she never went to the hospital and does not take any medication for her injuries. At the time of her deposition, she complained of shoulder and neck pain and stated that sleeping was uncomfortable. Plaintiff acknowledged that her activities were not limited by the injuries and that she did not miss any time from work as a result of the accident.

Defendant testified, at an examination before trial, that she was traveling on Meadow Lane and made a left turn onto Willow Drive. She proceeded approximately five feet onto Willow Drive when the accident occurred. Defendant did not observe plaintiff's vehicle before the accident. Defendant testified that she made the left turn and then "for some reason [she] looked to [her] right for a second and then when [she] looked back straight, that's when [she] noticed [plaintiff's] car" (Defendant's EBT: 15). The front left side of defendant's vehicle struck plaintiff's vehicle.

Motions

Defendant moves for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of the Insurance Law.

Defendant submits an affirmed IME report of Richard N. Weinstein, M.D., a board-certified orthopedic surgeon. Dr. Weinstein examined plaintiff on January 29, 2020. Plaintiff complained of neck pain and left shoulder pain. Dr. Weinstein found that plaintiff sustained a cervical sprain and left shoulder mild impingement.

Dr. Weinstein's range of motion examination of plaintiff's cervical spine revealed flexion of 40 degrees with 45 being normal; extension of 40 degrees with 45 being normal; right and left rotation of 60 degrees with 80 being normal; and right and left lateral rotation of 30 degrees with 45 being normal.

Dr. Weinstein's range of motion examination of plaintiff's left shoulder revealed forward elevation of 170 degrees with 180 being normal; abduction of 180 degrees with 180 being normal; internal rotation to T6; and external rotation of 60 degrees with 60 being normal.

Defendant also submits an affirmed radiology IME report of Jessica F. Berkowitz, M.D. Dr. Berkowitz reviewed an MRI of plaintiff's cervical spine performed on November 23, 2018. Dr. Berkowitz found a straightening with slight reversal of the normal cervical lordosis, which is a nonspecific finding that could result from positioning. Dr. Berkowitz found minimal to slight disc bulges at C4-5 through C6-7. Dr. Berkowitz found no evidence of acute traumatic injury to the cervical spine. According to Dr. Berkowitz, the MRI revealed no causal relationship between the accident and the MRI findings.

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Dr. Berkowitz also reviewed an MRI of plaintiff's left shoulder performed on December 21, 2018. She found the MRI unremarkable with no evidence of acute traumatic injury. Dr. Berkowitz opined that there was no causal relationship between the accident and the MRI findings.

Plaintiff opposes defendant's motion and cross-moves for partial summary judgment on the issue of liability pursuant to CPLR 3212.

Plaintiff submits an affidavit attesting that she went to physical therapy three times per week for ten weeks. After her insurance ceased payment, she was unable to afford physical therapy. Plaintiff attests that she still has pain in her neck and left shoulder and performs physical therapy exercises at home.

Plaintiff submits an affirmation and report of Steven Winter, M.D., a board-certified radiologist. Dr. Winter reviewed the MRI of plaintiff's cervical spine and avers that it reveals a C4/5 broad left predominant posterior subligamentous disc herniation extending to abut the ventral and left ventral cord margin; C6/7 broad left predominant posterior subligamentous disc herniation impressing on the left greater than the right ventral thecal sac; C5/6 left eccentric posterior disc bulge impressing on the left ventral thecal sac; C3/4 subligamentous posterior disc bulge; and cervical kyphosis with the apex at C4/5 with evidence of muscular spasm.

Plaintiff also submits an affirmation of Arnold Wilson, M.D., a board-certified orthopedic and reconstructive surgeon. Dr. Wilson first examined plaintiff on November 16, 2018 and found left shoulder impingement and cervical radiculopathy. He ordered an MRI of the cervical spine and prescribed anti-inflammatories for pain.

Dr. Wilson performed a range of motion test of the cervical spine on January 29, 2021. The examination revealed flexion of 40 degrees with 45 being normal; extension of 20 degrees with 45 being normal; right and left side bends of 30 degrees with 45 being normal; and right and left rotation of 40 degrees with 60 being normal. Examination of plaintiff's left shoulder revealed forward flexion of 135 degrees with 155 being normal; and internal rotation of 35 degrees with 70 being normal.

Dr. Wilson opined that plaintiff has sustained a permanent consequential limitation of use and a permanent partial loss of use of her cervical spine and left shoulder. Dr. Wilson further opines that these injuries were the direct and competent result of the motor vehicle accident.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853). "Once

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this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (see *Licari v Elliott*, 57 NY2d 230 [1982]). 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."

Under the "90/180" category, "a plaintiff must present objective evidence of a medically determined injury of a non-permanent nature" (*Toure v Avis Rent A Car Systems*, 98 NY2d 345, 357 [2002]; *Licari v Elliott*, 57 NY2d 230). Plaintiff must demonstrate that her usual daily activities were restricted during 90 of the 180 days following the accident and submit evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in her daily activities (see *Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955 [1992]).

Defendant demonstrated, prima facie, that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law 5102(d) (see *Bong An v Villas-Familia*, 183 AD3d 582, 583 [2d Dept 2020]). Plaintiff failed to raise an issue of fact in opposition.

With respect to permanent consequential limitation and significant limitation of use, defendant failed to demonstrate entitlement to summary judgment. Defendant's orthopedic expert found limitations in the range of motion of the cervical region and left shoulder and did not adequately explain and substantiate his opinion that the limitations were degenerative (see *Bertuccio v Murdolo*, 172 AD3d 988 [2d Dept 2019]; *Rivas v Hill*, 162 AD3d 809, 810-811 [2d Dept 2018]). Even if defendant demonstrated entitlement to summary judgment, plaintiff raised an issue of fact in opposition as to whether she sustained a serious injury pursuant to Insurance Law § 5102(d) as a result of the accident (see *Yu Feng Jiang v Francois*, 177 AD3d 826 [2d Dept 2019]; *Bonilla v Vargas-Nunez*, 147 AD3d 461 [1st Dept 2017]; *Smith v Green*, 188 AD3d 473 [1st Dept 2020]).

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As to liability, plaintiff argues that she was not negligent and that defendant was solely at fault for the happening of the accident. Plaintiff submits an affidavit attesting that she was proceeding at approximately five miles per hour when defendant made a left turn onto Willow Drive and struck her vehicle head-on. Plaintiff testified that defendant's vehicle entered her lane and struck her without explanation.

In opposition, defendant argues that plaintiff failed to prove entitlement to summary judgment on the issue of liability.

Plaintiff demonstrated entitlement to judgment as a matter of law on the issue of liability through the submission of the deposition testimony, her affidavit and the photographs of the accident scene attached to the cross motion. Plaintiff demonstrated that defendant made a left turn onto Willow Drive from Meadow Lane and struck plaintiff's vehicle head-on (see *Murphy v Epstein*, 72 AD3d 767 [2d Dept 2010]). Plaintiff could not have been expected to anticipate that defendant would turn directly into her lane of travel. In opposition, defendant failed to raise a triable issue of fact.

Accordingly, it is

ORDERED that the branch of defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury is **GRANTED** under the Insurance Law 5102(d) category of 90/180-days, and the motion is otherwise **DENIED** (motion sequence # 1); and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of liability is **GRANTED** (motion sequence #2).

Counsel for all parties are directed to appear in the **Settlement Conference Part, room 1600**, for further proceedings at a date and time to be provided.

Dated: White Plains, New York
April 23, 2021



HON. ALEXANDRA D. MURPHY, J.S.C.

H: MURPHY ALPHABETICAL MASTER/Chavarria v Andrijevic