

<b>Cupertino v Perkins</b>
2021 NY Slip Op 33590(U)
November 19, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 52500/19
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

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VICKIE F. CUPERTINO,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 52500/19

KEITH E. PERKINS, JR. and DONNA M. PERKINS,

Defendants.  

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The following papers were read on Defendants' motion for summary judgment.

NOTICE OF MOTION  
STATEMENT OF MATERIAL FACTS  
AFFIRMATION IN SUPPORT  
EXHIBITS A - IAFFIRMATION IN OPPOSITION  
STATEMENT OF MATERIAL FACTS  
EXHIBITS A - B

REPLY AFFIRMATION

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained in a motor vehicle accident. The accident occurred on October 4, 2018 at the intersection of Lime Kiln Road and South Drive in the Town of East Fishkill. Plaintiff alleges that as she was lawfully proceeding through the intersection when a Toyota pickup truck driven by Defendant Keith Perkins, Jr. struck the front end of her vehicle. Following the accident Plaintiff was transported by ambulance to Vassar Brothers Medical Center where she was treated and released. Defendants move for summary judgment alleging Plaintiff failed to sustained a "serious injury" as defined in Insurance Law §5102(d).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary

judgment, “the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant.” Szczerbiak v. Pilat, 90 NY2d 553 (1997).

When a plaintiff claims he or she has suffered a serious injury based on a “significant limitation of use of a body function or system,” plaintiff must demonstrate that the injury alleged has limited the use of the afflicted area in a significant way rather than a mild one. Licardi v. Elliot, 57 NY 2d 230 (1982). A mild, slight or minor limitation is insufficient to constitute a serious injury. Insurance Law §5102(d). Id. The word “significant” means that the injury is important and relates to medical significance. Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 (2002). The medical significance of an injury “involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part.” Id. at 353. A plaintiff’s serious injury claim must be supported by objective evidence. Id. at 350. On a motion for summary judgment the defendant has the threshold burden of establishing that a serious injury did not occur. See Serrano v. Canton, 299 AD3d 703 (3<sup>rd</sup> Dept 2002).

Plaintiff alleges that as a result of the motor vehicle accident she sustained injuries to both arms that resulted in a left hand carpal tunnel release procedure, cervical spine disc herniation at C4-C5, C5-C6 and T3-T4, cervical and thoracic radiculopathy and hematomas in the right breast and pelvic regions. She further alleges the accident aggravated and exasperated degenerative disc disease of the cervical, thoracic and lumbosacral spine. At her deposition she testified that she still suffers from pain in her neck, thoracic spine, arm, wrist, hand and abdomen. She further states that she is no longer able to swim, ride a bicycle, go to the gym, sew or garden and that the injuries have impaired her ability to lift packages or walk long distances.

In support of their motion for summary judgment Defendants have submitted copies of the pleadings, deposition transcripts, Plaintiff’s treatment records from Vassar Brothers Medical Center and the reports of physicians who conducted orthopedic and neurological independent medical examinations. The foregoing establish that following the accident Plaintiff was placed in a c-collar and transported by ambulance to Vassar Brothers Medical Center. Records from the emergency room state that Plaintiff complained of pain in the chest, abdomen and lower leg. They assert she denied neck pain, back pain or nausea. However, at her deposition Plaintiff testified that after the accident she complained of pain to the chest, back, neck, abdomen, elbows, and of having bad headaches and nausea. An x-ray of her leg was normal. CT scans of chest, abdomen and pelvis showed a large right breast and chest wall subcutaneous mass consistent with a hematoma. The CT scans of the head, cervical, thoracic and lumbosacral spine were normal. Plaintiff was discharged with instructions to follow up with her primary care physician.

Plaintiff treated with her primary care physician five days later on October 9, 2018. She was diagnosed with a hematoma in the right upper chest region. The report of Defendants’ expert neurologist Ira Neustadt states that an October 23, 2018 ultrasound of Plaintiff’s breast revealed post-traumatic changes and a six centimeter hematoma in the subclavicular region. Dr. Neustadt asserts that between October and December 2018 Plaintiff treated with a nurse practitioner for the

bruising and hematoma in her pelvic and chest areas. His report states that on December 15, 2018 an ultrasound of the abdomen showed a complex fluid collection in the lower left abdomen that likely represented an evolving hematoma. He states that a January 2019 CT scan of the abdomen and pelvis showed a left lower abdominal wall possible hematoma and subcutaneous tissues.

Plaintiff testified that in January 2019 she began to feel more pain in her arms, neck and thoracic spine. She further stated that she was experiencing radiation down through her arms and to her wrists that resulted in an inability to pick things up and her dropping things. She initially treated with orthopedist Dr. Stuart Styles who referred her to neurologist Dr. Surinder Jindal. Dr. Neustadt's report indicates that Plaintiff was diagnosed with bilateral carpal tunnel syndrome in April 2019. In June 2019 Dr. Styles performed left carpal tunnel surgery. Plaintiff testified at her deposition that the surgery was successful and reduced pain and symptoms in her left arm and wrist. However, Plaintiff asserts that she continues to suffer from pain in the neck, thoracic spine, arm, wrist, hand and abdomen. She stated that she underwent an extensive course of physical therapy. As of the date of her deposition she was still being treated by Dr. Jindal for pain in her neck and shoulders. In June 2019 Dr. Jindal began treating her with trigger point injections which she testified that she gets approximately once a month. Plaintiff testified that prior to the motor vehicle accident she had sustained no injuries to her neck, spine, shoulders, arms or wrists.

Defendants' motion is premised on the reports of independent medical examinations of Dr. Neustadt and orthopedist Dr. Bradley Wiener. Dr. Neustadt conducted an independent neurological examination of Plaintiff in November 2020. At the examination Plaintiff reported persistent neck pain that sometimes was associated with headaches. She also reported a persistent nagging pain in her shoulders and a knotted, tight feeling in her shoulder that radiates down her forearm. She reported such pain as sometimes including a tingling, electrical type sensation. Plaintiff reported improvement in her left arm following the carpal tunnel surgery but stated she had diminished grip strength, difficulty sometimes flexing her fingers and occasional numbness and pain. Dr. Neustadt performed a neurological exam which was normal and found that Plaintiff did not appear in any acute distress. A musculoskeletal examination was essentially normal. He reported bilateral tenderness to the shoulder region but stated they were subjective symptoms without any objective correlation. He found Plaintiff had a tingling in her fifth finger of her left hand. He asserted this was not a typical carpal tunnel syndrome symptom. Using a goniometer he found the flexion of Plaintiff's cervical and lumbar spine had normal ranges of motion. He found her right and left wrist flexion to be 60 degrees, extension to 60 degrees, radial deviation to 20 degrees and ulnar deviation to 30 degrees. Dr. Neustadt reported these were all normal. He further found range of motion of her elbows to be within normal limits. Dr. Neustadt asserts that the magnetic resonance imaging ("MRI") scan of her cervical spine showed some mild degenerative disc disease which he did not attribute to the subject motor vehicle accident. Dr. Neustadt opined that it represented a pre-existing condition. He further states that he could not with any degree of medical certainty attribute Plaintiff's left carpal tunnel syndrome status to the accident since there was no documentation of wrist trauma from the accident and that condition is usually caused by repetitive stress. He noted that Plaintiff reported a history of sewing. He found no objective evidence of any neurological deficits and found no objective evidence to support Plaintiff's subjective complaints of shoulder and

arm pain.

Dr. Bradley Wiener conducted an orthopedic independent medical examination of Plaintiff in November 2020. His examination of the spine found no muscular asymmetry. Range of motion tests with an inclinometer found 20 degrees of flexion of the cervical spine (normal 50-60 degrees) and 40 degrees extension (normal 50 to 60 degrees) 60 degrees of lateral rotation to the right and left sides (normal 70 to 80 degrees) and essentially a normal tilt of both sides. Range of motion tests to the lumbar spine found 60 degrees of flexion (normal 70 to 90 degrees) and 10 degrees of extension (normal 20 to 30 degrees). He found normal tilt in both the right and left sides of the lumbar spine and normal strength in hip flexion, knee extension, ankle dorsiflexion and plantar flexion. Range of motion for the right shoulder measured with a goniometer found 100 degrees of forward elevation (normal 170 to 180 degrees), 100 degrees of abduction (normal 170 to 180 degrees) and 70 degrees of external rotation (normal 80 to 90 degrees). He found similar limitations in the left shoulder but only 50 degrees of external rotation (normal 80 to 90 degrees). A physical examination of the left hand and wrist were essentially normal. Based on this examination and a review of Plaintiff's medical records, Dr. Wiener concludes that Plaintiff suffers from pre-existing left carpal tunnel syndrome status following surgery. He reported a normal examination of the lumbar spine and cervicalgia of the neck. He reported that the MRI showed evidence of cervical disc disease of an indeterminate age. He concludes that there was no causal relationship between Plaintiff's motor vehicle accident and her carpal tunnel syndrome. This opinion is primarily based on the absence of a direct traumatic injury to the left hand, her gender, age and the general risk factors for development of carpal tunnel syndrome. He further noted that Plaintiff had bilateral findings for cervical radiculopathy and carpal tunnel syndrome, yet was asymptomatic on the right side. He asserts that her restricted range of motion in both shoulders could not be explained on an anatomic or objective basis.

The foregoing is sufficient to demonstrate Defendants' *prima facie* entitlement to summary judgment. The affirmations of Defendants' expert physicians established that she did not suffer a neurological or orthopedic serious injury within the meaning of the Insurance Law. Both physicians assert that her carpal tunnel syndrome was likely not caused by the motor vehicle accident because she did not originally complain of wrist pain and because the syndrome is usually caused by repetitive stress. Dr. Wiener further opines that the limited range of motion to Plaintiff's shoulders and spine had no anatomical support and that any cervical disc injuries are degenerative. Plaintiff's deposition testimony further establishes Defendants' *prima facie* entitlement to summary judgment on her 90/180 day claim. There is no dispute that Plaintiff's alleged injuries did not prevent her from performing all the material acts which constitute her usual and customary daily activities for 90 days or more immediately following the accident.

In opposition, however, Plaintiff's medical records and the affirmed statement of her treating physicians Dr. Surinder Jindal and Dr. Stuart Styles are sufficient to create a material issue of fact about whether she suffered a significant limitation of use of a body function or system. Dr. Jindal has treated Plaintiff since shortly after the motor vehicle accident. He notes that an electromyography ("EMG") study revealed C6-C7 radiculopathy and an MRI of cervical spine

revealed left lateral disc herniation at C4-C5 and disc herniation at C5-C6. He notes that these findings were accompanied by complaints of radiation, pain and numbness. He reports that in April 2019 Plaintiff presented with persistent cervical pain radiating to the upper extremities and decreased sensation in the left ulnar nerve distribution. In June 2019 Plaintiff reported the same symptoms extending to the upper extremities and arms. In July 2019 Plaintiff complained of cervical pain radiating to the upper extremities, with more on the left side. She reported spasms, stiffness and a burning sensation along with pain in the thoracic region. Dr. Jindal gave Plaintiff medicine with trigger point injections in an attempt to treat the symptoms. At an April 2021 evaluation Plaintiff reported persistent cervical pain radiating to both upper extremities with numbness and tingling. She had decreased sensation in the C5-C6 medium ulnar nerve distribution. He noted limited range of motion of the cervical spine. Dr. Jindal concludes that the October 2018 motor vehicle accident caused Plaintiff's cervical radiculopathy, cervical disc disease and carpal tunnel syndrome. While he does not detail the limited range of motion he reports about the cervical spine, Dr. Wiener found a limited range of motion but did not attribute it to the motor vehicle accident. Dr. Styles asserts in an affirmation and narrative report that Plaintiff's carpal tunnel was a post-traumatic result of injuries sustained in the motor vehicle accident. He states that while the surgery he performed was successful and resolved many of the issues, Plaintiff still had some residual issues that she testified to at her deposition. This includes weakness to grip strength, numbness and pain in the neck, shoulder and elbow regions. The foregoing is sufficient to create a material of fact as to whether Plaintiff sustained serious injuries based on a significant limitation of use of a body function or system as a result of the motor vehicle accident. Plaintiff testified to subjective pain that has severely curtailed many of her life's activities. Her complaints are supported by objective range of motion limitations as reported by Dr. Wiener and her treating physicians testified that such symptoms are causally related to the motor vehicle accident. Based on the foregoing, it is

ORDERED that Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court. A pre-trial conference of this action will be held on January 20, 2022 at 9:15 a.m.

Dated: November 19, 2021  
Poughkeepsie, New York

ENTER:

  
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MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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