

Jung v Valarezo

2022 NY Slip Op 34624(U)

September 28, 2022

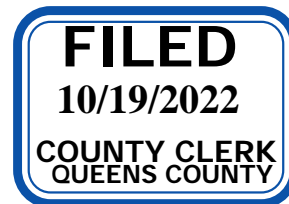
Supreme Court, Queens County

Docket Number: Index No. 712832/2018

Judge: Sally E. Unger

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SALLY E. UNGER
Justice

IA Part 24

SUNGJA JUNG,
-----x

Index Number: 712832/2018

Plaintiff,

Motion Date: 10/14/2021

-against-

Motion Seq. No. 2

MARIO VALAREZO,

DECISION AND ORDER

Defendant.
-----x

The following electronically filed (EF) papers were read on this motion by defendant for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §§5104(a) and 5102(d).

Table with 2 columns: Document Name, NYSCEF Doc. Nos. Includes Notice of Motion, Affirmation in Opposition, Reply Affirmation.

Upon the foregoing papers it is ordered that the motion is determined as follows:

Background

This is a personal injury action in which plaintiff seeks to recover damages for injuries she allegedly sustained as a result of a motor vehicle/pedestrian collision that occurred on May 21, 2018, in Queens County, New York.

DISCUSSION

Whether a plaintiff has sustained a "serious injury" within the meaning of Insurance Law §5102(d) is initially a question of law for the court (see Licari v Elliott, 57 NY2d 230, 455

NYS2d 570 [1982]). In the first instance, it is defendant's obligation to demonstrate that the plaintiff has not sustained a serious injury by submitting affidavits or affirmations of its medical experts who have examined the plaintiff and have found no objective medical findings which support the plaintiff's claim (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Upon such a demonstration, the burden shifts to the plaintiff to show, through the production of admissible evidence sufficient to demonstrate the existence of a "serious injury", or at least that there are questions of fact as to whether plaintiff suffered such injury (see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

Under the Insurance Law §5102(d), a "serious injury" is defined as one which results in, among others, (1) permanent loss of use of a body organ, member, function or system, (2) permanent consequential limitation of use of a body organ or member, (3) significant limitation of use of a body function or system or a medically determined injury or (4) impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that 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 (see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]).

In support of his motion, the defendant submits, among other things, pleadings, a bill of particulars, plaintiff's examination before trial (hereinafter "EBT") transcript, an examination report of Howard V. Katz, MD, a Board-Certified Orthopedic Surgeon, and an evaluation report of Darren Fitzpatrick, MD, a Board-Certified Radiologist.

On October 26, 2018, Dr. Fitzpatrick, conducted an independent radiological evaluation of plaintiff who evaluated the records five months after the collision. Dr. Fitzpatrick concluded that the plaintiff's injuries to the cervical spine, lumbar spine, and right shoulder were caused by degeneration, and that there was no evidence of traumatic injury, and they were not causally related to the incident.

On January 28, 2021, Dr. Katz conducted an independent orthopedic examination of plaintiff over two years after the incident. At the time of the examination, there were no authenticated medical records available for Katz's review. Dr. Katz opined that the alleged injuries to plaintiff's cervical spine, lumbar spine, right shoulder and left ankle were resolved, and the status of post left ankle surgery was healed. Further, he opined that the plaintiff is capable of seeking gainful employment without restrictions and that there was no evidence of orthopedic disability or residuals, or of permanency.

Based upon the review of Dr. Fitzpatrick's and Dr. Katz's reports, which will be discussed categorically herein, the Court finds that defendant has established his prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of the Insurance Law §5102(d) specific to plaintiff's cervical spine, lumbar spine, right shoulder and left ankle. However, the defendant failed to address plaintiff's alleged injury to her left knee and therefore failed to meet his prima facie burden with respect to her left knee injury.

The burden now shifts to plaintiff to establish the existence of a triable issue of material fact. In opposition, the plaintiff submits, among other things, a bill of particulars, an affirmation of Richard M. Seldes, MD, a Board-Certified Orthopedic Surgeon, her affidavit, and an unsworn, unaffirmed and uncertified MRI records from Sky Radiology dated October 11, 2018, pertaining to plaintiff's left ankle, right shoulder, left knee, lumbar spine,

and cervical spine. The Court finds said MRI records from Sky Radiology dated October 11, 2018, are inadmissible, because they are not properly sworn, affirmed or certified (see *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Chanda v Varughese*, 67 AD3d 947, 890 NYS2d 88 [2nd Dept 2009]; *Magid v Lincoln Services Corp.*, 60 AD3d 1008, 877 NYS2d 12 [2nd Dept 2009]). However, a reference to plaintiff's unsworn or unaffirmed reports in the defendants' moving papers or by the defendants' medical experts, is sufficient to place such records before the Court and to permit the plaintiff to rely upon these reports in opposition to the motion (see *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2nd Dept 2005]; see also *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2nd Dept 2002]).

Permanent Loss of Use of Body Organ, Member, Function or System

To qualify as a "serious injury" within the meaning of this category, "permanent loss of use" must be total (see *Oberly v Bangs Ambulance Inc.*, *supra*; *Nesci v Romanelli*, 74 AD3d 765, 902 NYS2d 172 [2nd Dept 2010]). The evidentiary submissions demonstrate that plaintiff did not sustain a total loss of any body part or organ (*id.*). Plaintiff's expert did not find that she sustained a total loss of use of any of the body parts which she allegedly injured in the subject motor vehicle collision, plaintiff failed to establish that she sustained a "permanent loss of use of a body organ, member, function or system" (*Nesci* at 767).

Permanent Consequential Limitation of Use and Significant Limitation of Use

"[T]o prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury...An expert's *qualitative* assessment of a plaintiff's condition also may suffice, 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" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002], citing *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]). Evidence of soft-tissue injuries alone is insufficient to establish a serious injury; there must be additional objective medical evidence establishing that the collision resulted in significant physical limitations (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). For these two statutory categories, the NY Court of Appeals has held that "whether a limitation of use or function is 'significant' or 'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure* at 353, quoting *Dufel* at 798).

Cervical Spine and Lumbar Spine

Defendant's expert, Dr. Katz provided a qualitative assessment and reported full range of motion (hereinafter "ROM") in plaintiff's cervical spine and lumbar spine. Dr. Fitzpatrick reviewed plaintiff's post-accident MRI films of the cervical spine and lumbar spine performed by Sky Radiology and opined that the plaintiff's injuries to the cervical spine

and lumbar spine were caused by degeneration, that there was no evidence of traumatic injury and they were not causally related to the incident. The court finds that the loss of ROM in plaintiff's cervical spine and lumbar spine were merely a minor limitation and should be classified as insignificant within the meaning of the no-fault statute (*see Toure* at 353; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2nd Dept 2011]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]). Accordingly, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact.

Plaintiff's submissions were insufficient to raise a triable issue of material fact to rebut the finding of the defendant's orthopedic surgeon and radiologist, i.e., that the injuries depicted in the MRI films of her lumbar spine and cervical spine were degenerative in nature and unrelated to the subject collision. Dr. Seldes did not address the findings of the defendant's radiologist pertaining to the degenerative nature of the plaintiff's cervical spine and lumbar spine. He concluded that, based upon a review of the uncertified MRI report, the subject injuries were caused by the collision and were not degenerative in nature. This conclusion was speculative and insufficient to raise a triable issue of fact as to the lumbar spine and cervical spine (*see Il Chung Lim* at 951; *Mensah v Badu*, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]).

Right Shoulder

Defendant's expert, Dr. Katz reported minor loss of ROM in plaintiff's right shoulder, i.e., flexion at 170 degrees (180 degrees normal), abduction at 170 degrees (180 degrees normal), adduction at 45 degrees (30 degrees normal), and external rotation at 80 degrees (90 degrees normal). Dr. Katz opined that there was no effusion or atrophy. He stated that the drawer test was negative.

Defendant's expert, Dr. Fitzpatrick reviewed plaintiff's post-accident MRI films of the right shoulder. He concluded that the plaintiff's injuries to the right shoulder were caused by degeneration, and that there was no evidence of traumatic injury. He further concluded that the injuries were not causally related to the accident.

In opposition, plaintiff's expert, Dr. Seldes failed to set forth in his affirmation any quantified ROM findings concerning plaintiff's right shoulder; nor did he provide a qualitative assessment of plaintiff's right shoulder (*see Toure* at 350). Therefore, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury to her right shoulder as a result of the incident at bar (*see Shtesl v Kokoros*, 56 AD3d 544, 867 NYS2d 492 [2nd Dept 2008]).

Left Knee

The defendant failed to address plaintiff's alleged injury to her left knee, and therefore failed to meet his prima facie burden with respect to her left knee injury. Since defendant failed to establish a prima facie case with regards to plaintiff's left knee, it is unnecessary to consider plaintiff's opposition with regards to plaintiff's left knee (*see Smith v Rodriguez*, 69 AD3d 605, 893 NYS2d 140 [2nd Dept. 2010]; *Washington v Asdotel Enters., Inc.*, 66 AD3d 880, 887 NYS2d 623 [2nd Dept. 2009]).

Left Ankle

Defendant's expert, Dr. Katz provided a qualitative assessment and reported full ROM in plaintiff's left ankle. Dr. Katz further reported minor loss of ROM in plaintiff's left ankle, i.e., sub inversion at 20 degrees (30 degrees normal). He opined that the arthroscopic surgical scars were healed. There was no effusion or atrophy. He stated that the drawer test was negative.

In opposition, plaintiff's expert, on October 29, 2018, Dr. Seldes affirms that he performed an arthroscopic surgery to the plaintiff's left ankle and administered injections on August 18, 2018, and September 25, 2018. Upon Dr. Seldes's examinations on July 24, 2018, August 28, 2018, September 25, 2018, October 9, 2018, November 13, 2018, January 8, 2019 and on recent examination of August 11, 2021, plaintiff indicated that she could not perform daily activities normally because of the pain and stiffness after the subject accident. Dr. Seldes provided a qualitative assessment and reported loss of ROM of plaintiff left ankle. Dr. Seldes's affirmation revealed significant ROM limitations in plaintiff's left ankle, based on both contemporaneous and recent examinations. Dr. Seldes's affirmation raised an issue of fact as to whether plaintiff sustained a serious injury to her left ankle under the permanent consequential or significant limitation of use categories of Insurance Law §5102 (d). (see *Shtesl v Kokoros*, 56 AD3d 544, 867 NYS2d 492 [2nd Dept 2008]).

While there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her left ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the incident (see Insurance Law §5104[a]; see also *Nussbaum v Chase*, 166 AD3d 638, 87 N.Y.S.3d 120 [2nd Dept 2018]; *Marte v NY City Tr. Auth.*, 59 AD3d 398, 871 NYS2d 921 [2nd Dept 2009]; *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 [2nd Dept 2004]). In the event plaintiff establishes at trial that she sustained a serious injury to her left ankle as a result of the subject accident, she will be entitled to seek damages for all of the injuries she sustained as a result of the accident (see *Nussbaum* at 639).

90/180 Category

Although this statutory category lacks the "significant" and "consequential" terminology of the two categories discussed above, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see Insurance Law §5102 [d]; see also *Toure* at 357; *Licari* at 236-239).

Here, plaintiff failed to submit sufficient objective medical evidence to establish a qualifying injury or impairment (*Toure* at 357). While plaintiff testified that after the collision, she suffered pain while running, cooking or cleaning the house, sitting or lifting any heavy items, such testimony alone does not establish she suffered a serious injury under the 90/180 category (see *Gaddy* at 958; *Lanzarone v Goldman*, 80 AD3d 667, 915 NYS2d 144, [2nd Dept 2011]).

Conclusion

Accordingly, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" is denied.

This constitutes the decision and order of the Court.

Dated: September 28, 2022


SALLY E. UNGER, A.J.S.C.