Grey

SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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CYNTHIA LEVCHENKO ,

Plaintiff,

-against-

FRANKLIN E. MENDEZ, EVELIN C. VILORIO AND ABRAHAM VILORIO,

Defendants.

----------x

TRIAL PART: 14
NASSAU COUNTY

INDEX NO: 12114-09

MOTION SEQ. NO:1. 2

SUBMIT DATE: 09/07/11

The following papers having been read on this motion:

Notice of Motion.....1
Notice of Cross Motion.....2
Opposition.....3
Reply.....4

Motion by defendants Evelin C. Vilorio and Abraham Vilorio and cross-motion by Franklin E. Medez for an order pursuant to CPLR § 3212 granting them summary judgment and dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) is granted in part, and denied in part as stated herein.

This action arises out of two separate motor vehicle accidents which occurred on October 17, 2007 and May 30, 2008. On October 17, 2007, the motor vehicle operated by plaintiff was allegedly struck in the rear by a motor vehicle owned and operated by Mendez. On May 30, 2008, the motor vehicle operated by plaintiff was allegedly struck in the rear by a motor vehicle owned by Abraham Vilorio and operated by Evelin Vilorio.

Initially, we note that after plaintiff's examination-before-trial was held, the attorneys for the parties hereto agreed that defendants would conduct one independent medical examination of plaintiff. On November 3, 2010, plaintiff presented to Dr. Issac Cohen's office in Garden City for the purpose of an independent orthopedic evaluation.

Initially, plaintiff raises a procedural question as to the timeliness of Mendez' cross-motion. CPLR§3212(a) provides that "the court may set a date after which no [dispositive] motion

may be made" and "[i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." At bar, the trial court specified in its certification order dated March 1, 2011 that "[m]otions for summary judgment need to be filed within 60 days of the filing of the note of issue."

Since the note of issue was filed on March 10, 2011, summary judgment motions were to be filed by May 9, 2011. The Vilorio's motion for summary judgment filed on May 5, 2011 is timely. The within cross-motion, however, was not filed until June 16, 2011.

In *Brill v City of New York*, 2 NY3d 648 [2004], the Court of Appeals expressly stated that the statutory deadline should be strictly enforced, in order to prevent the filing of "[e]leventh-hour summary judgment motions," a practice that "ignores statutory law, disrupts trial calendars and undermines the goals of orderliness and efficiency in state court practice" (*Id.* at 650-651). The court concluded that "good cause" requires a "satisfactory explanation for the untimeliness– rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Id.* at 652; *see also Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]; *Demacopolous v City of New York*, 73 AD3d 842 [2nd Dept. 2010]).

Further, "[a] cross-motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross-motion" *Leonardi v Cruz*. 73 AD3d 580 [1st Dept. 2010]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept. 2006], *app dism.* 9 NY3d 862 [2007].

Under the circumstances extant, we elect to consider the late cross-motion for summary judgment since the notice of motion was timely submitted and both the notice of motion and cross-motion both seek to dismiss the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

As a proponent of the summary judgment motion, movants had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. *(See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Defendants' 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 [2nd Dept 2006]).

Defendants established their *prima facie* entitlement to judgement as a matter of law by submitting, *inter alia*, the affirmed medical reports of Dr. Isaac Cohen, an orthopedist. Dr. Cohen found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Dr. Isaac Cohen, a board certified orthopedist, examined the plaintiff, performed quantified range of motion testing on her cervical spine, thoracolumbosacral spine, upper extremities/shoulders, lower extremities, compared his findings to normal ranges of motion values and concluded that plaintiff had normal ranges of motion of these body parts; conducted motor, sensory and reflex testing, which revealed no deficits; and concluded that plaintiff had resolved cervical spine, sprain, status post thoracolumbar spine sprain and resolved multiple soft tissue contusions. Dr. Cohen's quantified range-of-motion findings and comparisons are sufficient to sustain the movants *prima facie* burden. *Staff v Yshua*, 59 AD3d 614 [2nd Dept. 2009]. Dr. Cohen also submitted an addendum report regarding the accident that took place on May 30, 2008.

In support of his cross-motion, Mendez asserts that the Vilorios made a *prima facie* showing that plaintiff did not suffer a "serious injury" to her cervical spine, lumbar spine, thoracic spine or right shoulder in the October 17, 2007 accident and the May 30, 2008 accident. Mendez incorporates by reference the arguments raised by the Vilorios and requests that if this court grants summary judgment on behalf of the Vilorios, that it likewise grant it on behalf of Mendez. Specifically, Mendez asserts that "although the claims against Franklin Mendez involve a separate and distinct automobile accident from the claims against Evelin C. Vilorio and Abraham Vilorio, the injuries claimed in the second accident involving the Vilorio vehicle are merely an exacerbation of the injuries claimed in the first accident involving the Mendez vehicle; to wit, plaintiff, Cynthia Levchenko, is claiming injuries to her neck, upper, middle and lower back and right shoulder."

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of

the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Perl v Meher,* -NY3d- 2011 WL 5838721 [2011].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d). *See Toure v Avis Rent A Car Sys., Inc., supra; Scheeer v Kioubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 AD3d 278, 279[1st Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2nd Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2nd Dept 2008]; *Sharma v Diaz,* 48 AD3d 442 [2nd Dept 2007]; *Amato v Fast Repair, Inc.,* 42 AD3d 447 [2nd Dept 2007] and upon medical proof contemporaneous with the subject accident. *(Perl v Meher, supra*; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2nd Dept 2008]; *Manning v Tejeda*, 38 AD3d 622 [2nd Dept 2007]; *Zinger v Zylberberg,* 35 AD3d 851 [2nd Dept 2006]). The objective evidence can be the result of a qualitative assessment or a quantitative assessment of restricted range of motion by the physician. (*Toure v. Avis Rent A Car Sys. Inc., Supra*). However a quantitative measurement of plaintiffs restricted range of motion does not have to be contemporaneous with the accident, but is sufficient that the quantitative measurement is conducted at a later date. *(Meher, Supra)*

Even when there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v Perez,* 4 NY3d 566, 572 [2005]. Whether a limitation of use or junction is significant or consequential 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 a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995].

It has been repeatedly held that "[t]he mere existence of herniated or bulging discs, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Catalano v*

Kopmann, 73 AD3d 963 [2nd Dept 2010]; *Vilomar v Castillo*, 73 AD3d 758 [2nd Dept 2010]; *Ortiz v Iania Taxi Services, Inc.*, 73 AD3d 721 [2nd Dept 2010]; *Stevens v Sampson,* 72 AD3d 793 [2nd Dept 2010]; *Luizzi Schwenk v Singh*, 58 AD3d 811, 812 [2nd Dept 2009]).

Moreover, " '[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs' " (*Johnson v County of Suffolk,* 55 AD3d 875, 877 [2nd Dept 2008], quoting from *Kearse v New York City Transit Authority,* 16 AD3d 45, 49-50 [2nd Dept 2005]).

Based on the record submitted, plaintiff has raised a triable issue of fact by submitting, among other things, affirmed reports describing medical examinations conducted contemporaneously with the collision, as well as affirmed reports describing medical examinations conducted in 2011 (see reports of Drs. Becker, Yates, Dowing, Fische and Yao). These reports collectively demonstrate that there are triable issues of fact as to whether the collisions caused injuries to the plaintiff that were serious injuries under the "permanent consequential limitation" or "significant limitation" of use categories of Insurance Law §5102(d) (*see Evans v Pitt*, 77 AD3d 611 [2nd Dept 2010], *lv to app dism.* 16 NY3d 736 [2011]; *Sanevich v Lyubomir*, 66 AD3d 665 [2nd Dept. 2009]; *Noel v Choudhury,* 65 AD3d 1316 [2nd Dept. 2009]; *cf. Husbands v Levine,* 79 AD3d 109 [2nd Dept. 2010]).

Since plaintiff established that at least some of her injuries satisfy the "no-fault" threshold, "it is unnecessary to address whether [her] proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment." *Linton v Nawaz,* 14 NY3d 821, 822 [2010]; *McLelland v Estevez,* 77 AD3d 403 [2nd Dept. 2010].

Finally, plaintiff has not sustained her burden under 90/180 day category which requires plaintiff to submit objective evidence of a "medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural 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." (Insurance Law §5102[d]).

"When construing the statutory definition of a 90/180 day claim, the words 'substantially all

'should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment." (*Thompson v Abbasi,* 15 AD3d 95 [1st Dept 2005]; *Gaddy v Eyler, supra*).

Specifically, plaintiff has no admissible medical reports stating that she was disabled, unable to work or unable to perform daily activities for the first ninety (90) days out of one hundred eight (180) days. *See, Perl v Meher, supra; Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010].

In view of the foregoing, the motion and cross-motion are granted as to the claim for medically determined injury for the 90/180 period, but denied as to the remaining causes of actions.

This constitutes the order and judgment of this Court.

ENTER

DATED: November 28, 2011

ENTERED
DEC 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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J. S.C.

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