

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

SCAN

Present: HON. WILLIAM R. LaMARCA
Justice

ANA AGUILAR,
Plaintiff,
-against-
GAE TRANSPORTATION INC. and
LAHOMEN FRAZIEN,
Defendants.

INDEX NO: 5063/06
Action #1

MARIA DIAZ,
Plaintiff,
-against-
GAE TRANSPORTATION INC. LAHOMEN
FRAZIEN, MARIO AGUILAR and ANA
AGUILAR,
Defendants.

Motion Sequence #1, #002
Submitted January 11, 2008

INDEX NO: 8544/06
Action #2

The following papers were read on these motions:

Defendant AGUILAR Notice of Motion.....1
Defendant GAE and FRAZIEN Notice of Cross- Motion.....2
Plaintiff's Affirmation in Opposition.....3
AGUILAR Reply Affirmation.....4

Defendants in the Action #2, MARIO AGUILAR and ANA AGUILAR, move and defendants, GAE TRANSPORTATION and LAHOMEN FRAZIEN, cross-move, for an order dismissing plaintiff's complaint and granting defendants summary judgment, pursuant to CPLR §3212, on the ground that the claimed injuries of plaintiff, MARIA DIAZ, do not meet the no-fault threshold requirements of a "serious injury" as defined in Insurance Law

§5102(d). Plaintiff, opposes the motion which is determined as follows:

In Action #2, plaintiff seeks to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred on October 18, 2004, at approximately 11:30 A.M., at the intersection of East Clinton Avenue and Park Avenue in Roosevelt, New York. At the time of the accident, plaintiff was a passenger in the vehicle owned by defendant, MARIO AGUILAR, and operated by defendant, ANA AGUILAR, that came in contact with a taxi vehicle owned by defendant, GAE TRANSPORTAION, and operated by defendant, LAHOMEN FRAZIEN. It is alleged that the taxi vehicle made a left turn and struck the AGUILAR vehicle in which plaintiff was riding. In her bill of particulars, plaintiff alleged that a MRI of the lumbar spine revealed L4-S1 disc hydration with posterior disc herniation and facet hypertrophic changes, which were caused by or aggravated by the subject accident; that a MRI of the cervical spine revealed C3-4 posterior disc herniation with ventral cord impression, C4-C7 posterior subligamentous disc bulges and C7-T1 posterior disc herniation with ventral csf impression, which were caused by or aggravated by the subject accident; that she sustained an impingement syndrome of the left shoulder requiring surgical arthroscopic procedure and partial distal claviclectomy and repair of the anterior labral tearing as well as pain, tenderness, and limitation of motion of the left shoulder; that a MRI of the left shoulder revealed calcific tendinitis with subacromial/subdeltoid bursal fluid, which were caused by or aggravated by the subject accident; that she sustained cervical radiculopathy, and a left shoulder injury requiring surgical procedure and injection of lidocaine, as well as C5 radiculopathy.

As the proponent of the motion for summary judgment, defendants have the initial burden of establishing by competent medical evidence that plaintiff did not sustain a

serious injury causally related to the motor vehicle accident (*Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 [C.A.2003]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. If the initial burden is met, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law § 5102(d) (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197[C.A.2002]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100, 779 NYS2d 7 [1st Dept. 2004]).

In support of the motion and cross-motion, defendants have submitted the affirmed medical report of Stephen W. Lastig, M.D., a Diplomate of the American Board of Radiology, of Michael J. Katz, M.D., a Fellow of the American Academy of Orthopedic Surgeons, and of Maria Audrie DeJesus, M.D., a Diplomate of the American Board of Psychiatry and Neurology.

Dr. Lastig's report, dated May 23, 2007, is based upon a review of the MRI studies of the plaintiff performed on November 13, 2004 at the Standup MRI of Lynbrook Center, approximately one (1) month after the accident. Dr. Lastig found multi-level degenerative disc disease in the cervical spine and lumbar spine, with no focal disc herniations or bulges, and no rotator cuff tear in the left shoulder but calcific tendinitis. He concluded that no findings in the MRI's are causally related to the October 18, 2004 accident but are the

result of pre-existing degenerative changes.

Dr. Katz' report, dated April 27, 2007, based upon an interview and examination of the plaintiff, found normal range of motion and strength and sensation in the cervical spine, no spasm and a normal range of motion, full sensation and reflexes in the lumbar spine, and normal flexion, and no impingement or deformity of the left shoulder, with sensation intact and a well healed arthroscopic repair, Dr. Katz diagnosed plaintiff with a resolved cervical and lumbosacral sprain and with pre-existing degenerative changes, as well as with an excellent surgical outcome in arthroscopic left shoulder surgery. He opined that she was capable of gainful employment and was not disabled.

Dr. DeJesus, in a report dated May 3, 2007 based upon an interview and examination of the plaintiff and a review of her medical records, states that plaintiff claims she was involved in a prior accident many years ago, as well as a subsequent accident in May 2006 in which she sustained injuries that worsened her alleged neck and lower back pain. Dr. DeJesus found plaintiff to be alert, with no cognitive defects, no atrophy and with normal strength in her motor system. She diagnosed plaintiff status as post cervical and lumbar sprain/strain exacerbated by the motor vehicle accident in May 2006, and found no neurological disability. She opined that plaintiff can perform all of her usual daily activities without restriction and that she has recovered from any neurological injuries she may have sustained.

Defendants have made their initial burden of establishing that plaintiff has not sustained a serious injury within the ambit of Insurance Law § 5102(d).

In opposition to the motion, plaintiff's affidavit states that, following the accident, she was treated 3 to 4 times a week by Alliance Physical Medical and, because of continued

and more painful complaints regarding her left shoulder, she was referred to Dr. Dov Berkowiz, an orthopedic surgeon, who performed arthroscopic surgery to her left shoulder on June 22, 2005. She contends that, although the surgery eliminated some of the pain, she still has limitations in movement of the shoulder and she has difficulty raising her left arm and lifting things. She claims that, since the time of the accident, she has had difficulty doing basic every day things such as walking up and down stairs, squatting, sitting, lifting heavy object and raising her left arm above her head. She states that she has not been able to regain her schedule of full activities and can not do strenuous household chores, lift heavy objects or fully use her left arm. She states that she continues to have significant pain in her left shoulder and neck and lower back.

An affirmation of Harold Avella, M.D., a physician at Alliance, is also submitted in opposition to the motion.. Dr. Avella states that he examined plaintiff, on November 9, 2004, when she had continued complaints of pain to the neck and lower back and severe pain in the left shoulder, as well as numbness in the right hand and weakness in the hand. He noted marked restriction of motion found by objective tests. He states that he treated plaintiff over the next eight (8) months, and MRI's of the spine revealed herniated discs and multiple bulging discs. He referred plaintiff to Dr. Berkowitz, an orthopedic surgeon, because plaintiff was in constant pain, physical therapy was providing no relief and because an epidural procedure only relieved the pain temporarily. Dr. Avella states, that the surgical procedure performed by Dr. Berkowitz relieved some of plaintiff's pain but she continue to have diminished movement in her left shoulder and a partial disability in her neck, lower back and left shoulder. After a re-evaluation of plaintiff, on September 19, 2007, Dr. Avella found limitations of extension and rotation in the cervical spine, limitations

of the range of motion in the lumbar spine, and limitation of motion in the left shoulder. Dr. Avella states that all test were done with a hand held goniometer, and his final diagnosis found herniated discs at C3-4 and C7-T1, with exacerbation of neck pain, herniated discs at L4-5 and L1-S1, with exacerbation of lumbar pain, lumbar degenerative disc disease, cervical bulges, C6 radiculopathy and left shoulder impingement and tendinitis post arthroscopic surgery. Dr. Avella concluded that since the plaintiff did not suffer from any prior trauma that produced these symptoms, the October 18, 2004 accident was the cause of plaintiff's injuries. He opined that the injures were permanent and would affect her ability to perform her daily activities for prolonged periods of time and the prognosis was guarded for a full recovery. He noted that the physical therapy that plaintiff received at Alliance was not improving her shoulder and that surgery was required to improve her condition.

Counsel for plaintiff points out that defendants examining physicians, who saw plaintiff only one (1) time nearly three (3) years following the accident, have no basis for their medical conclusion.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of

credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The Court finds that the differences of opinion among the medical experts as to the nature, cause and extent of plaintiff's injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2nd Dept. 1999).


Based on the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment is denied

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 4, 2008



WILLIAM R. LaMARCA, J.S.C.

ENTERED
APR 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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