

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 2, 2015

519609

PATRICIA M. CLAUSI,
Appellant,

v

PATRICIA A. HALL et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 19, 2015

Before: Peters, P.J., Rose, Clark and Devine, JJ.

Law Office of David J. Clegg, Kingston (David J. Clegg of counsel), for appellant.

Law Office of Craig P. Curcio, Middletown (Tony Seimdey of counsel), for respondents.

Peters, P.J.

Appeal from an order of the Supreme Court (Melkonian, J.), entered November 5, 2013 in Ulster County, which granted defendants' motion for summary judgment dismissing the complaint.

Plaintiff commenced this action alleging that she sustained a serious injury under the significant limitation of use and 90/180-day categories of Insurance Law § 5102 (d) as a result of a July 2007 motor vehicle accident. In her bill of particulars, plaintiff claimed that she suffered from, among other things, radiculopathy, disc bulges and disc herniations in her lumbar spine, numbness and tingling in her lower extremities and an aggravation of a preexisting degenerative disc disease. Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint on the ground that

plaintiff did not suffer a causally related serious injury. Supreme Court granted the motion, and plaintiff now appeals.

Defendants, as the proponents of the summary judgment motion, bore the initial burden of establishing by competent medical evidence that plaintiff did not suffer a serious injury as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002]; Shelley v McCutcheon, 121 AD3d 1243, 1244 [2014]; Raucci v Hester, 119 AD3d 1044, 1044 [2014]). In support, defendants proffered, among other things, plaintiff's deposition testimony and the affirmed reports of orthopedic surgeon Harvey Siegel and neurologist Ira Neustadt, both of whom reviewed plaintiff's medical records and performed an independent medical examination of her in 2013. Siegel concluded that, other than a strain or sprain of the lumbar spine that has since resolved, no objective medical evidence existed establishing that plaintiff's injuries were caused by the subject accident. Rather, he opined that the injuries depicted in the postaccident MRIs, as well as the positive findings he documented upon examination, were the result of preexisting and previously symptomatic degenerative changes in plaintiff's spine, which he found to be responsible for her "mild disability." To that end, Siegel noted that plaintiff's medical records reveal that she had complained of lower back pain on two prior occasions, including approximately six months prior to the accident. Neustadt likewise opined that the MRI findings revealed evidence of preexisting degenerative disc disease, and he found no objective evidence of any neurological disability or residual effects from the accident. Further, with regard to the claim under the 90/180-day category, defendants relied upon plaintiff's deposition testimony that she missed only four days of work following the accident, as well as the lack of evidence that medical providers placed any significant restrictions on her daily activities within the 180-day period following the accident. This proof was sufficient to shift the burden to plaintiff to set forth competent medical evidence to support her claim of serious injury and connect the condition to the accident (see Putnam v Sysco Corp., 101 AD3d 1571, 1572-1573 [2012]; Flottesmesch v Contreras, 100 AD3d 1227, 1228 [2012]).

In opposition, plaintiff submitted the affirmation of her primary care physician, Eugene Heslin, with whom plaintiff treated both prior to and following the accident. Heslin detailed his review of the reports of the MRIs taken following plaintiff's accident, which revealed a broad-based intraforaminal disc bulge, foraminal stenosis and nerve root compression, as well as EMG study reports indicating radiculopathy with nerve root denervation.¹ Heslin's affirmation set forth plaintiff's symptoms, in qualitative terms, based upon his examinations shortly after the accident, and also provided objective, quantitative evidence of plaintiff's limitations based upon recent tests (see Perl v Meher, 18 NY3d 208, 217-218 [2011]). In that regard, Heslin detailed specific range of motion deficits in plaintiff's lumbar spine and observable muscle spasms, as well as findings of weakness of her right ankle and toe dorsiflexion that were consistent with the EMG findings and which had been first documented shortly after the accident. On the issue of causation, Heslin disputed the claim that plaintiff's degenerative disc condition – which he opined was asymptotic at the time of the accident – was the sole cause of her injury. Heslin noted that, although plaintiff had complained of radiating lower back pain on two prior occasions,² on both such instances plaintiff's pain resolved within a short period through the use of anti-inflammatory medications. Given the objective findings with regard to plaintiff's lumbar spine and the sudden onset of her symptoms immediately following the accident – which were different in both nature and degree from those she experienced

¹ While Heslin's affirmation was partly based upon unsworn EMG and MRI reports, inasmuch as Siegel discussed and relied upon those same unsworn reports in his affirmed report, Heslin was also entitled to rely upon them (see Womack v Wilhelm, 96 AD3d 1308, 1311 n 2 [2012]; Caulkins v Vicinanza, 71 AD3d 1224, 1226 [2010]).

² The first occasion was almost seven years prior to the accident, when plaintiff reported lower back pain that radiated into her legs after lifting a mattress. The second instance was approximately seven months before the accident, when plaintiff reported similar symptoms after picking up a pail of water.

prior to the accident – Heslin opined that the trauma of the accident aggravated plaintiff's preexisting degenerative disc disease and contributed to her current condition.

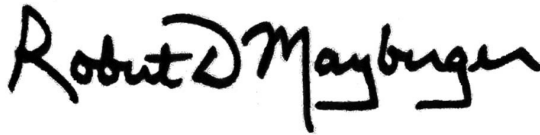
Viewed in the light most favorable to plaintiff (see Gronski v County of Monroe, 18 NY3d 374, 381 [2011]), this evidence was sufficient to raise a triable issue of fact as to whether plaintiff suffered a significant limitation of use of her lumbar spine as a result of the accident. Contrary to Supreme Court's conclusion, we do not find Heslin's affirmation to be speculative on the issue of causation. Rather, his opinion, based upon objective medical findings of her current injury and rendered after specifically considering the effects of her preexisting condition, adequately attributed plaintiff's injuries to the accident (see Perl v Meher, 18 NY3d at 218-219; Raucci v Hester, 119 AD3d at 1046; Putnam v Sysco Corp., 101 AD3d at 1573; Lipscomb v Cohen, 93 AD3d 1059, 1061 [2012]; MacMillan v Cleveland, 82 AD3d 1388, 1390 [2011]). Further, plaintiff adequately addressed a gap in treatment by submitting an affidavit asserting that she stopped treatment for approximately 15 months because she could not afford to bear the cost after her no-fault benefits expired (see Young Kyu Kim v Gomez, 105 AD3d 415, 415 [2013]; Lipscomb v Cohen, 93 AD3d at 1061; Garza v Taravella, 74 AD3d 1802, 1803 [2010]; see generally Pommells v Perez, 4 NY3d 566, 574, 577 [2005]). Accordingly, dismissal of plaintiff's claim under the significant limitation of use category was not warranted.

We reach a different conclusion, however, with respect to the 90/180-category. As noted, none of plaintiff's medical records from within the initial 180-day period following the accident referenced any limitations on her usual daily activities and, absent any objective medical evidence to substantiate her claims, plaintiff's self-serving assertions that she was unable to perform substantially all of her regular activities for the required period of time are insufficient to raise a question of fact (see Cole v Roberts-Bonville, 99 AD3d 1145, 1148 [2012]; Crawford-Reese v Woodard, 95 AD3d 1418, 1420 [2012]; Licygiewicz v Stearns, 61 AD3d 1254, 1255 [2009]; Clements v Lasher, 15 AD3d 712, 713-714 [2005]).

Rose, Clark and Devine, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendants' motion for summary judgment dismissing that part of the complaint alleging that plaintiff suffered a serious injury in the significant limitation of use category; motion denied to that extent; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court