Polynice v Shalomov
2010 NY Slip Op 30800(U)
April 6, 2010
Supreme Court, New York County
Docket Number: 115045/2007
Judge: George J. Silver
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SCANNED ON 4/9/2010
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER Justice PART 22

Index Number : 115045/2007
POLYNICE, BERTHA
vs.
SHALOMOV, YURY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendant Yury Shalomov ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Bertha Polynice ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury under NY Insurance Law §5102(d) by incurring right shoulder arthroscopy, partial tear of the rotator cuff on the bursal side, scarring, right shoulder sprain and cervical and lumbar sprain/strain. Plaintiff further contends that she was confined to bed from June 13, 2007 to June 21, 2007 and confined to her home from June 13, 2007 to January 19, 2008.

Under New York Insurance Law §5102(d), a "serious injury" is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material 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 or impairment.

Dated: ______ ______ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §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" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendant's Expert Reports

In support of this motion, Defendant submits the affirmed expert reports of Dr. Gregory Montalbano, orthopedist and Dr. Audrey Eisenstadt, radiologist.

Dr. Montalbano examined Plaintiff on November 21, 2008. His impression was that Plaintiff suffered from a pre-existing condition of subacromial impingement syndrome. Dr. Montalbano described this syndrome as congential/degenerative which causes impingement on the rotator cuff. He does not think that the shoulder injury is a result of the accident and did not find any evidence of permanent injury related to the accident. Dr. Montalbano also concluded that Plaintiff may have sustained a mild cervical and lumbar strain/sprain as a result of this accident, which has resolved. Dr. Montalbano measured the range of motion of Plaintiff's cervical spine and noted flexion was 60 degrees, compared to 60 degrees normal, extension was 45 degrees, compared to 45 degrees normal, right and left rotation was 50 degrees, compared to 50 degrees normal, bending lateral left and right was 45 degrees, compared to 45 degrees normal.

Dr. Montalbano also determined that lumbar spine range of motion was flexion was 90 degrees, compared to 90 degrees normal, extension was 30 degrees, compared to 30 degrees normal, right and left rotation was 45 degrees, compared to 45 degrees normal, bending lateral left and right was 45 degrees, compared to 45 degrees normal. Dr. Montalbano also examined Plaintiff's right shoulder and found two keloid portals and no observable muscle atrophy or tenderness. Range of motion for the right shoulder was flexion was 180 degrees, compared to 180 degrees normal, abduction was 130 degrees, compared to 130 degrees normal, external rotation was 30 degrees, compared to 30 degrees normal, internal rotation of T12 compared to T7. Further, rotator cuff strength testing was 5/5 measured in scaption, abduction and external and internal rotation. Drop Arm, Apprehension, Straight Leg Raising and Relocation tests were negative. He concluded that Plaintiff did not suffer from any injuries casually related to the accident. Dr. Montalbano also issued an addendum to his original report on January 8, 2009, after reviewing Plaintiff's right shoulder MRI. He did not find any evidence of acute injury on the MRI film and his opinion remained unchanged.

On July 24, 2008, Dr. Audrey Eisenstadt reviewed Plaintiff's right shoulder MRI film

dated July 24, 2007. Her impression was of a normal right shoulder MRI without any fractures, bone contusion or osteochondral defects. Further, Dr. Eisenstadt reported that the rotator cuff musculature was intact without tear or tendinitis. Her conclusion was that no post-traumatic changes were seen on Plaintiff's MRI.

Defendant's expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendant's submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendant also raises the fact that Plaintiff stopped treating with Dr. Reyes-Arguelles in December 2007. While a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v. Ross*, 2007 NY Slip Op 8001 [1st Dept]; *Pommells v Perez*, 4 NY3d 566, 574, 830 N.E.2d 278, 797 NYS2d 380 [2005]). Dr. Reyes-Arguelles clearly states that Plaintiff was discharged from her medical care because she had reached maximum medical improvement. This explanation clearly refutes Defendant's gap in treatment argument.

Plaintiff's Evidence

In opposition to Defendant's motion, Plaintiff submits the expert affirmations of Dr. Mehran Manouel, Dr. Zenaida Reyes-Arguelles, Dr. Charles DeMarco and Dr. Jeffrey Chess. Dr. Manouel was Plaintiff's treating orthopedic surgeon and performed right shoulder arthroscopic surgery on her right shoulder on September 7, 2007. Dr. Manouel states that during the surgery, he observed a partial tear of the rotator cuff on the bursal side. He further states that this injury is consistent with the effects of and causally related to the car accident. On April 8, 2009, Dr. Manouel examined Plaintiff and measured range of motion using a goniometer. He determined that Plaintiff's range of motion for the cervical spine was forward flexion of 50 degrees compared to 60 degrees normal, extension of 45 degrees compared to 50 degrees normal, right and left rotation of 65 degrees compared to 80 degrees normal, right lateral motion of 40 degrees compared to 40 degrees normal, and left lateral motion of 30 degrees compared to 40 degrees normal.

Dr. Manouel also examined Plaintiff's lumbar spine and reported range of motion of forward flexion of 40 degrees compared to 90 degrees normal, extension of 15 degrees compared to 30 degrees normal, right and left rotation of 20 degrees compared to 30 degrees normal, right and left lateral motion of 15 degrees compared to 20 degrees normal. Right shoulder range of motion was reported as forward flexion of 140 degrees compared to 180 degrees normal, abduction of 130 degrees compared to 160 degrees normal, internal rotation of 70 degrees

compared to 90 degrees normal, and external rotation of 70 degrees compared to 70 degrees normal. Dr. Manouel concludes that Plaintiff's injuries are chronic, disabling, permanent and causally related to the accident.

Dr. Reyes-Arguelles treated Plaintiff from June 23, 2007 through December 2007. Upon initial examination, range of motion measured by inclinometer for the cervical spine was flexion of 50 degrees compared to 60 degrees normal, extension of 40 degrees compared to 50 degrees normal, right and left lateral bending of 20 degrees compared to 40 degrees normal, right and left lateral rotation of 20 degrees compared to 80 degrees normal. Lumbosacral spine examination revealed range of motion of flexion of 70 degrees compared to 90 degrees normal, extension of 20 degrees compared to 30 degrees normal, left and right rotation of 20 degrees compared to 30 degrees normal, left and right lateral flexion of 10 degrees compared to 20 degrees normal. Further, Schroeder's, Kemp's and Straight Leg Raising tests were positive. Range of motion for Plaintiff's right shoulder was flexion of 100 degrees compared to 150 degrees normal, extension of 100 degrees compared to 150 degrees normal, abduction of 100 degrees compared to 150 degrees normal, internal rotation of 20 degrees compared to 40 degrees normal and external rotation of 90 degrees compared to 70 degrees normal.

On April 8, 2009, Dr. Reyes-Arguelles reexamined Plaintiff and reported a decreased range of motion of the cervical spine of flexion at 33.33%, extension at 60%, left lateral at 5.7%, right lateral at 0%, left rotation at 80% and right rotation at 65%. Lumbar spine decreases in range of motion were flexion at 85%, extension at 46.67%, left lateral at 25%, right lateral at 45%, left rotation at 70% and right rotation at 86%. Plaintiff's right shoulder range of motion limitations were forward flexion at 21%, extension at 2%, internal rotation at 5% and external rotation at 2%. All percentages were measured on an inclinometer. Dr. Reyes-Arguelles concluded that Plaintiff's injuries are permanent in nature and directly related to the car accident.

Dr. Charles Demarco examined Plaintiff's right shoulder MRI dated July 24, 2007. He concluded that there was an increased signal supraspinatus tendon consistent with a partial tear. He did not find any fractures, labral injuries or biceps dislocation. Dr. Jeffrey Chess examined Plaintiff's cervical spine MRI dated July 11, 2007, and concluded the presence of a posterior bulge of the C3-C4 intevertebral disc impinging on the thecal sac, subligamentous posterior herniation of the C4-C5 intevertebral disc impinging on the thecal sac, and a reversal of the cervical lordosis.

Additionally, Plaintiff submits the accident police report, New York Hospital Queens emergency room records, Plaintiff's affidavit and deposition testimony. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Thus, the police report and New York Hospital records are not sufficient to defeat a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). Further, Plaintiff's self-serving deposition statements and affidavit are entitled to little weight and are insufficient to raise triable

issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]).

Analysis

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot;* 57 NY2d 230, 455 NYS2d 570 [1982]). Dr. Manouel provided sufficient medical proof to support Plaintiff's claim of diminished range of motion. This evidence raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed from approximately June 13, 2007 to June 21, 2007 and from September 7, 2007 to September 15, 2007. Further, Plaintiff claims that she was confined to her home from June 13, 2007 to January 19, 2008. No evidence has been presented to suggest that Plaintiff's confinements to her home were medically indicated. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

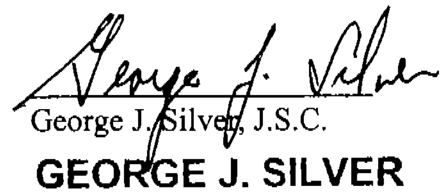
Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendant's motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.



George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: April 6, 2010
New York County

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