Alli v Steffens

2024 NY Slip Op 31384(U)

April 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 526837/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of April, 2024.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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FERZEENA ALLI,

Plaintiff,

Index No. 526837/2019

-against-

ADRIANNA STEFFENS and CASET STEFFENS,

DECISION & ORDER

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Exhibits.....	19 – 34
Memorandum in Opposition/Exhibits.....	39 – 46
Affirmation in Reply/Exhibit.....	51, 53

Upon the foregoing papers, Defendants Adrianna Steffens and Caset Steffens ("Defendants") move for an order, pursuant to CPLR 3212 and CPLR 3211 (a) (1) and (a) (7), granting them summary judgment and dismissing Plaintiff Ferzeena Alli's ("Plaintiff") complaint on the basis that her alleged injuries do not meet the "serious injury" threshold under Insurance Law 5102 (d) (Mot. Seq. No. 1).[1] Plaintiff opposes the motion.

[1] It is well-settled that a party moving to dismiss under certain grounds set forth in CPLR 3211 must do so before a responsive pleading is served (CPLR 3211 [e]). Here, Defendants' motion was made more than three years after their answer was filed. Accordingly, the Court will not consider the untimely portions of Defendants' motion seeking dismissal under CPLR 3211 (a) (1) (*see* CPLR 3211 [e]; *City of NY v Shahid*, 192 AD3d 754, 755 [2d Dept 2021]). Motions pursuant to CPLR 3211 (a) (7) can be made before or after a responsive pleading is filed (CPLR 3211 [e]). However, in their motion, Defendants do not allege that Plaintiff failed to plead that she sustained a serious injury. Instead, they argue that Plaintiff does not have a cause of action because Plaintiff's injuries do not rise to the level of a "serious injury" contemplated by Insurance Law § 1502 (d). Where it is clear from the papers that the parties are "charting a summary judgment course," the court may treat a motion as one for summary judgment (*see Fontanetta v John Doe 1*, 73 AD3d 78, 87-88 [2d Dept 2010]; CPLR 3211 [c]). Since Defendants have moved pursuant to both CPLR 3211 and 3212 but have charted a summary judgment course, the Court finds

This action arises out of a motor vehicle accident that occurred on May 11, 2019. In her complaint, Plaintiff seeks to recover damages for her personal injuries resulting from the subject accident. Specifically, Plaintiff alleges in her Bill of Particulars that she sustained injuries to her cervical, thoracic, and lumbar spine. In addition, Plaintiff claims she suffered serious injuries as defined by Insurance Law 5102 (d) resulting in a (i) fracture; (ii) permanent loss of use of a body, organ, member, function or system; (iii) permanent consequential limitation of use of a body organ or member; (iv) significant limitation of use of a body function or system; or (v) medically determined injury or impairment of a non-permanent nature which prevents [her] from performing substantially all of the material acts which constitute [her] usual and customary daily activities for not less than 90 days out of the first 180 days following the accident.

Defendants now move to dismiss the complaint, arguing that Plaintiff did not sustain a "serious injury" as defined by Insurance Law 5102 (d). First, Defendants aver that Plaintiff did not sustain a permanent consequential limitation or a significant limitation of use of a body function or system on the grounds that Plaintiff's alleged injuries stemmed from pre-existing conditions and were not causally related to the subject accident. Defendants contend that Plaintiff was examined at the hospital hours after the accident, and she exhibited normal ranges of motion. Defendants argue that x-rays of the thoracic and lumbar spine reflected degenerative findings and a CT scan of the cervical spine showed normal alignment. Defendants further contend that the diagnostic testing performed days later also reflected the same results. On June 23, 2021, Dr. Bazos performed an independent medical examination and found that Plaintiff exhibited normal ranges of motion and concluded that Plaintiff had sustained minor soft tissue injuries that resolved shortly after the accident and Plaintiff had no disability or limitations in performing her normal daily activities. Plaintiff also underwent neurologic examination by Dr. Roger Bonomo, who concluded that there was no objective evidence of injury to any part of the nervous system or spine. Dr. Jessica Berkowitz also reviewed Plaintiff's diagnostic studies and opined that there was no acute traumatic injury to the cervical, thoracic or lumbar spine and no causal relationship between the findings and the accident. Second, Defendants contend that Plaintiff cannot meet the 90/180 prong of the "serious injury" threshold. Defendants argue that, following the accident, Plaintiff continued to participate in her usual activities and was not confined to a hospital, bed, or home.

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that the motion should be treated solely as one for summary judgment and neither party is required to receive notice of the conversion (*see Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526 [2d Dept 2013]).

Moreover, though Plaintiff claimed that she stopped working as a stylist in March 2020 because she could not keep up with the work, Defendants argue that Plaintiff testified that the salon closed at that time due to the pandemic. Defendants also assert that Plaintiff continued to work as a home health attendant for her father and resumed working as a stylist in September 2020. Third, Defendants claim that there is no evidence of continuous treatment and Plaintiff failed to explain a two-year gap in treatment. Defendants cite to Plaintiff's deposition testimony in which Plaintiff stated that she stopped receiving physical therapy in June 2020.[2]

In opposition, Plaintiff contends that Defendants failed to meet their burden and even if they did, there were triable issues of fact. Plaintiff argues that Defendants relied on inadmissible medical records lacking affirmations, uncertified employment records and unauthenticated photographs. Plaintiff admits that she continued working as a stylist "for a while" following the accident. However, Plaintiff argues that she eventually had to stop working because she could not keep up or physically handle the work. Plaintiff also continued to take care of her disabled father; however, some duties had to be performed by her mother because her injuries would not allow her to do so. Plaintiff further argues that she could not run anymore. With respect to the alleged gap in treatment, Plaintiff contends that her medical records establish that she continued treatment until November 2020 when her insurance stopped paying and she could not afford to pay out-of-pocket. Thereafter, Plaintiff asserts that she continued to perform therapy exercises at home. Thus, Plaintiff argues that there is no evidence establishing a gap in treatment or that treatment has ever ceased.

In their reply, Defendants contend that they properly submitted and relied on Plaintiff's own medical records and employment records, which do not need to be certified. Moreover, Defendants argue that Dr. Diament's reports do not comment or address Defendants' contentions that Plaintiff's lumbar and cervical spine condition is degenerative in nature. Moreover, Dr. Diament's reports also reflect findings of degenerative changes. Defendants also take issue with Dr. Han's report dated July 11, 2023, which purportedly reveals only minor decreases from the normal ranges of motion that do not rise to the level of "serious injury." The report also failed to indicate which tests or methods were used to measure and verify the degrees recorded. Further,

[2] Defendants also asserted that based off Plaintiff's Bills of Particulars and discovery adduced thus far, Plaintiff's alleged injuries did not rise to the level of a fracture or permanent loss of use of a body organ, member, function or system. In opposition, Plaintiff did not address these two categories of "serious injury." Accordingly, these claims are deemed abandoned (*Louie's Seafood Rest., LLC v Brown*, 199 AD3d 790 [2d Dept 2021]).

according to Defendants, the report failed to refute the findings of Defendants' experts that the condition of Plaintiff's cervical and lumbar spine was degenerative and failed to rebut the showing that any limitations were not causally related to the accident. Additionally, Defendants contend that whether Plaintiff stopped receiving treatment in June or November 2020 is of no consequence because at this time, she has not received medical treatment for three years and her self-serving testimony of continuing self-treatment is unreliable and contradicted by her medical records, which indicate that she was not advised to continue any further or alternative treatment. As to Plaintiff's purported limitation in not being able to run, Defendants argue that there is no evidence Plaintiff's doctor advised her against such activity.

Whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court (*Licari v Elliot,* 57 NY2d 230 [1982]). The movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]). However, where the movant has made a showing that a party has not suffered a serious injury as a matter of law, the burden shifts to the opposing party to submit evidence in admissible form sufficient to create a material issue of fact warranting a trial (*Franchini v Palmieri,* 1 NY3d 536 [2003]; *Grasso v Angerami*, 79 NY2d 813 [1991]).

As a preliminary matter, the Court will address the issue raised by Plaintiff as to the admissibility of certain evidence submitted by Defendants. In her opposition, Plaintiff argued that her employment records are not verified, certified or authenticated and should not be considered (NYSCEF Doc No. 39, ¶ 26). Plaintiff further argued that her hospital records were not certified and her radiology records did not include CPLR 4532 affirmations.[3] Defendants contend that the medical records and employment records do not need to be certified and can be used by defendants in support of their motion for summary judgment on the threshold issue (*id.* at ¶ 40).

[3] Plaintiff also argues that Defendants' submission of photographs allegedly taken from Plaintiff's Facebook are not authenticated and inadmissible (NY St Cts Elec Filing [NYSCEF] Doc No. 39, ¶ 26). In their reply, Defendants did not address Plaintiff's argument (*see* NYSCEF Doc No. 51). Therefore, the Court will not consider the subject photographs (*see People v Price*, 29 NY3d 472, 479 [2017]).

While unaffirmed or uncertified medical records and reports are generally inadmissible, they may be admissible if they were the records of Plaintiff's treating physicians (*Uribe v Jimenez*, 133 AD3d 844, 844 [2d Dept 2015]) or where they were properly referenced by Defendants' medical experts (*Kearse v NY City Tr. Auth.*, 16 AD3d 45, 47, n 1 [2d Dept 2005]). Thus, the Court finds that Plaintiff's hospital and radiology records are admissible. However, Defendants' argument that Plaintiff's employment records are admissible on the same basis is unpersuasive. Since the employment records are not certified as business records, they are inadmissible (*see* CPLR 4518 [a]; *Babikian v Nikki Midtown*, LLC, 60 AD3d 470, 471-72 [1st Dept 2009]; *Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]).

The Court will first address Plaintiff's claim that she suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system. The Court of Appeals has determined that "a minor, mild or slight limitation of use" does not rise to a significant limitation within the meaning of Insurance Law 5104 *(Licari*, 57 NY2d at 236). To establish that a plaintiff did not sustain a serious injury under these categories, a defendant must present medical evidence reflecting that the ranges of motion are all within normal range, the specific measurements taken and the methods used to perform the measurements (*Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009]). "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that 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" (*Kearse*, 16 AD3d at 49-50).

Here, Dr. Bazos' report indicates that all ranges-of-motion were determined by visual landmarks and a goniometer and Plaintiff exhibited normal ranges of motion, pursuant to AMA Guidelines (NYSCEF Doc No. 28). Moreover, Dr. Bazos, an orthopedic surgeon, found a lack of any accident-related objective findings. Further, radiologist Dr. Berkowitz reviewed Plaintiff's diagnostic tests and did not find any causal relationship between their findings and the accident. Dr. Berkowitz opined that Plaintiff's cervical and lumbar spine exhibited degenerative changes.[4]

[4] Upon her review of the MRIs of the cervical and lumbar spine, Dr. Berkowitz found that the exhibited disc bulge and spondylosis were chronic and degenerative in origin (NYSCEF Doc No. 30, at 7-8, 11-12). With respect to the lumbar spine, Dr. Berkowitz also found that the "grade 1 spondylolisthesis is related to degenerative changes at the disc space and facet joints" (*id.* at 11-12). Dr. Berkowitz's impression of the CT examination of the cervical spine was that the uncovertebral joint hypertrophic changes are chronic and degenerative (*id.* at 9-10).

Defendants also provided a report from Dr. Bonomo, a neurologist, who lists the records he reviewed and the results of his examination of Plaintiff. However, Dr. Bonomo's report is deficient in that he failed to provide the "normal" ranges of motion from which a comparison could be made, indicate the device used to measure the extent or degree of limitation or specify the guidelines he used (*Allen v Lopez*, 2022 NY Slip Op 34030[U], *3 [Sup Ct, NY County 2022]). In addition to their experts' reports, Defendants rely on Plaintiff's x-rays taken on May 16, 2019, which reflected mild-to-moderate degenerative changes in her lumbar spine and "unremarkable views" of her cervical spine.[5] Thus, even if the Court does not consider Dr. Bonomo's report, Defendants have established, through other competent medical evidence, that Plaintiff's alleged injuries do not constitute a serious injury under the permanent consequential or significant limitation of use categories and they also established the absence of causation.

For Plaintiff's claim to survive, she must proffer sufficient evidence to raise a triable issue of fact. This evidence must be "objective medical proof of a serious injury causally related to the accident" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Where defendants proffer evidence indicating that a plaintiff's alleged injuries were related to a preexisting condition, the plaintiff must come forward with "objective medical evidence distinguishing plaintiff's preexisting condition from the injuries claimed to have been caused by [the] accident" (*Falkner v Hand*, 61 AD3d 1153, 1154 [3d Dept 2009]). Accordingly, a plaintiff fails to raise a triable issue of fact if her expert opines that the injuries were causally related but does not address defendants' expert's finding that these injuries were degenerative in nature (*see McMahon v Negron*, 186 AD3d 593, 593 [2d Dept 2020]).

In her opposition, Plaintiff submitted a narrative report from Dr. Han, in which he summarized the results of physical examinations conducted on January 23, 2020 and June 27, 2023. The report states that Dr. Han measured Plaintiff's ranges of motion using a goniometer and found limitations in the cervical and lumbar spine on both dates.[6] In addition, Dr. Han causally related Plaintiff's injuries to the subject accident. In his report, however, Dr. Han did not address Defendants' medical evidence demonstrating that the injuries were degenerative in nature or

[5] NYSCEF Doc No. 32. Dr. Berkowitz also opined that the x-ray of the cervical spine was unremarkable and there was no evidence of acute traumatic injury (NYSCEF Doc No. 30, at 13).

[6] Based on his recent examination of Plaintiff, Dr. Han found the following: **Cervical Spine** flexion: 40° (normal 45°), extension: 40° (normal 45°), lateral flexion R/L: both 35° (normal 45°) and rotation R/L: both 50° (normal 60°); **Lumbar Spine** flexion: 70° (normal 90°), extension: 25° (normal 30°), lateral flexion R/L: both 30° (normal 45°) and rotation R/L: both 20° (normal 30°) (NYSCEF Doc No. 42, at 4-5).

explain why these degenerative conditions could not have caused Plaintiff's alleged injuries (*Tamar v Allstate Dismantling Corp.*, 218 AD3d 515, 516 [2d Dept 2023]; *Amirova v JND Trans, Inc.*, 206 AD3d 601, 602 [2d Dept 2022]; *Bonilla v Bathily*, 177 AD3d 407, 408 [1st Dept 2019]). This renders Dr. Han's conclusions as to causation as speculative and insufficient to raise a triable issue of fact (*Zavala v Zizzo*, 172 AD3d 793, 794 [2d Dept 2019]; *Franklin v Gareyua*, 136 AD3d 464, 466 [1st Dept 2016], *affd* 29 NY3d 925 [2017]).

The Court will next address the 90/180 category of Plaintiff's claim. Under this category, a "serious injury" is defined as a plaintiff's inability to "perform[] substantially all of the material acts which constitute [his or her] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the [accident]" (Insurance Law 5102 [d]). Therefore, a plaintiff's current condition has no bearing on whether he or she was unable to carry out her normal and customary activities during the statutory period. Moreover, a plaintiff's self-serving statement or testimony claiming an inability to engage in customary daily activities will not suffice (*Ryan v Xuda*, 243 AD2d 457, 457-458 [2d Dept 1997]). Instead, there must be objective evidence of a medically imposed limitation (*id.*; *Jones*, 147 AD3d at 1280-1281 [3d Dept 2017]). This limitation must have "curtailed [plaintiff] from performing [her] usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

Here, it is undisputed that Plaintiff was not confined to her bed or home for any significant amount of time, much less 90 days.[7] Plaintiff further testified that she only missed two days from work.[8] Moreover, Plaintiff responded "no" when asked if there were any activities that she used to do pre-accident that she could no longer do post-accident.[9] Thus, Defendants demonstrated, prima facie, that Plaintiff did not sustain a serious injury under the 90/180 category. In opposition, Plaintiff failed to raise a triable issue of fact. Though Plaintiff later testified that she could not run anymore and could not perform some of her duties caring for her father and was limited at work,[10] the only support proffered by Plaintiff is her own testimony of limitations. Plaintiff's subjective

[7] There is conflicting evidence as to the length of Plaintiff's confinement. In her Bill of Particulars, Plaintiff claimed to have been confined to her bed or home from May 14 to May 15, 2019 (NYSCEF Doc No. 23, ¶ 12). However, at her deposition, Plaintiff denied being confined to her bed or home after the accident (Plaintiff tr at 122, lines 9-20).
[8] Plaintiff tr at 33, lines 10-15.
[9] *Id.* at 122, lines 21-25.
[10] *Id.* at 123, line 16. Plaintiff further cited to her testimony, in which she stated that she "now [] can't work in that place anymore" (*id.* at 123, lines 22-23) and "the pace was just too fast for me again, with the work load and my back, so I couldn't and I left" (*id.* at 125, lines 12-14). The Court notes that this second quote came after she was asked about looking for a job once pandemic restrictions were lifted, which undoubtedly came after the 180-day period following the accident.

description of her injuries are insufficient to make out a 90/180-day claim. Even if the Court were to consider Plaintiff's testimony, the Court finds her self-described limitations do not establish that she was prevented from performing "substantially all" of her usual activities for 90 out of the 180 days following the accident (*Perl v Meher*, 18 NY3d 208, 220 [2011]). Accordingly, Defendants are entitled to dismissal of Plaintiff's 90/180-day claim.

Accordingly, it is hereby

ORDERED, that the Defendants' motion (Mot. Seq. No. 1) is granted and Plaintiff's complaint is dismissed.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice