

Lowe v Nbohn

2013 NY Slip Op 33956(U)

August 26, 2013

Supreme Court, Bronx County

Docket Number: 310505/2011

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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NICOLA LOWE,

Plaintiff,

- against -

NAKPANE NBOHN and JUNITO AUTO CORP.,

Defendants.

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DECISION AND ORDER

Index No. 310505/2011

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated May 3, 2013 and the affirmation, affirmed reports, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated August 8, 2013 and the affirmations and exhibits annexed thereto; defendants' reply affirmation dated August 13, 2013; and due deliberation; the court finds:

Plaintiff pedestrian commenced this action to recover damages for personal injuries sustained when she was struck by defendants' motor vehicle on August 12, 2011 at the intersection of Broadway and Moylan Place, New York County. Defendants now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff alleges in her verified bill of particulars to have sustained disc bulges at C3-C4, C4-C5, C5-C6, L2-L3, L3-L4, L4-L5 and L5-S1; cervical and lumbar spine radiculopathy; internal derangement and small talonavicular spurs in the right ankle; and post-traumatic nervousness and anxiety. She has been confined to her home since the date of the accident. Plaintiff claims her injuries fall into the categories of fracture; 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; and 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 ("90/180").

In support of the application, defendants proffer the affirmed reports of orthopedic surgeon Lisa Nason, M.D. and neurologist Jean-Robert Desrouleaux, M.D., who examined plaintiff on July 23 and July 16, 2012, respectively, and radiologist Audrey Eisenstadt, M.D. Dr. Nason reported finding normal ranges of motion of the spine and right ankle. Additional objective tests yielded negative results. She opined that plaintiff's injuries had resolved without evidence of residuals or permanency. Dr. Desrouleaux observed full ranges of motion of the spine and additional objective tests yielded negative results. He opined that plaintiff's spine injury had resolved without permanence or residual effect. Dr. Eisenstadt reviewed the MRI studies of plaintiff's spine taken twelve days after the accident. The cervical spine MRI revealed a normal study. The lumbar spine MRI revealed disc degeneration and a disc bulge at L5-S1 which she opined was degenerative in origin and predated the accident. Plaintiff's deposition testimony reveals that at the time of the accident, she was working part-time as a security guard. Other than attending appointments and physical therapy, she missed no time from work. She met with a psychologist only once. Defendants have demonstrated that plaintiff did not sustain a serious injury within the meaning of the Insurance Law. *See Santana v. Tic-Tak Limo Corp.*, 106 A.D.3d 572, 966 N.Y.S.2d 30 (1st Dep't 2013); *Malupa v. Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 (1st Dep't 2013).

Plaintiff in opposition submits affirmations from physician David D. Delman, M.D., radiologist Robert Diamond, M.D., and neuropsychologist C.E. Robins, S.T.D., Ph.D. The affirmation from Dr. Robins is not in admissible form. *See CPLR 2106; Vailes v. Sukhraj*, 2011 N.Y. Misc. LEXIS 6101 (Sup. Ct. Nassau County Dec. 14, 2011). Dr. Delman began treating plaintiff on August 23, 2011 and

reported observing range of motion limitations of the spine and right ankle. He recommended MRI tests on those areas, which Dr. Diamond performed on August 24 and August 26, 2011. The imaging studies revealed disc bulges in the spine and talonavicular spurs in the right ankle. An EMG test performed on October 31, 2011 was positive for right L5 radiculopathy. Dr. Delman also recorded range of motion limitations during three examinations performed between August 23 and January 3, 2012, the date Dr. Delman opined that plaintiff had reached maximum medical improvement. Dr. Delman last examined plaintiff on July 16, 2013 and reported observing limited ranges of motion of the cervical and lumbar spine and right ankle. Although Dr. Diamond gave no opinion as to causation, *see Valdez v. Benjamin*, 101 A.D.3d 622, 957 N.Y.S.2d 325 (1st Dep't 2012), Dr. Delman opined that the conditions revealed on the MRIs were caused by the accident, not degeneration. His opinion as to causation is entitled to equal weight. *See Lee Yuen v. Arka Memory Cab Corp.*, 80 A.D.3d 481, 915 N.Y.S.2d 529 (1st Dep't 2011)

Plaintiff's submissions are sufficient to raise a triable issue of fact in the "permanent consequential" and "significant limitation of use" categories. *See Bonilla v. Abdullah*, 90 A.D.3d 466, 933 N.Y.S.2d 682 (1st Dep't 2011). Plaintiff, though, has submitted insufficient evidence to demonstrate she suffered a total loss of use or a fracture. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001); *Torres v. Dwyer*, 84 A.D.3d 626, 923 N.Y.S.2d 512 (1st Dep't 2011). Dismissal of the 90/180 claim is also warranted given her admission that she missed no time from work except to attend appointments. *See Idemudia v. Fields*, 105 A.D.3d 589, 963 N.Y.S.2d 245 (1st Dep't 2013).

Accordingly, it is

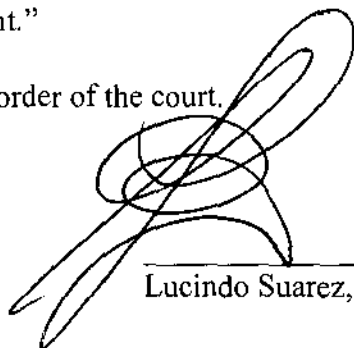
ORDERED, that the motion of defendants Nakpane Nbohn and Junito Auto Corp. for summary judgment is granted to the extent of dismissing plaintiff's claim of serious injury in the categories of "fracture," "a permanent loss of use of a body organ, member, function or system," and "a medically

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"; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants Nakpane Nbohn and Junito Auto Corp. dismissing plaintiff's claim of serious injury in the categories of "fracture," "a permanent loss of use of a body organ, member, function or system," and "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."

This constitutes the decision and order of the court.

Dated: August 26, 2013



Lucindo Suarez, J.S.C.