

Walton v Castillo

2015 NY Slip Op 30839(U)

April 1, 2015

Supreme Court, Bronx County

Docket Number: 306915/2012

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.

ST. MGX
3/180 Day Claim
Dismissed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X
KIM WALTON,

Index No: 306915/2012

Plaintiff(s)

-against-

DECISION AND ORDER

DAMASO J. CASTILLO,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendant(s) X

The following papers numbered 1 to 3 read on this motion for summary Judgment

No	On Calendar of January 27, 2015	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1</u>
	Answering Affidavit and Exhibits-----	<u>2</u>
	Replying Affidavit and Exhibits-----	<u>3</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

This action arose as a result of personal injuries sustained by plaintiff, Kim Walton (hereinafter, "Walton") as a result of a motor vehicle accident which occurred on July 24, 2011. Defendant moves for summary judgment dismissing this action, contending that Walton cannot establish that she sustained serious injury as that term is defined in Insurance Law §5102(d).

The initial burden on a threshold motion is upon the defendant to present evidence establishing that plaintiff has not sustained a serious injury and therefore has no cause of action. It is only when defendant's initial burden is met that plaintiff would be required to establish *prima facie* that a serious injury had been sustained within the meaning of Insurance Law § 5102(d). (*Pommells v Perez*, 4 N.Y.3d 566, 574 [1st Dept 2005]).

Defendants offer, in part, as proof of the absence of serious injury to plaintiff the affirmation of Marianna Golden, M.D. a neurologist, Jessica F. Berkowitz, M.D. a radiologist,

and Frank D. Oliveto, M.D., an orthopedic surgeon. The evaluations performed by the aforementioned physicians were performed at the request of defendants.

As a result of Dr. Golden's physical examination of plaintiff on November 12, 2013, Dr. Golden diagnosed plaintiff with a cervical and lumbar sprain that had resolved. Dr. Golden found that plaintiff had normal range of motion of the cervical and lumbar spine. Dr. Golden opined that Walton had a normal neurological examination.

Dr. Berkowitz diagnosed Walton with a minimal disc bulge at C5-6 that is chronic and degenerative. Dr. Berkowitz opined that there is no causal relationship between Walton's vehicular accident and the radiologic findings.

As a result of Dr. Oliveto's physical examination of plaintiff on November 12, 2012, Dr. Oliveto diagnosed Walton with cervical, thoracic and lumbar injury that had resolved along with a resolved elbow sprain. Dr. Oliveto opined that there was no causal relationship between the plaintiff's accident and plaintiff's reported symptomatology.

"The medial affirmations...submitted by defendants...satisfied these movants' initial burden of showing the alleged soft tissue injuries suffered by plaintiff Uddin did not constitute a serious injury" as defined by Insurance Law § 5102(d). The findings of these physicians were based on their personal examinations of [plaintiff] and the unremarkable findings from relevant range-of-motion, sensory and other tests they conducted. [The] physicians concluded in their reports that there was no objective evidence of disability or need for further medical treatment and/or testing." (Uddin v. Cooper, 32 A.D.3d 270, 270-271 [1st Dept 2006]).

Plaintiff submits, in part, in support of her claim of serious injury the affirmation of Delys St. Hill M.D., plaintiff's treating physician. Dr. St. Hill affirms that Walton has herniated discs in her C2-C6 intervertebral levels as a result of MRI study. During Walton's initial visit on

July 25, 2011, Dr. St. Hill found measured significant restrictions in Walton's cervical spine including a 50% reduction in cervical flexion, 60% reduction in cervical extension, a 50% reduction in left and right lateral flexion and a 50% reduction in Left and right rotation at Walton's initial visit. In the most recent testing in November of 2014, Dr. St. Hill continued to find significant deficits in cervical range of motion including a 33% reduction in flexion, 30% reduction in extension, 38% reduction in left and right lateral flexion, 25% reduction in left and right rotation.

Defendant['s] ... examining physicians found that plaintiff ... continued to have significant restrictions in motion, evidenced by range-of-motion calculations, approximately two years after the accident. These findings alone raise an issue of fact as to whether [plaintiff] suffered a significant limitation of a body function or system, and refute the physicians' statements that Joseph's examinations revealed no significant limitation or disability (*McDowall v Abreu*, 11 AD3d 590 [2004]; see also *Thorner v Latture*, 11 AD3d 448 [2004]).

(*Servones v Toribio*, 20 A.D.3d 330 [1st 2005]).

With respect to Permanent Consequential, Dr. St. Hill has affirmed that the injuries sustained in this accident were permanent, which is supported by the continuing significant reduction in range of motion that has persisted despite significant treatment.

With respect to 90/180, Walton testified that she did not miss any days of work.

(Transcript p. 42).

As a point of comparison, where evidence shows, for example, that the plaintiff actually returned to work within the first 90 days after the accident, it is proper to dismiss 90/180 claims (see e.g. *Byong Yol Yi v Canela*, 70 AD3d 584 [2010]; *Brantley v New York City Tr. Auth.*, 48 AD3d 313 [2008]), since the ability to return to work may be said to support a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities. But the ability to leave the house, without more, does not similarly support any such inference.

(*Correa v Saifuddin*, 95 A.D.3d 407, 409 [1st Dept 2012]).

Accordingly, defendant's motion is granted to the extent that plaintiff's 90/180 claim is dismissed.

The foregoing shall constitute the decision, and order of the Court.

Dated: APR 01 2015



KENNETH L. THOMPSON JR. J.S.C.