

Jones v Shabayev

2017 NY Slip Op 30366(U)

February 24, 2017

Supreme Court, Kings County

Docket Number: 507799/2014

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of February, 2017

P R E S E N T :

HON. DEBRA SILBER,

Justice.

_____ X

LORI JONES,

Plaintiff,

-against-

**ANATOLIY SHABAYEV, MILAR HOLDINGS
LLC and ELIZABETH L. NARVAEZ-HASSAN,**

Defendants.

_____ X

DECISION / ORDER

**Index No. 507799/2014
Mot. Seq. # 4 & 5
Cal. # 27 & 28
Date Submitted: 1/5/17**

Papers numbered 1 to 20 were read on these motions:

Papers Numbered:

Notice of Motion/Order to Show Cause/Exhibits _____

1-8, 9-12

Affirmation in Opposition/Exhibits _____

13-19

Reply Affirmation/Exhibits _____

20

Defendants Milar Holdings LLC and Anatoliy Shabayev move for summary judgment and dismissal of plaintiff Lori Jones' action, pursuant to CPLR Rule 3212, on the grounds that plaintiff has failed to sustain a "serious injury," pursuant to Insurance Law § 5102(d). Defendant Elizabeth Narvaez-Hassan cross-moves for the same relief. Movants have made a *prima facie* case with objective medical evidence with regard to the following categories of injury:

- a permanent consequential limitation of use of a body organ or member.
- a significant limitation of use of a body function or system.
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident.

As regard the categories of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," the court notes that, although the affirmation of defendants' independent orthopedist, Dr. Barbara Freeman, shows restrictions in plaintiff's range of motion, the affirmation also explains Dr. Freeman's conclusion that the limitations are from plaintiff's pre-existing and/or degenerative condition.

As regards the category of "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident," defendants provide an affirmation from defendants' Independent Trauma Expert, Dr. Ronald A. Paynter, who is board certified in emergency medicine. He reviewed the plaintiff's emergency room records, the police accident report, the plaintiff's bill of particulars and the ambulance call report. He did

not examine the plaintiff. After an extensive description of the ER records, Dr. Paynter concludes that the ER records are inconsistent with the injuries alleged in plaintiff's Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident. While a novel approach to making a prima facie case for dismissal under this category of injury, the court finds his affirmation to be sufficient in this regard. See *Poorun v Decosa Enterprises, Inc.*, 2014 NY Slip Op 33343(U) [Sup Ct Queens Co].

Plaintiff Lori Jones, in opposition, has presented objective medical findings which demonstrate that she sustained a "serious injury" pursuant to Insurance Law § 5102(d) with regard to the following categories of injury:

- a permanent consequential limitation of use of a body organ or member.
- a significant limitation of use of a body function or system.
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Plaintiff Lori Jones has thus overcome the motion and demonstrated that she has sustained a "serious injury" pursuant to Insurance Law § 5102(d) with regard to the categories "a permanent consequential limitation of use of a body organ or member" and a significant limitation of use of a body function or system, and defendants' motions are denied with regard to those categories of injury.

Plaintiff has also presented objective medical evidence which overcomes the defendants' motions with regard to the category "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days

during the 180 days immediately following the accident.” Specifically, the affirmations of her treating physicians provide medical evidence that she did not return to work for more than four months following the accident on the advice of her treating doctors. As such, defendants’ motions are denied in their entirety.

This constitutes the decision and order of the court.

ENTER:



Hon. Debra Silber, J.S.C.