

**Joaquin v NYLL Mgt. Ltd.**

2017 NY Slip Op 30374(U)

January 3, 2017

Supreme Court, Bronx County

Docket Number: 21425/13

Judge: Howard H. Sherman

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

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**Jeanette Joaquin and Violetta Difo De Espinal,**

Decision and Order

Index No.: 21425/13

*Plaintiffs,*

-against-

**NYLL Management LTD., Epifanio Aquino and  
Siddek Alhumadi.**

*Defendants*

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**Epifanio Aquino ,**

*Third-Party Plaintiff*

-against-

**Saddek Alhumadi.,**

*Third-Party Defendant*

**Howard H. Sherman**

JSC

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Facts and Procedural Background

Plaintiffs seek damages for injuries allegedly sustained on July 19, 2011 in a two-vehicle collision that occurred at or near the intersection of Walton Avenue and East 181<sup>st</sup> Street, Bronx, New York.

The Note of Issue was filed on November 24, 2014.

Plaintiff **Jeanette Joaquin** ("Joaquin") alleges that as a result of the motor vehicle accident she sustained injuries to her left knee and right shoulder necessitating arthorscopic surgery, respectively, four and seven months later, and which caused permanent limited range of motion of these areas, and injuries to the cervical and lumbar spine that resulted in permanent restrictions in the range of motion of each spinal area [Verified Bill of Particulars

¶ 5].

Plaintiff **Violetta Difo De Espinal** (“ **Difo** ”) alleges that as a result of the motor vehicle accident she sustained injuries to her left shoulder necessitating arthoscopic surgery four months later, and causing permanent limitations of the shoulder’s range of motion, as well as serious injuries to both the right shoulder, and lumbar spine [Verified Bill of Particulars ¶ 5].

The injuries sustained by both plaintiffs are alleged to qualify as “ serious ” as defined as : 1) a permanent consequential limitation of use of a body organ or member, and/or 2) a significant limitation of use of a body function or system, and/or 3) a medically determined injury or impairment which prevented plaintiffs from performing all of the material acts which constitute their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident .

In addition , with respect to Difo , it is alleged that the injuries qualify in the “permanent loss of use ” category.

**Motion/Cross-Motion**

Defendant Siddel Alhumadi (Alhumadi) now moves for summary judgment dismissing the complaint based on the failure of either plaintiff to have sustained an accident-related serious injury within the meaning of Insurance Law § 5102(d). Co-defendants NYLL Management Ltd., and Efifanio Aquino cross-move for the same relief.

In support, Alhumadi comes forward with affirmed reports of independent medical

evaluations conducted by Arnold T. Berman , M.D., , a board- certified orthopedist, and Jessica Berkowitz, M.D., a board-certified radiologist [Exhibits K-M], and excerpts of the plaintiffs' deposition testimony [Exhibits N.O].

Co-defendants come forward with the affirmed reports of independent medical evaluations conducted by Marc P. Kanter, , M.D., , a board- certified emergency medicine physician, and John H. Buckner, M.D., a board-certified orthopedist [Exhibits A,B].

Plaintiffs oppose the motion and cross-motion in separate affirmations submitting copies of contemporaneous and recent medical reports.

Medical Evidence in Support

Joaquin

Upon examination on June 5, 2014, with the use of a goniometer, Dr. **Berman** [Exhibit J] found full range of motion in every plane of the cervical and thoracolumbar spine, and in both shoulders, and knees, as quantified and compared to normal readings. Upon negative findings on a series of objective tests, and a review of the contemporaneous medical records, he concluded that the accident-related sprains/strains of the cervical and lumbar spine, and the left knee contusion , had resolved without residuals, and that the operative procedures for the left knee and right shoulder were unrelated to the motor vehicle accident, and consistent with the findings of pre-existing degenerative joint disease evidenced in the contemporaneous films.

Dr. **Berkowitz** [Exhibit K] reviewed the contemporaneous MRI studies of the lumbar spine , and the right shoulder, and left knee, and concluded that the 08/31/11 lumbar spine films were "unremarkable" and exhibited no evidence of acute traumatic injury. The right

shoulder MRI of 12/15/11 was found to reveal no joint effusion , nor areas of signal intensity nor a rotator cuff tear, or any other evidence of acute traumatic injury.

Dr. Berkowitz noted that her findings with respect to each MRI were in disagreement with those of the radiologist conducting the contemporaneous studies.

Dr. **Kanter** [Exhibit A, Cross-Motion] reviewed the emergency treatment records and concluded within a reasonable degree of medical certainty that there was no indication that plaintiff sustained any significant injury as a result of the motor vehicle accident, other than a cervical muscle strain . He also found the injuries asserted in the bill of particulars to be “inconsistent with the initial presentation and the documentation in the medical records.”

Difo

Dr. **Berman** [Exhibit L], found full range of motion in every plane of the cervical and thoracolumbar spine , and in both shoulders, as quantified and compared to normal readings. After a series of objective tests, and a review of the contemporaneous medical records, he concluded that any accident-related strains of the lumbar spine and the right shoulder, and the derangement of the left shoulder had resolved without residuals. Upon review of the MRI studies of the left shoulder, Dr. Berman concluded that the partial thickness bursal surface tear and tendinitis exhibited in the contemporaneous study “did require arthroscopic surgical treatment on 11/16/2011 ” and there was no “aggravation of a preexisting condition.”

Plaintiff presented for examination by **Dr. Buckner** on June 23, 2014, with complaints of left shoulder and arm pain and difficulty lifting and moving that arm. Upon clinical evaluation including a series of objective tests and range of motion measurements with a

standard goniometer, and a review of the contemporaneous medical records, he concluded that plaintiff did not sustain any serious accident-related injury. Dr. Buckner opined to a reasonable degree of medical certainty that the examination was "normal" with the exception of the healed arthroscopic incisions and a suggestion of a congenital/developmental scoliosis. With respect to the left shoulder surgery, Dr. Buckner concluded that neither the contemporaneous films nor the operative report incorporated findings consistent with a recent trauma-related injury.

Depositions

Joaquin testified that she was confined to bed for a month and to home for a month and a week after the accident [82], and Difo testified that she was not restricted to bed or to home after the accident [52-53], but after the surgery she stayed home for a month [53].

Discussion and Conclusions

Joaquin

Upon consideration of the moving papers, as afforded all favorable inferences in favor of the non-moving plaintiff, the court finds that defendants have sustained their initial burden by coming forward with probative medical evidence of the lack of acute traumatic injury exhibited in the emergency treatment records and the contemporaneous diagnostic studies, as well as a series of negative findings upon recent orthopedic examination, including full range of motion in all planes of the areas alleged to have been affected. With respect to the remaining category asserted, the court finds that plaintiff's testimony concerning her return to work for a four to five month period one or two weeks post-accident, and of the lack of any medical directive to refrain from working at the hair salon [88-90], supports a finding

that defendant have also made a sufficient prima facie showing of the lack of a 90/180 claim here.

In opposition to this showing, plaintiff comes forward with the affirmed "narrative evaluation" of orthopedist Raz Winiarsky, M.D., [Exhibit A], who conducted an examination of plaintiff on March 15, 2015, and reviewed the contemporaneous treatment and operative reports [7/25/11 - 02/01/12], and diagnostic studies.

Based on the history provided and these medical records, and his findings on examination, Dr. Winiarsky opined to within a reasonable degree of medical certainty, that plaintiff sustained a permanent, partial, and significant loss of function of the low back, left shoulder<sup>1</sup>, and left knee causally related to the accident. He noted that plaintiff was asymptomatic prior to the accident, and symptomatic ever since, and concludes that she will require continued orthopedic and pain management follow-up.

Also submitted are the reports of the MRI studies of the right shoulder and the left knee, and the 11/09/11 and the 02/01/12 operative reports, which, though unaffirmed, are admissible as having been relied upon by defendant's experts in making their assessments. Notably, the latter reports confirm the existence of a partial medial meniscal tear of the left knee, and a partial tear of the supraspinatus tendon, and a labral tear of the right shoulder found in the contemporaneous reports disputed by Dr. Berkowitz. The remaining medical reports attributable to North Jersey Ambulatory Surgical Center are not tendered in

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<sup>1</sup> It is clear that the physical examination conducted was limited to the *right* [emphasis added] shoulder, and not the left, and that the findings were made with respect to that shoulder.

admissible form.

While the probative value of the examining physician's report is significantly diminished by the failure to tender in admissible form, the contemporaneous treatment records on which he relied, it is submitted that as afforded all favorable inferences, Dr. Winiarsky's report and the contemporaneous diagnostic and operative reports are sufficient to raise a triable issue of fact that plaintiff sustained accident-related serious injuries of the left knee and right shoulder as defined in the "significant" and "permanent consequential" loss of use categories.

Plaintiff fails to come forward with medical proof to raise an issue of fact of a serious injury in the 90/180 category.

**Difo**

Upon consideration of the record here, the court finds that there is no material issue of fact that plaintiff sustained a "total" loss of use of shoulder or of the lumbar spine sufficient to support the claim of serious injury in the permanent loss of use category (see, *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457 [2001]).

Based upon the findings of defendants' orthopedic experts on recent examinations, including full range of motion in all planes of the shoulders, and the lumbar spine, the court finds that defendants have met their prima facie burden to demonstrate as a matter of law the lack of serious injury in the "permanent consequential loss of use category", and in reliance on plaintiff's testimony concerning the lack of any post-accident confinement

[52-53], the 90/180 category.

However, the court also finds that defendants have failed to meet their initial burden with respect to the significant limitation of use category by failing to demonstrate as a matter of law that a tear of the left shoulder, which was surgically repaired nearly four months after the accident, was not causally related to the motor vehicle accident.

Dr. Berman found that the 08/18/11 MRI of the left shoulder demonstrated a bursal surface tear requiring surgical intervention, and he concluded that this condition was not an exacerbation of a preexisting condition. By implicitly raising a causal connection to the motor vehicle accident, he disputes Dr. Buckner's finding of an atraumatic etiology of that bursal tear.

In opposition, plaintiff submits the affirmation of Steven Touliopoulos, M.D., who examined Difo for the first time on December 30, 2014, and reviewed the contemporaneous medical records. Dr. Touliopoulos found restrictions in the range of motion of the left shoulder ranging from 22% to 44%: forward flexion (140 degrees, 180 degrees, normal); abduction (130 degrees, 180 degrees, normal), and external rotation (40 degrees, 90 degrees, normal). Hawkins and Neer's impingement signs produced discomfort, and rotator cuff strength was found to be "mildly" diminished in all planes. He opined to a reasonable degree of medical certainty that plaintiff had "an overall permanent partial disability with respect to her extremity injury" that he causally relates to the motor vehicle accident. Despite the fact that the probative value of the report is negatively impacted by the failure to submit

admissible copies of the treatment reports relied upon , it is sufficient to raise an issue of fact as to whether nearly three and one-half years post-accident , and more than three years after surgery, there were continuing limitations of the range of motion of plaintiff's left shoulder .

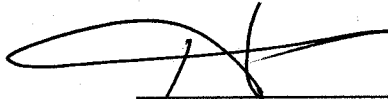
Plaintiff comes forward with no probative contemporaneous medical record to raise an issue of fact with respect to a 90/180 claim , the treating physician's checking of the "patient instructed of certain limitation to his/her activities" box , without more, being insufficient for such purpose.

Accordingly, it is

ORDERED that the motion and the cross-motion be and hereby are granted to the extent of awarding summary judgment in favor of defendants dismissing all claims of serious injury as against each plaintiff with the exception of those asserted in the "significant" and "permanent consequential " loss of use categories.

This shall constitute the decision and order of this court .

1/3/17  
~~December 31, 2016~~

  
Howard H. Sherman