Hogan v Mahabir
2017 NY Slip Op 30763(U)
March 13, 2017
Supreme Court, Bronx County
Docket Number: 304006/14
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

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Florence Hogan *Decision and Order*

Plaintiff

-against- Index No. 304006/14

Lisa Mahabir, Lalla Mahabir,
Kougue Badiaga and **Bamako Express, Inc.**,

Defendants Howard H. Sherman

---x *J.S.C.*

The following papers numbered 1-4 read on this motion and cross-motion by Defendants for summary judgment dismissing the complaint submitted after oral argument on March 13, 2017

Notice of Motion - Affirmation , Exhibits A-I	1
Notice of Cross-Motion , Affirmation , Exhibits A,B	2
Affirmation in Opposition , Exhibits A-D	3
Affirmation in Reply	4

Upon the foregoing papers , and oral argument this date, the motion and cross-motion are granted to the extent set forth below.

Upon consideration of the papers on submission, and the oral argument this date, the court finds that the moving and the cross-moving defendants have met their prima facie burden to demonstrate as a matter of law that plaintiff did not sustain an accident-related serious injury in the three categories asserted .

Defendants submit expert reports of an orthopedist and neurologist, who found exclusively negative results on a series of objective tests, and full range of motion in the cervical and lumbosacral spine, and in the right shoulder , and left hip, and knee, and ankle, and, who each opined that the alleged injuries to these

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areas as well as any contusion to the chest , had resolved . Defendants also come forward with the affirmed report of a dentist who examined plaintiff and concluded that plaintiff has no TMJ condition. The affirmed report of a board-certified radiologist includes findings of preexisting multilevel degenerative conditions in the contemporaneous MRI studies of plaintiff's cervical and lumbar spine , and her right shoulder evidenced there as AC joint degeneration . He also found no evidence of osseous or soft tissue injury that might have resulted from the accident, in any of these films (see Lee v. Lippman, 136 A.D.3d 411, 24 N.Y.S.3d 277 [1st Dept.2016]; Matos v. Urena, 128 A.D.3d 435, 10 N.Y.S.3d 6 [1st Dept.2015]). Also probative is the affirmed report of a board-certified emergency medicine physician who found that the contemporaneous emergency treatment records were inconsistent with the injuries alleged in the bill of particulars . Finally, defendants come forward with plaintiff's contemporaneous medical reports revealing within two months of the accident, plaintiff had full range of motion of the right shoulder, and hips and left knee and within four months post-accident, there was full range of motion in three of six planes of the cervical spine , and three of four planes of the lumbosacral.

In reliance on the contemporaneous medical records, and the radiologist's findings with respect to the MRI studies, and plaintiff's testimony concerning her return to work on a full shift within a week of the accident, and her ability to train for the marathon during the statutory period, the court finds that defendants also met their burden to prove as a matter of law, the lack of a 90/180 claim.

In opposition , plaintiff comes forward with no probative medical evidence to support a claim in the **permanent consequential loss of use** category as she did not submit objective evidence of permanent limitations based on a recent examination (see Zambrana v. Timothy, 95 A.D.3d 422, 422, 943 N.Y.S.2d 92 [1st Dept. 2012]), because chiropractor's report incorporating such findings is not properly before the court as it is affirmed and defendants object to its admissibility (see, Long v. Taida Orchids, Inc., 117 A.D.3d 624 [1st Dept.2014]).

Nor does plaintiff come forward with any probative evidence to support a claim of serious injury in the **90/180 category** as she has not shown that following the accident, any treating physician advised her not to engage in work or to significantly curtail her other activities , including training (see Pinkhasov v. Weaver, 57 A.D.3d 334, 869 N.Y.S.2d 445 [1st Dept.2008]).

With respect to the remaining category asserted, it is settled that "a significant limitation [of use of a body function or system] need not be permanent in order to constitute a serious injury" (Estrella v. Geico Ins. Co., 102 A.D.3d 730, 731, 959 N.Y.S.2d 210 [2d Dept. 2013] [internal quotations omitted]; see Partlow v. Meehan, 155 A.D.2d 647, 647, 548 N.Y.S.2d 239 [2d Dept. 1989]), and the lack of a recent examination, while sometimes relevant, is not dispositive by itself in determining whether a plaintiff has raised a triable issue of fact in opposing a defendant's prima facie evidence under the " significant limitation" of use category (see, Vasquez v. Almanzar, 107 A.D.3d 538, 967 N.Y.S.2d 361 [1st Dept.2013]).

Upon consideration of the affirmation of the treating physician , and the supporting contemporaneous reports, it is clear that the injuries to the hips, the right shoulder , and left knee, when clinically assessed six weeks post-accident , revealed no restrictions in range of motion , and by September 2014, the spinal areas revealed no tenderness on palpation, and all objective tests addressed to these areas were found to be negative. The prescription for physical therapy was reduced to once a week. No ROM testing for the cervical and lumbar spine was conducted after May 2014, i.e., 4 months post-accident, and at that time, the

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findings revealed significant restrictions in three of the six planes of the cervical spine, and in extension of the lumbar spine ,and a 33% restriction in rotation of the thoracic spine . On that exam, there were also positive findings on Compression and Distraction testing of the cervical spine . In June , epidural steroids were twice administered to the lumbar spine as prescribed by the treating physician, who opines within a reasonable degree of medical certainty that these injuries to the lumbar and cervical spine are causally related to the motor vehicle accident "based on [his] examinations, [his] review of all of [plaintiff's] diagnostic testing , including MRIs and EMG coupled with her complaints and symptomology including her restrictions in her ranges of motion[ ]", and are "consistent with the direct trauma of the spine as a result of being thrown forward and back upon impact . . ." [Affirmation of David Zelefsky, M.D.,¶ ¶ 18-20]. Dr. Zelefsky also notes that plaintiff reports " no history of any prior trauma to the affected areas." [18]

As afforded all favorable inferences, it is submitted this medical proof is sufficient to raise an issue of fact that plaintiff sustained an accident-related significant limitation of use of her cervical and/or lumbar spine.

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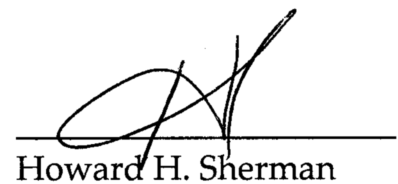
Accordingly, it is

ORDERED that the motion and the cross-motion be and hereby are granted to the extent of awarding summary judgment dismissing the claims of serious injury in all categories with the exception of "significant limitation of use."

This shall constitute the decision and order of this court.

Dated: March 13, 2017



Howard H. Sherman