

Goodman v Hopkins
2017 NY Slip Op 32046(U)
September 19, 2017
Supreme Court, Kings County
Docket Number: 502474/14
Judge: Debra Silber
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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 19th day of September, 2017

P R E S E N T :

HON. DEBRA SILBER,

Justice.

_____ X

SERRINA GOODMAN,

Plaintiff,

-against-

HAVANA HOPKINS, THERESA COLEMAN
and RAYMOND CHEN,

Defendants.

_____ X

DECISION / ORDER

Index No. 502474/14
Mot. Seq. # 9 & 11
Submitted: 8/17/17

Papers numbered 1 to 25 were read on these motions:

Papers Numbered:

Notices of Motion/Order to Show Cause/Exhibits_____

1-9, 10-12

Affirmation in Opposition/Exhibits_____

13-23

Reply Affirmation/Exhibits_____

24, 25

Defendants Havana Hopkins and Theresa Coleman move (Motion Seq. #9) for summary judgment and dismissal of plaintiff Serrina Goodman’s action, pursuant to

CPLR Rule 3212, on the grounds that plaintiff has failed to sustain a “serious injury,” pursuant to Insurance Law § 5102(d). Co-defendant Raymond Chen cross-moves (Motion Seq. #11) for the same relief.

These motions were both heard on August 17, 2017. On that date the court also heard two motions (Motion Seq. 8 & 10) on the issue of liability in the instant action and dismissed all claims and cross-claims as against defendants Havana Hopkins and Theresa Coleman. As such, their motion (#9) is denied as academic. Defendant Chen’s cross motion was submitted; decision was reserved.

The subject motor vehicle accident took place on May 28, 2013. Plaintiff’s Bill of Particulars alleges that she sustained injuries to her cervical and lumbar spine, right knee and left shoulder.

Movant Chen, relying on his papers and those of former defendants Hopkins and Coleman, has made a *prima facie* case with objective medical findings with regard to the following applicable 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; or
- ☒ 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

The defendant has thus met his *prima facie* burden of showing that the plaintiff Serrina Goodman did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Movant has made a *prima facie* case with regard to “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 plaintiff admits (at her EBT) to being confined to her bed for one day and confined to her home for one day following the accident. Moreover, she testified that she was able to return to work and perform her usual duties “a few days” after the accident.

Movant has also made a prima facie case for dismissal with regard to “a permanent consequential limitation of use of a body organ or member” and “a significant limitation of use of a body function or system. Defendants’ Independent Medical Examination from Dr. Dana Mannor, an orthopedic surgeon, dated January 26, 2017, indicates that plaintiff’s range of motion in her right knee was not normal, but neither was it normal in her left knee. He states that these abnormal findings are “consistent with body habitus,” meaning her weight. Dr. Mannor notes that his examination “reveals healed surgical portal. There is no heat, swelling, effusion, erythema, atrophy, deformity or crepitus noted. Non tender to palpation.” As regards the plaintiff’s right knee, his diagnosis is “status post right knee arthroscopic surgery in 2015 - healed by [date of] examination.” Dr. Mannor reviewed many of plaintiff’s medical records. He states she is morbidly obese. He conducted range of motion testing with a hand-held goniometer. He reports normal findings with regard to her neck, back and shoulder. Dr. Mannor concludes that plaintiff’s strains and sprains have resolved and that her right knee healed after the arthroscopic surgery.

At this juncture, the court must make two observations. First, plaintiff served her opposition papers in two installments, but none of the attorneys objected to this at oral argument. As movants in motion seq. #9 were dismissed from the case on liability, their

objection would be irrelevant, but in any event, their Reply affirmation was served after the second of the plaintiff's submissions. Movant Chen, in motion seq. #11, makes no mention of the fact that plaintiff's opposition was sent in two installments in his Reply affirmation, also mailed after both parts of plaintiff's opposition would have been received by counsel for Mr. Chen.

Second, plaintiff's counsel claims that the affirmation of Dr. Mannor must be disregarded as he failed to properly affirm to the truth of his IME report. Counsel is not correct in this regard. His affirmation "pursuant to CPLR 2106" is missing a few words, but is sufficient, as the omission is *de minimus*. (See *Singer v Rodriguez*, 2012 NY Slip Op 32147[U] [Sup Ct NY County 2012]).

Plaintiff, 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.

Dr. Matthew Wert provides an affirmation which certifies his treatment records of plaintiff, and states that he performed the surgery on her right knee. He is with Kings Physician's Services, PC, 263 Seventh Avenue, Brooklyn, NY. The records indicate that she first saw Dr. Wert on June 12, 2014, about a year after the accident, and he performed arthroscopic surgery on her right knee on December 16, 2015. The plaintiff's latest visit with him was a follow up visit on April 6, 2017. On that date, she

received her third Synvisc injection of 2017 to her right knee. To the extent he provides copies of other doctor's records, they are inadmissible and could not be considered.

Exhibit B is an affirmation from Dr. Boris Ripa, who states that he has been treating plaintiff for injuries to her neck, lower back, left shoulder and right knee, from this accident on May 28, 2013, since she first came to see him on May 31, 2013. He states that she stopped treatment when her no fault benefits ended, and at that time, her symptoms and condition had not resolved. From the records, it appears that she received physical therapy and chiropractic treatment until the end of August, 2013. He states that, to a reasonable degree of medical certainty, the plaintiff's injuries to her "neck, lower back, left shoulder and right knee are causally related to the motor vehicle accident of May 28, 2013." He attaches his office records.

Exhibit E is an affirmation from Dr. Mark McMahon dated June 13, 2017. He states that he has seen plaintiff over the years since her accident, and now that it has been four years since the accident, she has reached maximum medical benefit and remains impaired. He conducted range of motion testing of her right knee, left shoulder, neck and lower back on April 20, 2017. He found significant restrictions in her range of motion in all of these body parts. He concludes that the injuries are significant and permanent and were caused by the accident of May 28, 2013.

Plaintiff Serrina Goodman 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 thus defendant's motion is denied.

The evaluation of competing evidence (the battle of the experts) falls within the

province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. (See, *Dietrich v Puff Cab Corp.* 63 AD3d 778 [2d Dept 2009]; *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1st Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3rd Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2d Dept 1980]).

It must be noted that if a plaintiff overcomes the motion with regard to one or more applicable categories of injury in Insurance Law 5102(d), the court is not permitted to dismiss the plaintiff's claims with regard to any other categories. (See *Baulete v L&N Car Serv., Inc.*, 153 AD3d 896 [2d Dept 2017]).

Therefore, as plaintiff has overcome the motion and raised triable issues of fact, the motion is denied.

This constitutes the decision and order of the court.

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**