

Lawrence v Carrasquillo
2017 NY Slip Op 32194(U)
September 1, 2017
Supreme Court, Bronx County
Docket Number: 306227/2013
Judge: Elizabeth A. Taylor
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SEP 08 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2
ALICIA LAWRENCE,

Plaintiff,

Index No. 306227/2013

DECISION/ORDER

- against -

Present:
HON. ELIZABETH A. TAYLOR

VERONICA CARRASQUILLO, AMARA KROMAH,
and IMF ASSOCIATES, INC.,

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No ___ On Calendar of _____	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2, 3-4
Answering Affidavit and Exhibits-----	5-6
Replying Affidavit and Exhibits-----	7
Affidavit-----	_____
Pleadings -- Exhibit-----	_____
Stipulation -- Referee's Report --Minutes-----	_____
Filed papers-----	_____

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

Motion pursuant to CPLR 3212 for an order dismissing the complaint against defendants Amara Kromah and IMF Associates, Inc., on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law §5102 (d), is denied.

Cross-motion pursuant to CPLR 3212 for an order dismissing the complaint against defendant Veronica Carrasquillo, on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law §5102 (d), is denied.

Plaintiff commenced this personal injury action to recover damages for injuries, allegedly sustained in a motor vehicle accident that occurred on March 3, 2013. Plaintiff alleges to have suffered injuries to her left knee, left shoulder, left ankle, and cervical and lumbar spine. It is noted that plaintiff withdrew her lumbar injury claim pursuant to the stipulation dated August 6, 2015.

To prevail on a motion for summary judgment, movants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (see *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations from medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In the bill of particulars, plaintiff alleges "serious injuries" in the following categories: 1) "significant disfigurement;" 2) "fracture;" 3) "permanent consequential limitation of use of a body organ or member;" 4) "significant limitation of use of a body function or system;" and 5) "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." In the bill of particulars, plaintiff further alleges that after the accident, she was confined to bed for three months and has been confined to her home since the date of the accident.

In support of the motion, movants submit: 1) the Verified Bill of Particulars; 2) plaintiff's deposition transcript; 3) Dr. Mark Decker's affirmations; 4) Dr. John Buckner's; affirmation and 5) Dr. Walshon's affirmation. Dr. Walshon affirms that he is licensed to practice in the State of Connecticut. As Dr. Walshon does not affirm that he is also licensed to practice in this State, the affirmation does not constitute competent evidence (see CPLR 2106 [a]; *Lieber v City of New York*, 94 AD3d 715, 716 [2d Dept 2012] [Court held affirmation from a physician who was not authorized by law to practice in New York was inadmissible]). It is noted that Dr. Walshon did not examine the plaintiff,

but, merely reviewed medical records and concludes that plaintiff did not suffer an injury causally related to the accident.

On September 15, 2014, Dr. Buckner conducted an orthopaedic examination of the plaintiff including range of motion testing of her left knee, left shoulder and cervical spine and concluded that there was normal range of motion. Although Dr. Buckner concluded that there was normal range of motion in said parts, he failed to set forth the normal ranges of motion. Additionally, Dr. Buckner affirms that he did not examine plaintiff's left ankle due to her recent surgery. Dr. Decker reviewed the May 6, 2013 MRI film of plaintiff's left shoulder found a superior labral tear of indeterminate age (see *Linton v Nawaz*, 62 AD3d 434, 436 [1st Dept 2009], *affd*, 14 NY3d 821 [2010]). Movants' doctors examined plaintiff well beyond the 90/180 day period.

Based upon the foregoing, this court finds that defendants have failed to meet their prima facie burden of demonstrating that plaintiff has not suffered a serious injury with respect to her left shoulder, left ankle and cervical spine.

With respect to the left knee claim, Dr. Decker reviewed the May 6, 2013 MRI of plaintiff's left knee and concluded that there was no evidence of traumatic injury and found degenerative changes not causally related to the accident. As a result, this court finds the foregoing sufficient to meet defendants' prima facie burden of establishing that plaintiff did not suffer a causally related permanent consequential or significant limitation with respect to her left knee (see *Hwang v Doe*, 144 AD3d 507 [1st Dept 2016] [court held that at trial, plaintiff could not recovery for right knee injury regardless of whether plaintiff established a serious injury with regard to his cervical and lumbar spine, as

plaintiff failed to raise an issue of fact as to whether he suffered a casually related injury to this right knee)).

To create an issue of fact for the alleged injury to the left knee, plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Perl v Mehis*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 353 [2002]).

In opposition, plaintiff submits the affirmations of: 1) Dr. Albert Ciancimino; and 2) Dr. David Newman. On March 13, 2013, approximately 10 days after the accident, Dr. Ciancimino examined the plaintiff and found that she suffered an injury to her left knee causally related to the accident. Thereafter, plaintiff underwent treatment of her left knee. On October 3, 2013, Dr. Newman performed surgery to plaintiffs' left knee and concludes that she suffered a causally related injury. On August 17, 2016, Dr. Newman examined plaintiff and conducted range of motion testing of her left knee. Dr. Newman found restriction in the range of motion and concluded that plaintiff suffered a permanent disability.

Based upon the foregoing, this court finds that plaintiff raises an issue of fact as to whether she suffered a permanent consequential limitation or a significant limitation of her left knee.

The foregoing shall constitute the decision and order of this court.

Dated: SEP 01 2017



A.J.S.C.