

Greenberg v Sheikm

2017 NY Slip Op 32330(U)

November 1, 2017

Supreme Court, New York County

Docket Number: 156481/2014

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ J.S.C. Justice

PART 22

GREENBERG, CARLY
-v-
SHEIKH, JAMIL

INDEX NO. 156481/2014
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

Defendants Jamil Sheikm and M&I Cab Corp.'s ("Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Carly Greenberg as a result of the February 10, 2013, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges she sustained injuries to, inter alia, bilateral ankles, bilateral knees, and cervical and lumbar spine. Plaintiff's complaint avers that her injuries meet the following Insurance Law § 5102 (d) criteria: Permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day.

Defendants' orthopedist, Dr. Lisa Nason, examined Plaintiff on May 7, 2015, and found normal ranges of motion for Plaintiff's cervical, thoracic (although injury to Plaintiff's thoracic spine was not alleged in her bill of particulars) and lumbar spine, bilateral knees and bilateral ankles and conducted other objective tests that were negative. Dr. Nason concludes that Plaintiff's alleged injuries to her cervical, (thoracic) and lumbar spine, bilateral knees and bilateral ankles are all resolved.

Defendants' neurologist, Dr. Jean-Robert Desrouleaux, also examined Plaintiff on May 7, 2015, and found normal ranges of motion for Plaintiff's cervical, thoracic and lumbar spine, and conducted other objective tests that were negative. Dr Desrouleaux concludes that Plaintiff's alleged injuries to the cervical, (thoracic) and lumbar spine, are all resolved.

Defendants' radiologist, Dr. Audrey Eisenstadt , reviewed an MRI's of Plaintiff's cervical (taken

Dated: NOV 01 2017 1015 J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

GREENBERG

-v-

SKELM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

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Upon the foregoing papers, it is ordered that this motion is

on April 24, 2013), thoracic (taken on April 7, 2013) and lumbar (taken on April 24, 2013) apine. Regarding Plaintiff's cervical spine Dr. Eisenstadt found degenerative disc disease and no evidence of an osseous contusion, disc herniation or an annular tear to indicate traumatic bony or intervertebral disc rupture causally related to the accident. Dr. Eisenstadt found the MRI's of Plaintiff's thoracic and lumbar spine to be unremarkable/normal.

Defendants annex to their moving papers the MRI findings of Plaintiff's left knee from Lenox Hill Radiology & Medical Imaging Associates dated April 25, 2013, "electronically signed by" John Himelfarb, MD. Dr. Himelfarb found a "small to moderate size joint effusion with a small popliteal cyst, anterior subcutaneous edema, subtle bone contusion/trabecular fracture involving the anterior, inferior, medial aspect of the patella [and] menisci ligaments intact."

Defendants' submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained serious injuries to her cervical spine and left knee. Dr. Nason concludes that Plaintiff's injury to her cervical spine is resolved but Dr. Eisenstadt concludes that Plaintiff's injuries to her cervical spine are the result of degeneration. While Dr. Nason concludes that Plaintiff's injuries to her knees is resolved, The MRI findings of Dr. Himelfarb dated April 25, 2013, conclude inter alia, that Plaintiff has a subtle bone contusion/trabecular fracture of her left patella. Dr. Nason did not review the April 25, 2013, MRI findings of Plaintiff's left knee. These contradictory findings concerning Plaintiff's cervical spine and left knee raise triable issues of fact for the jury to resolve (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306 [1st Dept 2008]).

Dated: NOV 01 2017

295

_____, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.

PRESENT: _____

Justice

PART _____

22

GREENBERG

-v-

SWEIKM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

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Upon the foregoing papers, it is ordered that this motion is

Defendants made a prima facie showing that Plaintiff did not sustain serious injuries to her right knee and bilateral ankles through the affirmation of Dr. Nason and that Plaintiff did not sustain a serious injury to her lumbar spine through both Dr. Nason and Dr. Desrouleaux's affirmations who both upon examination found normal ranges of motion and negative objective tests for Plaintiff's lumbar spine (*Fernandez v Hernandez*, 151 AD3d 581 [1st Dept June 20, 2017] [holding "[d]efendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident" through orthopedic surgeon's report "who found normal ranges of motion, negative objective test results, and resolved sprains, strains and contusions . . ."]).

Plaintiff raised a triable issue of fact as to whether she suffered a serious injury to her ankles and right knee through the affirmation of Dr. Robert Haar, who reviewed Plaintiff's medical records and examined her on July 13, 2016. Dr. Haar reports that Plaintiff "demonstrates tenderness along the anterolateral joint spaces from the anterior aspect of the fibula to the midpoint of the tibiotalar joint. Her range of motion is 30°/50° of plantar flexion [and] 10°/20° of dorsi flexion bilaterally. She has synovitis in the left ankle which has become chronic and requires surgical repair." Dr. Haar concludes that Plaintiff "sustained a permanent partial injury to both her ankles from the car accident on February 10, 2013." (*DaCosta v Gibbs*, 139 AD3d 487 [1st Dept 2016] [holding plaintiff raised a triable issue of fact through her physicians affidavits who found objective indication of injury and causation]). Regarding Plaintiff's knees Dr. Haar found that Plaintiff "continued to demonstrate medial joint line tenderness of both knees[,] [p]atellofemoral compression was positive [and] [s]he could not descend into a full squat." Dr. Haar concludes that the February 10, 2013 accident is the cause of Plaintiff's injuries

Dated: NOV 01 2017

395

_____, J.S.C.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

GREENBERG
-v-
SWEIKH

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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Upon the foregoing papers, it is ordered that this motion is

to her knees (*Id.*).

Plaintiff failed to raise a triable issue of fact as to whether she suffered a serious injury to her lumbar spine because Dr. Haar relied solely on the unsworn medical records of other doctors who treated Plaintiff (*Vargas v Ahmed*, 41 AD3d 328 [1st Dept 2007] [holding plaintiff failed to raise an issue of fact where his doctor did not examine him and relied on unsworn medical records to form his opinion). Nevertheless, if Plaintiff establishes she sustained a serious injury to either knee, either ankle or cervical spine, she will be entitled to recover for all her injuries, including to her lumbar spine (*Karounos v Doulalas*, 2017 NY Slip Op 06602 [1st Dept Sept. 26, 2017] [holding “[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold.”]).

Finally, Defendants met their prima facie burden as to Plaintiff’s 90/180-day claim by relying on her deposition testimony that she was confined to her bed for two weeks and that in the Spring of 2013 she was taking classes ever day (*Cf Fathi v Sodhi*, 146 AD3d 445 [1st Dept Jan 5, 2017]). In opposition,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOV 01 2017

495

_____, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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J.S.C.
Justice

PART 22

Index Number : 156481/2014
GREENBERG, CARLY
vs
SHEIKM, JAMIL
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
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Upon the foregoing papers, it is ordered that this motion is

Plaintiff failed to raise an issue of fact.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury to her lumbar spine; and it is further

ORDERED that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury under the 90/180-day category;

ORDERED that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury to her bilateral knees, bilateral ankles and cervical spine; and it is further

ORDERED that the parties are directed to appear for a settlement conference 80 Centre Street, Room 136 on December 12, 2017, at 9:30 AM.

This constitutes the Decision and Order of the Court.

Dated: 11/1/17
NOV 01 2017

595

 J.S.C.

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