

Angel v Bouslihim

2018 NY Slip Op 30059(U)

January 16, 2018

Supreme Court, New York County

Docket Number: 151343/2015

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PRESENT: _____
Justice

PART 22

ANGEL, NICOLE
-v-
BOUSLIHIM, SAM

INDEX NO. 151343/2015
MOTION DATE _____
MOTION SEQ. NO. 002

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 Sam Bouslihim and Dimitrios Mouroulis's ("Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Nicole Angel as a result of the October 3, 2014, motor vehicle incident 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 her right foot (tear of the lateral plantar plate attachment and synovitis). Plaintiff avers that her injuries meet the following Insurance Law § 5102 (d) criteria: a fracture; permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day.

Defendants met their prima facie burden that Plaintiff did not sustain a serious injury to her right foot through the affirmed report dated June 23, 2016, of their orthopedic surgeon, Dr. J. Serge Parisien who found normal ranges of motion and negative/normal test results for Plaintiff's right foot and concluded that her alleged injury to her foot was resolved (Cattouse v Smith, 146 AD3d 670 [1st Dept 2017]).

In opposition Plaintiff submits affirmations from two podiatrist. Defendants object arguing that a podiatrist is not authorized to affirm pursuant to CPLR 2106 because podiatrists are not medical doctors. However, Defendants cite no appellate authority in support of their argument and the Court found none. Without more evidence from movants on this issue, the Court is unable to find that podiatrists are not medical doctors and therefore, not permitted to affirm under CPLR 2106.

Plaintiff's podiatrists are Dr. Rock G. Positano and Dr. Erica Papatomas. Dr. Positano first examined Plaintiff on October 13, 2014 and he noted swelling of her right foot and impaired ranges of _____, J.S.C.

Dated: JAN 12 2018

10/4

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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

PRESENT: _____
Justice

PART 22

ANGEL
-v-
BOUSLIKIM

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

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

motion and diagnosed her with “sesamoiditis of the right foot and a plantar plate injury and neuroma.” Dr. Positano recommended ice and heat treatments and states Plaintiff was unable to tolerate physical therapy and/or massage treatments. He also recommended that Plaintiff continue wearing the boot she was given in the emergency room after the incident and continued to monitor her over the next two years. Dr. Positano notes that Plaintiff still cannot tolerate physical therapy and/or message treatments and that she no longer wears the boot but he ordered orthotics for her shoes that she continues to use with metatarsal pads for stabilization of her right foot. Dr. Positano concludes that Plaintiff’s “continuing edema, tenderness and difficulty performing certain activities are consistent with [her] injuries.”

Dr. Papathomas first saw Plaintiff on June 23, 2016, and states that Plaintiff told her that she had only resumed fifty percent of her normal activities. Dr. Papathomas noted that Plaintiff was using orthotics and metatarsal pads. Dr. Papathomas’s examination of Plaintiff’s right foot revealed edema with painful ranges of motion and she diagnosed a right foot contusion. Dr. Papathomas recommended elevation and cold and warm compresses in addition to the orthotics with metatarsal pads. Dr. Papathomas ordered an MRI and discussed surgery with Plaintiff and states Plaintiff opted to continue with conservative treatment at the time. Dr. Papathomas’s November 17, 2016, examination of Plaintiff revealed right foot edema with painful ranges of motion.

Plaintiff’s radiologist, Dr. John t. Rigney affirms that he reviewed an MRI of Plaintiff’s right foot taken on October 6, 2016, and it shows a partial tear of the plantar plate of the hallux laterally and synovitis and joint effusions of the metatarsophalangeal articulation of the hallux as well as the second through fifth digits and small neuromas of the second and third web space. Dr. Rigney concludes that Plaintiff’s right foot injuries are traumatic in nature and causally related to the October 3, 2014, incident.

Dated: _____, J.S.C.

JAN 12 2018

294

MOTION 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

HON. PAUL A. GOETZ

PRESENT: _____ J.S.C.
Justice

PART 22

ANGEL
-v-
BOWSLIKH

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) _____
Answering Affidavits — Exhibits _____ No(s) _____
Replying Affidavits _____ No(s) _____

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

Dr. Rigney further concludes that the plantar plate tear, joint effusions, synovitis and the neuromas, are serious, significant and permanent injuries to Plaintiff's musculoskeletal system.

Plaintiff also submits a December 16, 2014, affirmed report Dr. Joseph C. Cole who performed a physical medicine and rehabilitation/acupuncture examination. Dr. Cole notes that the examination of Plaintiff's right foot was limited because Plaintiff was wearing a surgical boot which she did not remove for the examination. Dr. Cole made no other observations concerning Plaintiff's right foot and diagnosed her with tear at the plantar aspect. Dr. Cole indicates that he did not review any of Plaintiff's medical records.

Plaintiff did not raise an issue of fact as to whether she suffered a fracture in her right foot because she did not submit a contemporaneous x-ray taken in the emergency room showing a fracture (Cf Frias v Gonzalez-Vargas, 147 AD3d 500 [1st Dept 2017]). In addition, Plaintiff's experts did not set forth any findings of limitations in range of motion in Plaintiff's right foot; in the absence of such evidence their conclusory opinions are insufficient (Hernandez v Cepedes, 141 AD3d 483 [1st Dept.2016]) and Plaintiff cannot demonstrate she suffered a serious injury (Cattouse v Smith, 146 AD3d 670 [1st Dept 2017]). Moreover, Dr. Rigney's findings of, inter alia, a partial tear of the plantar plate, without any evidence of limitations caused by the tear and other pathologies is insufficient to raise a triable issue of fact (Green v Domino's Piazza, LLC, 140 AD3d 546 [1st Dept 2016]; Mulligan v City of NY, 120 AD3d 1155 [1st Dept 2014]).

Defendants also met their prima facie burden as to Plaintiff's 90/180-day claim by relying on her deposition testimony that she was not confined to her bed or home as a result of the accident. (Cf Fathi v

Dated: _____, J.S.C.
JAN 12 2018 394

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

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

PRESENT: _____
Justice

PART 22

ANGEL
-v-
BOWSUKHIA

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

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

Sodhi, 146 AD3d 445 [1st Dept 2017]). In opposition, Plaintiff relies on her deposition testimony that she wore a boot on her right foot for four to five months, used crutches for two months after the accident and then a cane through January, 2015. Plaintiff further testified that she works as a freelance production manager and had to stop traveling for her work, she still wares orthopedic inserts and is restricted in the types of shoes she can wear. This testimony is sufficient to raise an issue of fact on Plaintiff's 90/180-day claim (Cf Fernandez v Duran, 2011 NY Misc LEXIS 5140, 2011 NY Slip Op 32836[U] [SC NY Co 2011]; Costleigh v Lucas, 2008 NY Misc LEXIS 9609; 2008 NY Slip Op 32485 [U] [SC Nassau Co 2008]).

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 right foot under the fracture, permanent loss of use, permanent consequential limitation of use and significant limitation of use categories; and it is further

ORDERED that Defendants' summary judgment motion is DENIED as to Plaintiff's 90/180-day claim; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22, 80 Centre Street, Room 136 on February 20, 2018 at 9:30 AM.

This constitutes the Decision and Order of the Court.

Date: JAN 12 2018.

494

[Signature], J.S.C.

MOTION/CASE IS FULLY 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