

Minier v C. Antunes Iron Works, Inc.

2018 NY Slip Op 30887(U)

April 3, 2018

Supreme Court, Bronx County

Docket Number: 303360/2016

Judge: Kenneth L. Thompson, Jr.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JUANA MINIER,

Plaintiff,

-against-

C. ANTUNES IRON WORKS, INC., and FATIMA
ANTUNES

Defendants

Index No: 303360/2016

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

X

The following papers numbered 1 to 2 read on this **motion to dismiss**

No	On Calendar of December 7, 2017	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
	Answering Affidavit and Exhibits-----	2
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

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

Defendants move pursuant to CPLR 3212 to dismiss plaintiff's complaint for failure to sustain a serious injury as that term is defined in Insurance Law 5102(d). Plaintiff was struck as a pedestrian on May 5, 2016, by a vehicle operated by defendant, Fatima Antunes, (Antunes), and owned by co-defendant, C. Antunes Iron Works, Inc.

Defendants submit the affirmation of an orthopedic surgeon Raghava R. Polavarapu, MD, (Polavarapu), who examined plaintiff on November 1, 2016. Polavarapu opines that the cervical, thoracic and lumbar spine sprains/strains, bilateral shoulder sprains/contusions, bilateral hand sprains/contusions, bilateral foot sprains/contusions, left ankle and left knee sprains/contusions are all resolved. Polavarapu further opines that the right knee examination was normal. Polavarapu

compared the observed range of motion for the aforesaid body parts with the expected range of motion and found all of the obtained range of motions to be normal.

“The medical affirmations ...submitted by defendants... satisfied these movants' initial burden of showing the alleged soft tissue injuries suffered by plaintiff Uddin did not constitute a “serious injury” as defined by Insurance Law § 5102(d). The findings of those physicians were based on their personal examinations of [plaintiff] and the unremarkable findings from relevant range-of-motion, sensory and other tests they conducted. [The] physicians concluded in their reports that there was no objective evidence of a disability or need for further medical treatment and/or testing.” (*Uddin v. Cooper*, 32 A.D.3d 270, 270-271 [1st Dept 2006]).

Plaintiff submits the affirmation of Kevin H. Weiner, MD, (Weiner), a Board Certified Physical Medicine and Rehabilitation physician. Plaintiff Weiner opines that plaintiff sustained a cervical disk bulge, a lumbar disk herniation with impingement on the nerves. Weiner obtained loss of range of motion with the cervical and lumbar spine. Weiner opines that the aforesaid injuries were traumatically caused by the vehicular accident on May 5, 2016 and that the injuries are permanent.

Plaintiff alleges in her bill of particulars that she sustained a serious injury in

the following categories: dismemberment, significant disfigurement, permanent loss of use of a body organ, member, function or system, significant limitation and 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.

With respect to plaintiff's claim of a permanent loss of use of a body organ, member, function or system, the Court of Appeals has held "that only a total loss of use is compensable under the 'permanent loss of use' exception to the no-fault remedy." (*Oberly v Bangs Ambulance*, 96 N.Y.2d 295, 297 [2001]). There is no evidence, whatsoever, of a total loss of use of any of plaintiff's organs, members, function or system. There is also no evidence of significant disfigurement, or a 90 out of 180 days medically determined impairment.

However, with respect to significant limitation, "[i]n order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*see e.g. Dufel*, 84 NY2d at 798; *Lopez*, 65 NY2d at 1020)."

Toure v Avis Rent a Car Sys., 98 NY2d 345, 350 (2003). In *Dufel* at 798, a 20% permanent loss of use was sufficient evidence to sustain a verdict for plaintiff.

Accordingly, defendants' motion is granted to the extent that the dismemberment, significant disfigurement, permanent loss of use of a body organ, member, function or system and 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, are all dismissed. That branch of defendant's motion that seeks to dismiss plaintiff's claim of a significant limitation is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 4/3/2018



KENNETH L. THOMPSON JR. J.S.C.