

Kim v Palmar De Ocoa Inc.
2018 NY Slip Op 31340(U)
May 24, 2018
Supreme Court, Queens County
Docket Number: 702964/16
Judge: Leslie J. Purificacion
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
JENNIFER KIM

Index Number: 702964/16

Plaintiff,

DECISION/ORDER

--against--

Motion Sequence: 4

PALMAR DE OCOA INC., YAVE E.
PERALTA, JUAN DAVID MOSQUERA,
CAESAR R. MAWYIN, and SANDY YEUNG

Defendants,

-----X

The following papers numbered 1 to 14 read on defendants Palmar De Ocoa, Inc. and Yave E. Peralta's motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d) and co-defendant Sandy Yeung's cross motion for the same relief.

Papers
Numbered

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Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiff on September 16, 2015. Plaintiff served a verified bill of particulars, dated May 24, 2016, alleging an injury to her right knee. On March 23, 2017, the plaintiff served an

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amended verified bill of particular, wherein she alleged additional injuries to her cervical spine, lumbar spine and thoracic spine.

Plaintiff asserts that as a result of the accident she suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body 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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]).

Defendants Palmar De Ocoa, Inc. and Yave E. Peralta move for summary judgment dismissing the complaint on the grounds that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d). Co-defendant Sandy Yeung cross moves for the same relief.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and a defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through

submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of its application, defendants submit plaintiff's bill of particulars, dated May 24, 2016; plaintiff's examination before trial testimony; the affirmed report of orthopedic surgeon Elizabeth Morrison, M.D., dated September 16, 2016; the affirmed report of neurologist Vladimir Zlatnik, M.D. dated September 19, 2016; the affirmed report of plastic surgeon Gary S. Bromley, M.D. dated September 28, 2016; and the affirmed report of Eric L. Cantos, M.D., dated December 3, 2016.

On September 16, 2016, Dr. Morrison conducted an examination of the plaintiff's right knee. Range of motion was done according to AMA Guidelines and measured with a goniometer. An examination of the plaintiff's right knee revealed no restrictions of range of motion as compared to the normal range of motion. She also conducted the following tests: McMurray, Lachman, Anterior and Effusion. All of these test results were negative. Dr. Morrison noted "post alleged right knee arthroscopic surgery, resolved had been resolved". Dr. Morrison opined that the plaintiff exhibited no evidence of residuals or permanency.

On September 19, 2016, Dr. Zlatnik conducted an examination of the plaintiff. Dr. Zlatnik found plaintiff's gait and tandem normal. There was no muscle atrophy. He also conducted the following tests: Romberg, provocative nerve stretching, compression, Neri's, Spurling's, Phalen's, Tinel's, upper lasague's sign and lower lasague's sign. All of these test results were negative. Dr. Zlatnik opined that there was

no clinical signs of traumatic CNS or PNS dysfunction. He concluded that there was no evidence of permanent injury or disability from a neurological perspective.

On September 28, 2016, Dr. Bromley conducted an examination of the scarring on plaintiff's right knee. Dr. Bromley opined that the scarring was cosmetically acceptable and no further treatment for the scarring was required.

In his report dated, December 3, 2106, Dr. Eric L. Cantos reviewed the MRI of the plaintiff's right knee taken on January 13, 2016. Dr. Cantos found there was joint effusion and mild degenerative changes most notable in the lateral patella femoral joint region. He did not see evidence of an acute fracture, meniscal tear or ligamentous disruption.

With respect to her right knee, the affirmations of defendants' doctors establish prima facie that the plaintiff did not sustain a "serious injury" as a result of the motor vehicle accident. Thus, the burden shifts to the plaintiff to come forward with sufficient evidence that she sustained serious injuries (see, Gaddy v Eyler, 79 NY2D 955).

In opposition to the motion, plaintiff submits the initial chiropractic evaluation of Sangwoo Mah, DC, DAAML P, dated October 26, 2015; a re-evaluation report from Dr. Sangwoo Mah, DC, DAAML P, dated August 8, 2017; the affirmed report of radiologist Adam Silver, M.D., dated August 29, 2017, incorporating his previous reports, wherein he evaluated plaintiff's MRI of her lumbar spine and X-rays of her lumbar and cervical spine; the affirmed report of David R. Payne, M.D., dated August 29, 2017, incorporating his previous report of plaintiff's MRI of the right knee and cervical spine; the narrative report of orthopedic surgeon Dr. Daniel J. Yoo, M.D., dated September 1, 2017, who detailed plaintiff's right knee treatment and right knee operation; the certified

treatment records of Dr. Daniel J. Yoo; the certified records of Dr. John S. Cho, M.D., who treated the plaintiff's neck, lower back, knee and shoulder; and an affidavit from plaintiff. The plaintiff also submitted in a sur-reply notarized copies of Dr. Mah's aforementioned reports, Dr. Yoo's certified treatment records, Dr. Cho's certified treatment records and a physician's affirmation from Dr. Yoo.

The court finds that the reports of plaintiff's treating doctors are sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system.

Plaintiff amended her bill of particulars several months prior to the making of defendants' motion, where she also included a claim for injuries to her cervical spine, lumbar spine and thoracic spine. Since none of defendants' doctors commented specifically to these body parts, the defendants have failed to show that the plaintiff did not sustain a serious injury to her spine.

As to the 90/180 category, the court finds the defendants have met their *prima facie* burden. The defendants submit the plaintiff's deposition testimony, where she testified to pain associated with her daily routine. However, plaintiff did not claim that she could not perform the material acts that constitute her daily activities during at least 90 of the first 180 days following the accident.

The court further finds that plaintiff has failed to raise a triable issue of fact with respect to whether she suffered "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 90 days during the 180 days immediately following the occurrence of the injury or impairment".

Accordingly, the defendants Palmar de Ocoa Inc. and Yave E. Peralta's motion for summary judgment is granted to the extent that plaintiff's claim that she suffered "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" is dismissed.

In all other respects, the motion is denied.

The defendant Sandy Yeung's cross motion is denied as moot.¹

This is the decision and order of the court.

Date:

MAY 24 2018



Hon. Leslie J. Purificacion, J.S.C.

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¹By decision dated, April 30, 2018, defendant Yeung's motion summary judgment on the issue of liability dismissing the complaint and any cross claims against her was granted.