

**Vainstein v Ndoye**

2018 NY Slip Op 31626(U)

March 15, 2018

Supreme Court, New York County

Docket Number: 152720/15

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Adam Silvera Part 22**

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**SARAH VAINSTEIN and ERIC BRUMETT,**

**Plaintiffs,**

**-against-**

**MAKHTAR NDOYE,**

**Defendant.**

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**DECISION/ORDER**

**INDEX NO. 152720/15  
MOTION SEQ. NO. 001**

**ADAM SILVERA, J. :**

Plaintiffs commenced this action seeking monetary damages for injuries allegedly sustained in an automobile accident on September 18, 2014. Plaintiff Sarah Vainstein (hereinafter referred to as “Ms. Vainstein”) was a pedestrian crossing at the intersection located at 24<sup>th</sup> Street and 6<sup>th</sup> Avenue, New York, New York, when she was struck by defendant’s vehicle and knocked to the ground. Ms. Vainstein was taken to the Bellevue Hospital emergency room by ambulance where she complained of pain in her left foot, right knee, right elbow, jaw, neck and back. After considerable treatment by a chiropractor, a physical therapist, an orthopedist and a podiatrist, she still complains of pain in her back, neck, right knee and left ankle.

Plaintiff Eric Brumett, Ms. Vainstein’s husband, who was not involved in the accident, is suing for loss of consortium. In the bill of particulars, plaintiffs allege various injuries, including right knee, left ankle, cervical and lumbar spine and jaw injuries, claiming that these injuries constitute a serious injury under §5102(d) of the Insurance Law.

Defendant now moves for summary judgment dismissing the complaint on the ground that Ms. Vainstein’s injuries did not reach the threshold of “serious injury” as required by the

Insurance Law sufficient to maintain this lawsuit. In support, defendant submits Ms. Vainstein's deposition transcript in which she testified that she had a prior injury to some of the same body parts injured in the subject accident. In 2008, Ms. Vainstein was involved in an accident while riding a bicycle. She was struck by a car, which resulted in injuries to her neck, back, and jaw.

Defendant also submits the affirmations and test results of physicians who examined Ms. Vainstein on behalf of defendant. Dr. Naunihal Singh, a neurologist, examined her on July 27, 2016 and affirmed that she had a normal neurological examination and he found no presence of any neurological injury or disability. Dr. Arnold Berman, an orthopedist, examined her on July 28, 2016 and affirmed that she had no objective findings of permanent injury or disability as it related to the accident. Dr. Berman also affirmed that Ms. Vainstein was able to participate in all activities of daily living and perform her work duties without restrictions.

Defendant submits an affirmation from Dr. David Fisher, a radiologist, who reviewed Ms. Vainstein's MRI examinations of the lumbar spine, cervical spine, right knee and left ankle. Dr. Fisher opined that, after review, the MRIs of the lumbar and cervical spine revealed there were no disc herniations and no radiographic evidence of traumatic or causally related injuries; and that the MRI of the right knee and left ankle was normal, and there was no meniscal or ligament tears, and no radiographic evidence of traumatic or causally related injuries.

Defendant contends that based on the evidence, there is no proof that Ms. Vainstein suffered the type of serious injury as defined in §5102(d) of the Insurance Law. He asserts that based on the objective findings of medical specialists, Ms. Vainstein's injuries are more likely the result of pre-existing conditions unrelated to the subject accident.

In opposition, plaintiffs argue that Ms. Vainstein suffers from permanent pain as a result of the subject accident. At her deposition, Ms. Vainstein testified that after the hospitalizations,

she received treatment from Tammy Bohne, a chiropractor, once or twice a week for about six months. She also received physical therapy once or twice a week from Dr. Joyce Goldenberg, a pain management physician at the Central Park Physical Therapy Center. This treatment lasted for five months. Ms. Vainstein further testified that as a result of the accident, she missed two weeks of work as an instructor and consultant, and currently has difficulty sitting for long periods of time, washing dishes, folding clothing, descending stairs, exercising, hiking and taking long walks. While acknowledging that she was involved in a prior accident in 2008, which resulted in pain to her neck, back and jaw, she claimed that she no longer had neck or back pain when the subject accident occurred.

Plaintiffs submit affirmations from Dr. Goldenberg; Dr. John Himelfarb, a radiologist; Dr. Hilary Umans, another radiologist; and an affidavit from Tammy Bohne. Dr. Goldenberg states that she first examined Ms. Vainstein shortly after the accident and noted significant loss of range of motion after utilizing a goniometer on Ms. Vainstein's cervical spine, lumbar spine and right knee. Dr. Goldenberg last examined Ms. Vainstein on February 23, 2017, and noted significant loss of range of motion to her cervical spine, lumbar spine, as well as tenderness to palpitation of the right knee, left ankle and left foot. Based upon her examinations, she concluded that the loss of range of motion were causally connected to the subject accident, and resulted in a permanent consequential limitation of the use of her cervical and lumbar spine.

Plaintiffs submit copies of the MRIs. According to them, the MRI of Ms. Vainstein's right knee reveals a partial tear of the proximal medial collateral ligament; the MRI of her cervical spine reveals a left posterolateral disc herniation at the C2-3 level and posterior disc bulges at the C5-6 and C6-7 levels; the MRI of the lumbar spine reveals posterior disc bulges at the L1-2 through L5-S1 levels, as well as at T11-12; and the MRI of the left ankle reveals tearing

and scarring of the anterior talofibular ligament, posttraumatic scarring of the calcaneofibular ligament, and ankle and posterior subtalar synovitis. Dr. Goldenberg affirms that the conditions revealed in the MRIs can be connected to the subject accident.

Ms. Bohne's affidavit is based on her examination and treatment of Ms. Vainstein, in which she states that Ms. Vainstein sustained a significant limitation of the neck, lower back, right knee and left ankle. The affirmations of Dr. Himelfarb and Dr. Umans are based upon their respective examinations of the MRI of the right knee and the MRI of the left ankle. Both conclude that the MRI findings were attributable to the subject accident and were not degenerative in nature.

Plaintiffs also address the examinations conducted by defendant's physicians. They claim both Dr. Singh and Dr. Berman noted a significant loss of range of motion in Ms. Vainstein's cervical and lumbar spine; that Dr. Singh did not examine her right knee, right elbow and left ankle; that both physicians failed to review her medical records, including the MRI reports; that both physicians failed to address her claim of an exacerbation of a prior asymptomatic lumbar and cervical injury; and that neither physician examined her jaw. These physicians affirmed that Ms. Vainstein's limitations were self-imposed due to her pregnancy, but plaintiffs dispute the conclusion, claiming that neither offered objective medical proof of this conclusion.

Plaintiffs argue that defendant failed to prove that Ms. Vainstein did not sustain a serious injury, and his motion should be denied notwithstanding the sufficiency of their opposition papers. Alternatively, plaintiffs argue that they presented evidence establishing a prima facie serious injury, precluding summary judgment. Plaintiffs contend that they submitted proof of a medically diagnosed qualitative impairment that would constitute a serious injury. They also contend that they adequately addressed Ms. Vainstein's prior injury, stating that defendant did

not offer any evidence that her lumbar and cervical injuries were caused by the 2008 accident.

In reply, defendant contends that he has met his burden of proof by submitting the medical affirmations. Defendant argues that plaintiffs did not offer more than a conclusory explanation regarding Ms. Vainstein's pre-existing injuries from the 2008 accident. Since plaintiffs did not submit proof of an injured jaw in their papers, defendant argues that such claim should be dismissed. Defendant specifically claims to have met his burden of proof that Ms. Vainstein has not met the requirement of the 90/180 category in §5102(d) of the Insurance Law.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law". *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dep't 2007); citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact' ". *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dep't 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *See Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1<sup>st</sup> Dep't 2002).

Courts have consistently held that the question of whether a plaintiff has established a prima facie case for a "serious injury", as described in §5102(d) of the Insurance Law, remains an issue of law. *See Licari v Elliott*, 57 NY2d 230, 235 (1982). Claims of serious injury are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident. *See Pommells v Perez*, 4NY3d 566, 574 (2005). Where a plaintiff's physician asserts a permanent injury, and sets forth the findings upon which this opinion is based, such

evidence is sufficient for denying summary judgment to a defendant. *See Lopez v Senatore*, 65 NY2d 1017, 1020 (1985).

In his motion for summary judgment, defendant submits Ms. Vainstein's deposition testimony to disprove plaintiffs' claim of serious injury. Defendant notes that she stated that she did not go to work for two weeks. She also alluded that she was injured in a 2008 accident, which effected some of her body parts, as in the more current accident. Defendant also submits the affirmations of two physicians who examined her and a physician who examined her MRI reports. All the affirmations conclude that, presently, Ms. Vainstein lacks a serious injury pursuant to the Insurance Law.

Plaintiffs submit the affirmations of several physicians, including Dr. Goldenberg. In her affirmation, Dr. Goldenberg alludes to her most recent examination of Ms. Vainstein, which occurred about seven months after the examinations by Dr. Singh and Dr. Berman. The results of Dr. Goldenberg are very different from those of defendant's physicians, indicating permanent, consequential injuries to Ms. Vainstein's cervical and lumbar spine. Dr. Goldenberg concludes that the injuries are related to the subject accident, and specifically repudiates the claim that Ms. Vainstein's injuries are pre-existing, or related to the previous 2008 accident.

In their opposition, plaintiffs argue that defendant's physicians did not conduct complete examinations of Ms. Vainstein and did not address her complaints of exacerbation at the time. They dispute the reason for the limited range of motion in her body parts, as recognized by Dr. Singh and Dr. Berman in their examinations. Plaintiffs assert that these physicians failed to read or review Ms. Vainstein's previous medical records, including the positive information in the MRI reports. Plaintiffs contend that this failure resulted in a faulty evaluation of her injuries, and that defendant's motion should be denied as insufficient.

Defendant, in his reply papers, does not address plaintiffs' assertions and reaffirms the conclusions made by Dr. Singh and Dr. Berman. He also states that Ms. Vainstein's allegedly pre-existing injuries were discussed in plaintiffs' papers in a conclusory manner.

The court finds that the motion for summary judgment is insufficient and that the examinations conducted by defendant's physicians were incomplete and did not address some issues raised by Ms. Vainstein, such as her claims of exacerbation of prior asymptomatic spinal injuries. Moreover, these examinations did indicate some loss of range of motion in Ms. Vainstein's cervical and lumbar spine. Whether this condition was attributable to her pregnancy is not conclusive at this time.

A defendant's failure to establish entitlement to summary judgment in the first instance mandates denial of his or her motion, regardless of the sufficiency of the opposition papers. *See Bray v Rosas*, 29 AD3d 422, 424 (1<sup>st</sup> Dep't 2006). The court finds that defendant failed to satisfy his burden of establishing that the injuries sustained by Ms. Vainstein were not serious, as defined by §5102(d) of the Insurance Law.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: March 15, 2018

ENTER:



Hon. Adam Silvera, J.S.C.