

**Richards-Byers v Evelyn Douglin Ctr. for Serving
People in Need, Inc.**

2018 NY Slip Op 32321(U)

September 17, 2018

Supreme Court, Kings County

Docket Number: 514433/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

YVONNE RICHARDS-BYERS,

Plaintiff,

-against-

**EVELYN DOUGLIN CENTER FOR SERVING
PEOPLE IN NEED, INC. and SHARICE NEWBY,**

Defendants.

x

DECISION / ORDER

**Index No. 514433/16
Motion Seq. No. 5
Date Submitted: 7/26/18
Cal No. 45**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>69-85</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>102-112</u>
Reply Affirmation.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action in which a motor vehicle operated by defendant Sharice Newby and owned by defendant Evelyn Douglin Center allegedly made a left turn from Bedford Avenue onto Lenox Road, and hit plaintiff Yvonne Richards-Byers, who was a pedestrian. Plaintiff's bill of particulars claims that as a result of the accident she sustained multiple herniated discs with impingement at L2-L3, L3-4, L4-L5, L5-S1, T1-T2 and T9-T10 and bulging discs with impingement throughout her thoracic spine with related pain, stiffness and decreased range of motion, as well as a fractured tooth, injuries to her cervical spine, right shoulder and various sprains and strains, abrasions

and bruising. A supplemental bill of particulars added plaintiff's claim that she also sustained multiple cervical disc herniations with impingement.

Defendants contend that plaintiff did not sustain a "serious injury" as a result of this accident inasmuch as her alleged injuries were pre-existing and/or causally unrelated to the subject accident. This motion was brought as a cross motion to motion sequence # 4, plaintiff's motion for summary judgment on the issue of liability.¹

Defendants have made a prima facie showing of their entitlement to summary judgment with the affirmations of Robert Madison, D.D.S., Jessica F. Berkowitz, M.D., Richard Lechtenberg, M.D. and Arnold T. Berman, M.D., who all assert that plaintiff's claimed injuries are not causally related to the subject accident (*see White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Robert Madison, D.D.S., who examined the plaintiff and reviewed her dental records concludes that the tooth plaintiff claims was fractured as a result of the accident was seriously compromised before the accident and was injured months after the accident, so it cannot be considered accident-related. Jessica F. Berkowitz, M.D., a radiologist, reviewed the MRI films of plaintiff's spine taken on November 6, 2015 and x-rays of her shoulder taken on October 23, 2015, a few weeks after plaintiff's October 21, 2015 accident. She found no evidence of acute trauma and reports observing nothing but chronic and degenerative conditions. Richard Lechtenberg, M.D.,

¹The court notes that movants have no blueback on their papers and used post-its for exhibit tabs. It is requested that counsel use exhibit tabs and a blueback in future motions.

conducted a neurological examination of plaintiff and found normal ranges of motion and no objective clinical neurologic deficits that would substantiate the injuries claimed in plaintiff's bill of particulars. Finally, Arnold T. Berman, M.D., who conducted an orthopedic examination of plaintiff, found that plaintiff had normal ranges of motion and that the sprains and strains she sustained in the accident had all resolved, with no residuals, and that the bulging and herniated discs reported in the MRIs were the result of degenerative changes that pre-existed the accident and did not correlate with his clinical examination.

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether she sustained a "serious injury," based upon the March 2, 2018 affirmed report of Hal S. Gutstein M.D., and the affirmed medical records of Larissa Lempert M.D., a neurologist, who treated plaintiff from January 2016 to December 2017. Dr. Gutstein, who most recently examined plaintiff on March 2, 2018, found that she has significant limitations in the range of motion in her lumbar and cervical spine and that plaintiff has "ongoing, enduring, and permanent injuries, including multiple herniations & bulging discs . . . with impression upon neural structures, [a]ggravation of pre-existing changes of the spine, with confirmed moderate to severe right L4-L5 lumbar radiculopathy on EMG studies . . . [that] continue to cause limitations on [plaintiff's] usual and customary activities . . . since the October 21, 2015 accident." He concludes, "[b]ased upon the history obtained, clinical examination findings and review of MRI and EMG reports it is [his] professional opinion that [plaintiff] has sustained a permanent disability of her cervical and lumbar spine and PCS [post concussion syndrome] causally related to the October 21, 2015 accident."

Plaintiff's treating neurologist, Dr. Lempert, performed nerve conduction studies on January 18, 2016 and January 20, 2016. The results were abnormal. Almost two years later, the doctor found almost no improvement and recommended that plaintiff have trigger point injections in her neck, which she administered and recommended that plaintiff continue with the chiropractor and use of a TENS unit. Months later, on December 15, 2017, Dr. Lempert reports only slight improvement. On that date, her "impression" is:

"headaches, dizziness, neck pain, back pain, shoulder pain s/p MVA on October 21, 2015. Post-concussion syndrome, muscle spasm/strain. Lumbosacral radiculopathy. Presentation is causally related to injury sustained on October 21, 2015."

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: September 17, 2018

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**