

Matthew v Brown
2018 NY Slip Op 33173(U)
December 10, 2018
Supreme Court, Kings County
Docket Number: 506764/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

GISELLE MATTHEW,

Plaintiff,

-against-

**HASOUNE C. BROWN, JET TRANSPORTATION,
"JOHN DOE," DEFENDANT'S REAL NAME BEING
UNKNOWN and LORRETTE KENINE BRODY,**

Defendants.

DECISION / ORDER

Index No. 506764/16

Motion Seq. No. 3, 6

Date Submitted: 10/25/18

Cal No. 35, 37

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

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>52-61</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>76-77</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>95-105, 107</u>
Reply Affirmations.....	<u>109, 110</u>

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

This is a personal injury action arising out of a motor vehicle accident that occurred on February 28, 2014. Plaintiff was the rear seat passenger in a cab owned by defendant Jet Transportation and operated by defendant Hasoune Brown. The cab was stopped in traffic heading northbound on Flatbush Avenue in Brooklyn near the intersection with 6th Avenue when it was allegedly hit in the rear by a vehicle owned by Lorrette Kenine Brody, driven by an unidentified operator who left the scene.

In her bill of particulars, plaintiff alleges that she sustained injuries to her cervical

and lumbar spine, including herniated discs at C3-C4, C4-C5, C5-C6, L4-L5 and L5-S1, a bulging disc at C6-C7, and left shoulder tendonitis. At the time of the accident, plaintiff was 35 years old.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff only had cervical and lumbar sprains and strains as a result of the subject accident, which have resolved with no continuing disability. Defendants claim that her pre-existing degenerative disc disease is unrelated to the subject accident. In addition, movants contend that plaintiff testified that she missed only one day of work (as a teacher) after the accident, undercutting any claim under the 90/180 category.¹ Plaintiff counters that the facts and evidence clearly establish that she sustained a "serious injury" as defined by Insurance Law § 5102(d).

Movants have not come forward with sufficient evidence to make a prima facie showing of defendants' entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The defendants provide a report from their examining neurologist, Dr. Chandra M. Sharma, M.D., (exam December 6, 2017) a report from their examining orthopaedic surgeon Joseph C. Elfenbein, M.D., (exam May 24, 2017) a report from a radiologist, Mark Decker, M.D., who reviewed the MRIs of plaintiffs' spine, and a report of Jay M. Walshon, M.D, who reviewed plaintiff's emergency room records. Doctor Sharma found that the plaintiff had a full range of motion in her cervical and lumbosacral spine and left shoulder, with negative test results, and a normal exam with no disability or

¹Movants Brown and Jet submit the supporting evidence while cross-movant Brody adopts Brown and Jet's contentions, in a "me too" motion.

permanency and no objective findings to support her subjective complaints. Dr. Effenbein found a reduction from normal lumbar flexion of 20 degrees (60 normal) and cervical extension of 40 degrees (60 normal) and in plaintiff's left shoulder, abduction and forward flexion of 160 (180 normal). He provides no explanation for these abnormal findings. In reviewing plaintiff's MRIs, Dr. Decker states he sees only degenerative disc disease, consisting of a herniated disc at C3-C4 as well as bulging discs at C4-C5, C5-C5, C6-C7, L4-L5 and L5-S1, which are all pre-existing and unrelated to the subject accident. He found no evidence of an acute traumatic injury. Finally, Dr. Walshon found that the injuries in plaintiff's bill of particulars are unsupported by plaintiff's own complaints following the accident at the Emergency Room, and are unsupported by the notes in the emergency room records. He states that, other than muscle sprains, the claimed injuries do not have an acute traumatic origin and cannot be causally related to the February 28, 2014 accident (see *Gouvea v Lesende*, 127 AD3d 811 [2d Dept 2015]; *Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 30 [2d Dept 2005]). Further, movants point out that plaintiff's testimony that she missed only one day of work after the accident makes a prima facie showing that plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the accident (see *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

Even if defendants had made a prima facie case for dismissal, plaintiff has come forward with sufficient evidence to overcome the motion and raise an issue of fact. Dr. Golal Nejati's report, based upon a follow-up examination of plaintiff conducted

on July 17, 2018, states that he found significant limitations in plaintiff's range of motion in her cervical and lumbar spine, with other positive test results. Moreover, he states that based on a review of the plaintiff's medical history, her complaints and her symptomatology, the results of his physical examination indicate to him that the injury to plaintiff's neck and back are causally related to the motor vehicle accident on February 28, 2014. He notes that plaintiff had no prior injuries or pain in her neck or lower back and had no symptomatology before the date of this accident. He avers that the plaintiff's injuries, including the bulging and herniated discs, are traumatic in origin and were caused by the subject accident. He also opines that plaintiff's injuries are permanent.

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: December 10, 2018

ENTER:



Hon. Debra Silber, J.S.C.

*Hon. Debra Silber
Justice Supreme Court*