

Mathura v Davalus

2018 NY Slip Op 33399(U)

November 13, 2018

Supreme Court, Queens County

Docket Number: 711133/2016

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

CHANDRA MATHURA,

Index No.:711133/2016

Plaintiff,

Motion

Date: October 3, 2018

-against-

Motion Cal. No.: 34

FERNANDO DAVALUS and VOLCANIC
HACKING CORP.,

Motion Sequence No.: 3

Defendants.

FILED
NOV 28 2018
COUNTY CLERK
QUEENS COUNTY

The following efile papers numbered 52-62, 64-78 submitted and considered on this motion by defendants Fernando Davalus and Volcanic Hacking Corp. seeking an Order pursuant to CPLR 3212 for summary judgment against plaintiff Chandra Mathura on the grounds that she failed to sustain a serious injury under the New York State Insurance Law, sections 5102(d) and 5104(a).

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 52-62
Affirmation in Opposition-Affidavits-Exhibits....	EF 64-77
Reply Affirmation-Affidavits-Exhibits.....	EF 78

Plaintiff Chandra Mathura (hereinafter "Mathura") commenced this personal injury litigation to recover damages for serious injuries which she allegedly sustained when she was struck by an motor vehicle while she was walking on February 17, 2016 at the intersection of Lexington Avenue and East 30th Street, County and State of New York. Mathura alleged that the accident and her injuries were caused by the negligence of the defendants, Fernando Davalus (hereinafter "Davalus") and Volcanic Hacking Corp. (hereinafter "Volcanic") in the ownership and operation of their vehicle. Discovery is now complete and plaintiff filed a Note of Issue on February 21, 2018. Davalus and Volcanic now move for summary judgment against Mathura on the grounds that she failed to sustain a serious injury under the New York State Insurance Law, sections 5102(d) and 5104(a). This motion has been made timely.

In support of the motion, in addition to the verified bill of particulars dated February 20, 2017, defendant documentary evidence included plaintiff's deposition transcript dated August 9, 2017; the affirmation of Simon P. Werberger, Esq.; and, the independent medical examination reports of Dr. Thomas P. Nipper, Dr. Edward M. Weiland, Dr. Rikki Lane, and Dr. Eric L. Cantos.

Mathura alleged in her verified bill of particulars that as a result of the accident of February 17, 2016 she sustained serious injuries to her neck, left knee, right knee, left shoulder, headaches and that she had to undergo cervical fusion surgery. She claimed that she was confined to bed for one week and incapacitated from employment intermittently thereafter and permanently from June 2016 to present, and continuing. She claimed \$15,000.00 in lost wages. She alleged that she sustained a serious injury under the significant disfigurement; fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; and the 90/180 day categories of the Insurance Law.

Deposition testimony of plaintiff Chandra Mathura

Plaintiff Chandra Mathura gave sworn testimony in this matter on August 9, 2017. She testified in sum and substance that she sustained injuries on February 17, 2016 while a pedestrian walking at the intersection of Lexington Avenue and East 30th Street, County and State of New York. The accident occurred at about 6:30 P.M. She stated that she was crossing in the crosswalk with the green light in her favor when the accident occurred. The car which came into contact with her person was a yellow taxicab. At the time of the accident she was employed as a nanny, but had not worked since June of 2016 because of the accident. Following the accident she was taken to Bellevue Hospital in an ambulance, and recalled she had bruising to her right knee. She told the doctors at the emergency room that she felt pain to her left arm, both knees, left shoulder and left leg. She was discharged with bandages, and a neck brace. Thereafter, she went to the emergency room at Jersey City Medical Center and received treatment for pain to the areas of her body as alleged herein, receiving medication for pain. After the accident she remained in bed for seven days.

In March 2016 she saw a doctor in Manhattan who recommended that she undergo physical therapy. She went for physical therapy three times a week for about two months, receiving treatment to her knees, neck, left shoulder and back. She received physical therapy at a second location in Manhattan three times a week for about a month in a half and received treatment to the same parts of her body as aforementioned. In May of 2016, she went to another physical therapy location, and continued to be treated for the same body parts about three times a week. The last time she went to the facility was June 2017. She had an appointment to see her doctor. She recalled taking MRI's of her neck, back and left shoulder. She also stated that she treated with a doctor due to headaches. As a result of the accident she claimed that she had to undergo neck surgery on August 11, 2016, resulting in an operative scar on the back of her neck. She wore a neck bandage for four months, and at the time of the deposition she was still receiving physical therapy for her neck and also wearing a back brace which was prescribed a few months after the accident. She also has been

wearing knee braces. She has applied for permanent disability from Social Security. She had a prior automobile accident in 2003 where she sustained an injury to her neck. After receiving physical therapy to her neck for the 2003 accident, she stated that she did not have any pain in her neck. Following the surgery on her neck she was told to stay home for six months. She related was let go from her nanny position because her employers told her she was spending too much time at doctor's offices. She testified to scarring on her neck as well as on her left knee. She described the scar on her left knee as a bruise which was still visible, and she still complained of pain in her neck, back, both knees and left shoulder.

Independent Medical Report of Dr. Rikki Lane

Dr. Rikki Lane, Board Certified Physician in Emergency Medicine reviewed plaintiff's bill of particulars, emergency room records from Bellevue Hospital, and the police report and issued a report. In her opinion, the records reviewed were inconsistent with the injuries alleged in plaintiff's bill of particulars. The claimed injuries did not have an acute traumatic origin and were not causally related to the accident, other than very minor left knee contusion status post the accident.

Independent Medical Report of Dr. Thomas P. Nipper

Dr. Thomas P. Nipper performed an independent medical examination of Mathura on November 3, 2017. The doctor reviewed the verified bill of particulars and various medical records and performed an orthopedic examination. Range of motion testing was tested with the use of a goniometer and was the following:

Cervical Spine-flexion 40 degrees (50 degrees normal); extension 50 degrees (60 degrees normal); right and left rotation 60 degrees (80 degrees normal); right and left bend 35 degrees (45 degrees normal). Surgical scarring was seen over the anterior cervical spine;

Lumbar Spine-flexion 50 degrees (50 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bending 25 degrees (25 degrees normal). Straight leg raising was negative to 90 degrees bilaterally.

Shoulders- flexion 180 degrees (180 degrees normal); abduction 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); external rotation 90 degrees (90 degrees normal). Internal rotation was normal to L1 level bilaterally.

Knees-flexion 130 degrees (130 degrees normal); extension to 0 degrees bilaterally (0 degrees normal).

In Dr. Nipper's opinion, the plaintiff's injuries had all resolved. In his medical opinion, "the speeds and forces experienced by the claimant were sufficient to have resulted in sprain injuries to the affected areas and the plaintiff did not sustain any significant or permanent injury as the result of the motor vehicle accident." He stated that findings on MRI reports of the cervical spine, knees and

lumbar spine were all consistent with degenerative changes. Also, “based on the mechanism of injury as well as the findings noted on cervical MRI, the procedure performed on the claimant’s cervical spine was performed for reasons other than for any traumatic injury related to the motor vehicle accident.”

Independent Medical Report of Dr. Edward Weiland

On October 17, 2017, Dr. Weiland performed an independent neurologic examination of plaintiff. The doctor reviewed the verified bill of particulars and various medical records and performed a neurologic examination. Range of motion testing was tested with the use of a goniometer and was the following:

Cervical Spine- flexion 40 degrees (50 degrees normal); extension 50 degrees (60 degrees normal); right and left rotation 70 degrees (80 degrees normal); right and left lateral flexion 35 degrees (45 degrees normal);

Lumbar Spine-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral flexion to 25 degrees (25 degrees normal);

Thoracic Spine-flexion 45 degrees (45 degrees normal); extension 0 degrees (0 degrees normal); right and left rotation 30 degrees (30 degree normal); right and left lateral bending 45 degrees (45 degrees normal).

A well-healed surgical scar was seen over the right anterior aspect of the neck consistent with a prior surgical procedure to the site. His impression was cervical myofascial pain disorder and status post cervical spine surgery; history of contusion to the left shoulder and both knees; non-focal neurological examination. The doctor stated that he could not find any evidence of any lateralizing neurological deficits at that time. In his opinion, the restriction in movement in the cervical spine was consistent with good recovery from the cervical spine procedure.

Independent Medical Report of Dr. Eric L. Cantos

On May 12, 2017, Dr. Cantos reviewed the MRI of the plaintiff’s left knee which was taken on April 16, 2016. In his opinion it revealed small joint effusion, mild joint space narrowing and degenerative changes associated mild meniscal degeneration, incidental well circumscribed benign fibrous-osseous lesion and/or enchondroma in the proximal tibia. Ligaments and tendons appear intact.

The doctor also reviewed the MRI of plaintiff’s left shoulder taken on April 23, 2016. In his opinion the study showed subacromial narrowing with evidence of chronic impingement syndrome. In light of the short time between the accident and the study, in Dr. Cantos’ opinion, plaintiff had a preexisting condition and impingement before the accident occurred. He did not see any evidence

of a fracture.

Legal Analysis

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party’s failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (See *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

The Court finds that the defendant failed to demonstrate entitlement to judgment as a matter of law. Defendant has the burden of establishing, *prima facie*, that plaintiff did not sustain a “serious injury” within the meaning of the Insurance Law (see *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). The Court finds that defendant failed to establish as a matter of law that the plaintiff did not sustain a serious injury to her neck and back. Dr. Nipper stated in his report that straight leg raising was negative to 90 degrees, but failed to state what range of motion was in comparison to normal values, (see *Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]; *Walker v Public Admin. of Suffolk County*, 60 AD3d 757 [2d Dept 2009]; *Malave v Basikov*, 45 AD3d 539 [2d Dept 2007]). The doctor also found range of motion deficits on examination in plaintiff’s cervical spine, and did not state what was the cause for the range of motion deficits (see generally *Pomells v Perez*, 4 NY3d 566 [2005]). Also, defendant’s doctors failed to demonstrate that the scarring seen on plaintiff’s left knee and neck did not constitute a significant disfigurement under the Insurance Law (see *Borquist v Hyde Park Cent. School District*, 107 AD3d 926 [2d Dept 2013]; *O’Brien v Bainbridge*, 89 AD3d 1511 [4th Dept 2011]; *Onder v Kaminski*, 3030 AD2d 665 [2d Dept 2003]; *Waldron v Wild*, 96 AD2d 190 [4th Dept 1983]).

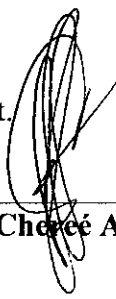
Moreover, assuming defendants had established their entitlement to judgment as a matter of law, in opposition, plaintiff submitted medical records including DHD Medical, P.C., Central Park Physical Medicine and Rehabilitation, P.C., Lenox Hill Radiology and reports of her doctors, Dr. Paul M. Brisson, Dr. Thomas S. Matthew, Dr. Joyce Goldenberg, Dr. Jonathan C. Gordon, Dr. Nicky Bhatia, and Dr. Steven Struhl, demonstrating both contemporaneous and recent range of motion testing on plaintiff’s neck, back and knees, revealing range of motion deficits to her neck and back, considered to be related to the accident, addressing allegations related to degeneration, and raising triable issues of fact as to whether plaintiff sustained a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system as a result of the accident under the Insurance Law (see generally *Perl v Meher*, 18 NY3d 208 [2011]; *Lopez v*

Senatore, 65 NY2d 1017 [1985]; *Patisso v Brady*, 152 AD3d 782 [2d Dept 2017]).

Therefore, the defendant's motion is denied.

This constitutes the decision and Order of the Court.

Dated: November 13, 2018



Hon. Chereé A. Buggs, JSC

FILED
NOV 28 2018
COUNTY CLERK
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