

<b>Pena v Diallo</b>
2019 NY Slip Op 30328(U)
January 18, 2019
Supreme Court, Kings County
Docket Number: 522162/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18<sup>th</sup> day of January, 2019.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
EVELYN M. PENA,  
*Plaintiff,*

Index No.: 522162/2016

DECISION AND ORDER

- against -

Motion Sequence #1, #2

MAHAMADOU DIALLO and JOHN or JANE DOE,  
Fictitious names intended for the driver of the motor vehicles,  
*Defendants.*

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>5.</u>
Reply Affidavits (Affirmations).....	<u>6.</u>

After a review of the papers the Court finds as follows:

This action concerns a motor vehicle incident that occurred on August 4, 2016. The Plaintiff Evelyn M. Pena (hereinafter "the Plaintiff") was operating a vehicle that was involved in a collision with a vehicle operated by Defendant John or Jane Doe and owned by Defendant Mahmadou Diallo (hereinafter "Defendant Diallo"). By way of a summons and verified complaint, the Plaintiff asserts causes of action against the Defendants alleging the negligent operation of the vehicle owned by Defendant Diallo. The Plaintiff claims in her Verified Bill of Particulars (Defendant's Motion Exhibit B, Paragraph 11), that as a result of the accident she sustained a number of serious injuries, including but not limited to, injuries to her right elbow, cervical spine, thoracic spine, lumbar spine, right shoulder, left knee, and right knee. The Plaintiff also alleges (Defendant's Motion Exhibit B, Paragraph 20) that she was prevented from

“performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the within occurrence.”

Defendant Diallo moves (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). The Plaintiff opposes the motion and contends that Defendant Diallo has failed to meet his initial *prima facie* burden, in as much as he fails to address the Plaintiff’s “90/180” claim. In the alternative, the Plaintiff alleges that there are issues of fact that should prevent granting summary judgment. The Plaintiff also cross moves for leave to Amend her Bill of Particulars.

As an initial matter, the Court grants the Plaintiff’s cross-motion made pursuant to CPLR 3025(b) for leave to Amend her Bill of Particulars and to submit a Supplemental Bill of Particulars (Plaintiff’s Motion, Exhibit 1) alleging further injury to the Plaintiff’s lumbar spine, namely L4-5 bulge with superimposed herniation compressing on the thecal sac. “Leave to amend a bill of particulars is freely given absent prejudice or surprise, unless the amendment is sought on the eve of trial.” *Grande v. Peteroy*, 39 A.D.3d 590, 591, 833 N.Y.S.2d 615, 617 [2<sup>nd</sup> Dept, 2007], *as amended* [2008]. What is more, the note of issue does not need to be vacated given that the Plaintiff has previously claimed lumbar sprain/strain in her Bill of Particulars and Defendant Diallo’s orthopedist conducted an examination of the Plaintiff’s lumbar spine. The Defendant is deemed served with the supplemental bill of particulars contained (as Exhibit 1) in the cross motion.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2<sup>nd</sup> Dept,

2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974].

The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2<sup>nd</sup> Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2<sup>nd</sup> Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994].

*Insurance Law § 5102(d)*

Defendant Diallo contends that the affirmed reports of Dr. Mark J. Decker, Dr. Ronald A. Paynter and Dr. Pierce J. Ferriter, support his contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a “serious injury”, as that term is defined by Insurance Law § 5102.

Dr. Mark J. Decker, a radiologist, did not conduct a medical examination but instead conducted a radiology evaluation on November 15, 2017 of an MRI of the Plaintiff’s cervical spine, dated October 27, 2016. Dr. Decker also examined an MRI of the Plaintiff’s left knee. As

part of his findings Dr. Decker concluded in regard to the cervical spine that “[t]hese findings are degenerative, longstanding and not causally related to the date of the accident of 08/04/2016.” As for the examination of the MRI of the left knee Dr. Decker concluded that there was “[n]o evidence to suggest that an acute traumatic injury was sustained.” (See Defendant’s Motion, Examination by Dr. Decker, Attached as Exhibit E).

Dr. Ronald A. Paynter, conducted a medical examination of Plaintiff on February 10, 2018.<sup>1</sup> In his report, Dr. Paynter detailed his findings based upon his review of Plaintiff’s medical records, his personal observations and range of motion testing. In the section entitled Impression, Dr. Paynter stated that “[t]here was normal range of motion of the head, neck, back, chest, right arm, right elbow, right shoulder, knees, left leg and left ankle.” (See Defendant’s Motion, Examination by Dr. Paynter, Attached as Exhibit F). However, Dr. Paynter failed to compare those findings to the normal range of motion and as a result, “failed to objectively demonstrate that the plaintiff did not sustain a permanent consequential or significant limitation of use.” *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2<sup>nd</sup> Dept, 2005].

Dr. Dr. Pierce J. Ferriter, conducted a medical examination of Plaintiff on April 4, 2018. In his report, dated April 27, 2018, Dr. Ferriter detailed his findings based upon his review of Plaintiff’s medical records, his personal observations and range of motion testing. As part of an orthopedic range of motion examination, Dr. Ferriter examined the Plaintiff’s cervical spine, lumbar spine, right shoulder, right elbow, right knee, left knee and left ankle/foot. Dr. Ferriter opined that “[t]he orthopedic examination is objectively normal and indicates no findings which would result in no orthopedic limitations in use of the body parts examined.” (See Defendants’ Motion, Examination of Dr. Ferriter, Attached as Exhibit G).

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<sup>1</sup> The report date is February 10, 2018, however there is no indication of the date of the examination. As such the Court will assume for purposes of this motion, that the exam and the completion of the report were on the same day.

Turning to the merits of the motion by the Defendants, the Court is of the opinion that the instant motion papers do not adequately address as a matter of law the Plaintiff's claim as set forth in the subject verified bill of particulars (Defendant's Motion, Exhibit B, Paragraph 20), that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Moreover in Plaintiff's EBT testimony, when asked when she returned to work, the Plaintiff stated that she did not return to work after the accident and received workers compensation during that time. (See Defendant's Motion, Exhibit A, Pages 49, 58, 59). See *Bracco v. Zuhir*, 123 A.D.3d 753, 996 N.Y.S.2d 540 [2<sup>nd</sup> Dept, 2014]; *Bracco v. Zuhir*, 123 A.D.3d 753, 996 N.Y.S.2d 540 [2<sup>nd</sup> Dept, 2013]; *Manzanares v. Aliev*, 62 A.D.3d 963, 964, 878 N.Y.S.2d 907 [2<sup>nd</sup> Dept, 2009]. As a result, the Defendant has failed to meet his *prima facie* burden. See *Greene-Manzi v. A to Z Landscaping, Inc.*, 105 A.D.3d 702, 703, 962 N.Y.S.2d 645 [2<sup>nd</sup> Dept, 2013]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2<sup>nd</sup> Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2<sup>nd</sup> Dept, 2003]; *Frier v. Teague*, 288 A.D.2d 177, 732 N.Y.S.2d 428 [2<sup>nd</sup> Dept, 2001].

Even assuming, *arguendo*, that Defendant Diallo had met his *prima facie* burden, there are material issues of fact presented by the Plaintiff that would prevent the Court from granting summary judgment. In opposition, the Plaintiff relies on the reports of Dr. David H. Delman, Dr. David Milbauer, and Dr. Casey M. Johnston. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the motion by the Defendant is denied.

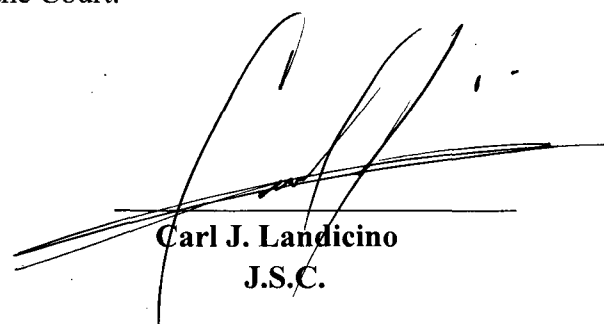
Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence #1) is denied.

Plaintiff's cross-motion (motion sequence #2) is granted. The Defendant is deemed served with the supplemental bill of particulars contained (as Exhibit 1) in the cross motion.

This constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino**  
**J.S.C.**

KINGS COUNTY CLERK  
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