

Clay v Mendieta

2019 NY Slip Op 30701(U)

March 12, 2019

Supreme Court, Kings County

Docket Number: 500618/2016

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 12th day of March, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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TAYIBAH A. CLAY,

Index No.: 500618/2016

Plaintiff,

- against -

DECISION AND ORDER

EDISON R. MENDIETA, ROYAL EXPRESS LINE,
CORPORATION and MIN HUANG

Motions Sequence #5, #6

Defendants.

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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, 7,</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on August 10, 2015. The Plaintiff Tayibah A. Clay (hereinafter "the Plaintiff") was a passenger in a motor vehicle owned and operated by Defendant Min Huang (hereinafter "Defendant Huang") that was allegedly involved in a collision with a vehicle owned by Defendant Royal Express Line and operated by Defendant Edison R. Mendieta (hereinafter referred to collectively as "Defendant Royal Express").

By way of a summons and verified complaint, the Plaintiff asserts causes of action against the Defendants alleging the negligent operation of their respective vehicles. As a result of said incident, the Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 11), that she sustained a number of serious injuries, including but not limited to injuries to her lumbar spine, right knee and left shoulder. The Plaintiff alleges (Defendant's Motion

Exhibit B, Paragraph 20) that she was prevented from “performing substantially all the material acts which constitute his [sic] usual and customary daily activities for not less than ninety (90) days during the one hundred and (180) eighty days.”

Defendant Huang moves (motion sequence #5) 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). Defendant Royal Express also moves (motion sequence #6) for the same relief.

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 [2nd 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 [2nd 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 [2nd 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 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Insurance Law § 5102(d)

Defendant Huang contends that the affirmed reports of Dr. Ronald A. Paynter, Dr. David A. Fisher, Dr. Edward M. Weiland, and Dr. Thomas Nipper, support his contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Defendant Royal Express relies on the affirmed reports of Dr. Jonathan S. Luchs and Dr. Ronald Gresamer. 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.

Defendant Huang’s Doctors’ Reports

Dr. Ronald A. Paynter did not conduct a medical examination but instead reviewed the Emergency Room (E.R.) treatment records dated August 10, 2015, and completed his report on December 1, 2016. As part of his summary Dr. Paynter opined in summary that “[i]t is my opinion within a reasonable degree of medical certainty that there was no acute traumatic findings to causally relate Ms. Clay’s accident on 08/10/2015 and the claimed injuries, other than mild left flank and mild back pain from the MVC.” (See Defendant’s Motion, Examination of Dr. Ronald A. Paynter , Exhibit I).

Dr. David A. Fisher did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff’s thoracic spine (9/11/15), cervical spine (10/12/15), left shoulder (10/12/15) right knee (10/19/15) and lumbar spine (10/19/15). For each of these reviews Dr. Fisher found that there was “no radiographic evidence of traumatic or causally related injury to the...” various areas that were the subjects of the MRIs (i.e. cervical spine, right knee). (See Defendant’s Motion, Examination of Dr. David A. Fisher, Exhibit J).

Edward M. Weiland, M.D., a neurologist, conducted an examination of the Plaintiff on April 18, 2017. Dr. Weiland performed a neurological exam including range of motion measurements using a goniometer, an instrument for objective testing. Dr. Weiland opined that “I find no primary neurologic disability at the present time as it relates to injuries reportedly occurring on 08/10/15.” (See Defendants’ Motion, Examination of Dr. Weiland, Annexed as Exhibit K).

Dr. Thomas Nipper, conducted an orthopedic medical examination of Plaintiff on September 7, 2017. In his report, which was duly affirmed on October 19, 2017, Dr. Nipper detailed his findings based upon his review of Plaintiff’s medical records, his personal observations and objective testing. While Dr. Nipper did find some limited range of motion in the left shoulder, Dr. Nipper opined that “[t]he decreased ranges of motion noted above were, in my opinion, voluntary and subjective in nature.” Dr. Nipper further opined that “[t]he claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident.” (See Defendants’ Motion, Examination of Dr. Thomas Nipper, Annexed as Exhibit L).

Defendant Royal Express’ Doctors’ Reports

Dr. Jonathan S. Luchs, a radiologist, did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff’s left shoulder, right knee, lumbar spine, thoracic spine, and cervical spine. In relation to these reviews, Dr. Luchs generally found that “[t]here are no post-traumatic findings evident on this exam. There are no findings on this exam causally related to the claimant’s alleged injury.” He also determined degenerative findings. (See Defendant’ Royal Express’ Cross-Motion, Examination of Dr. Jonathan Luchs, Exhibit E).

Dr. Ronald P. Grelsamer, an orthopedist, performed an orthopedic evaluation which included an examination and a review of medical records. As part of his conclusion Dr. Grelsamer opined that the Plaintiff “did not sustain a documented serious or permanent knee injury. The arthroscopy was not necessary but did her no harm.” (See Defendant’ Royal Express’ Cross-Motion, Examination of Dr. Ronald P. Grelsamer, Exhibit F).

In order to rebut any arguable *prima facie* showing of the Defendants, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. See *Levitant v. Beninati*, 167 A.D.3d 730, 731, 87 N.Y.S.3d 504, 505 [2nd Dept, 2018]; *Nussbaum v. Bablu*, 138 A.D.3d 703, 704, 27 N.Y.S.3d 886, 887 [2nd Dept, 2016]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff’s injuries as defined by statute. See *Ye Jin Han v. Karimzada*, 92 N.Y.S.3d 906, 907 [2nd Dept, 2019]; *Lacombe v. Castellano*, 134 A.D.3d 905, 906, 22 N.Y.S.3d 484, 484 [2nd Dept, 2015].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than “a mild, minor or slight limitation of use.” The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation alleged, and its duration. See *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd Dept, 1991].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose

and use of the body part. *See Toure v Avis Rent-a-Car Sys., Inc.*, 98 NY2d 345, 353 [2002]; *Walker v. Esses*, 72 A.D.3d 938, 939, 899 N.Y.S.2d 321, 322 [2nd Dept, 2010]. In the alternative, the Plaintiff must establish that she sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts which constituted her usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

Dr. Kenneth McCulloch, an orthopedic surgeon, conducted an examination of the Plaintiff on several different occasions, including November 17, 2015, January 8, 2016, July 21, 2016, July 28, 2017, July 13, 2018, August 5, 2018, and August 31, 2018. As part of the November 17, 2015 examination Dr. McCulloch conducted a range of motion examination of the right knee and found “range of motion was 5-120. Normal is 0-150.” Dr. McCulloch also opined that “the patient was a 38 year old female with right knee Germanic lateral meniscus tear.” This resulted in a discussion regarding surgery of the right knee. Dr. McCulloch treated the Plaintiff after her right knee surgery and noted that “[r]ange of motion of the right knee was 0-95. Normal is 0-150.” As part of the examination on August 31, 2018, Dr. McCulloch found that “[r]ange of motion of the right knee was 2 or 3 to 120. Normal is 0-150.” Dr. McCulloch opined as part of his report that “based upon the history as has been provided to me by the patient, a review of the medical records, physical examination findings, radiographic findings, and intraoperative findings, the injuries in question are directly causally related to the accident in which Ms. Clay was involved on August 10, 2015.” (See Plaintiff’s Affirmation in Opposition, Examination of Dr. McCulloch, Annexed as Exhibit B).

Dr. Simon Ryoo, a radiologist, did not conduct a medical examination of the Plaintiff, but instead reviewed the MRI records related to images of the Plaintiff’s thoracic spine, cervical

spine, left shoulder, lumbar spine and right knee. Dr. Ryoo opined that the left shoulder suffered from “[m]ild to moderate impingement of the supraspinatus outlet.” In relation to the lumbar spine, Dr. Ryoo noted “impingement of the traversing S1 nerve roots bilaterally.” As to the right knee, Dr. Ryoo opined that “[a] complex tear involving the anterior horn of the lateral meniscus is demonstrated, with marked attenuation and irregularity, extending to both the superior and inferior articular surfaces.” (See Plaintiff’s Affirmation in Opposition, Examination of Dr. Simon Ryoo, Annexed as Exhibit A).

While the affirmations of the Defendants’ Doctors were arguably sufficient to meet the Defendants’ *prima facie* burden, Plaintiff’s evidence, namely the affirmed report of Drs. McCulloch and Ryoo raise triable issues of fact with regard to the Plaintiff’s claim that she sustained a serious injury. “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].


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

Defendant Huang’s motion (motion sequence #5) is denied.

Defendant Royal Express’ cross- motion (motion sequence #6) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

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