

Montouri v Corwin

2019 NY Slip Op 31296(U)

March 19, 2019

Supreme Court, Kings County

Docket Number: 513265/2015

Judge: Devin P. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 513265/2015
SEQ #006,004

Part 91

DECISION/ORDER

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

NADIA MONTOURI,

Plaintiff,

against

PHILIP A. CORWIN, DORIS BRAUTIGAN, ELAINA
CORWIN, AND ROBERT EISENSTAT,

Defendants.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon the foregoing papers, defendants Doris Brautigan and Robert Eisenstat’s motion for summary judgment, and defendants Philip A. Corwin and Elaina Corwin’s cross-motion for summary judgment, on the issue of “serious injury” are decided as follows:

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff brings this action against defendants for damages caused in a motor vehicle accident that occurred on August 16, 2015. In order to prove damages, plaintiff must prove that she has injuries that satisfy one or more of the “serious injury” categories set forth in NY Insurance Law § 5102(d) (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). In her bill of particulars, plaintiff alleges injuries to her neck and back.

In support of their motions, defendants submit the affirmation of Dr. Jay William

2019 APR 26 AM 11:08
KINGS COUNTY CLERK
FILED

Eneman, an orthopedic surgeon, who examined plaintiff on July 3, 2017. Dr. Eneman states that he measured various ranges of motion in plaintiff's cervical and thoraco-lumber spine using a goniometer. He found that all measured ranges of motion fell within normal parameters, except for right and left lateral bending in plaintiff's thoracic spine. Plaintiff's right and left lateral bending measured 40 degrees, where the normal range is 45 degrees (an approximately 11% reduction). Dr. Eneman opined that there was no objective basis for this decreased range of motion, and that plaintiff had control over this outcome. Despite his determination that plaintiff controlled the outcome, Dr. Eneman concluded that the accident caused plaintiff's decreased range of motion. Dr. Eneman also concluded that plaintiff was not disabled.

Defendants also submit plaintiff's deposition in which she testified that she was not confined to her bed due to injury, and that she was not prevented from working, but that her ability to work was restricted due to her injury.

In opposition, plaintiff submits the affidavit of Dr. Mah, a chiropractor, who states that she examined plaintiff on October 5, 2015. Using diagnostic instruments, Dr. Mah found that plaintiff had 71% to 98% of her normal range of motion in her cervical spine, which correlated to an MRI finding of a bulging disc at C5-C6. Dr. Mah also found that plaintiff had 53% to 60% of her normal range of motion in her lumbar spine, which correlated with lumbar nerve root compression on plaintiff's right side. Dr. Mah diagnosed plaintiff with alteration of motion segment integrity. Dr. Mah concluded that plaintiff suffers from a permanent consequential limitation in her neck and back, which she finds was caused by the accident.

In her affidavit, Dr. Mah refers to her medical records, which are submitted with plaintiff's opposition papers as Exhibit C. These records include several reports of examinations

of plaintiff during the period 2015 to 2018. Dr. Mah identifies the documents as her records, including records she received. However, the certification is weak, as Dr. Mah does not provide information about the records sufficient to qualify them as business records pursuant to CPLR 4518.

To the extent these documents are hearsay, they still may be relied upon to oppose summary judgment if they are not the only documents relied upon to rebut the movant's prima facie case (*Taveras v City of New York*, 108 AD3d 614, 616 [2d Dept 2013]). Because these documents are accompanied by Dr. Mah's affidavit, which is not hearsay, the court will consider Dr. Mah's examination reports. The latest examination report is dated March 24, 2018. The report describes range of motion testing of plaintiff's cervical and lumbar spine. The figures from these tests show decreased range of motion, when compared to normal values, throughout plaintiff's cervical and lumbar spine.

Although Dr. Mah's report and records are sufficient on their own to rebut defendants' prima facie case, plaintiff also submits the affirmation of Ji Hoon Kim, a chiropractor, as well as additional medical records. However, a chiropractor is not among those who may submit affirmed reports pursuant to CPLR 2106, and must submit their reports in the form of an affidavit (*Austin v McPherson*, 111 AD3d 610, 611 [2d Dept 2013]). Consequently, the court will not consider the report. Nor will the court consider the additional medical records, which are not authenticated (*Yunatanov v Stein*, 69 AD3d 708, 709 [2d Dept 2010]; *Annan v Abdelaziz*, 68 AD3d 794, 795 [2d Dept 2009]).

The conflicting reports and records of Dr. Mah, and the report of Dr. Eneman, create issues of fact which must be resolved at trial. Accordingly, defendants' motion and cross-motion

are denied. Plaintiff's request for summary judgment in her favor, after searching the record, is likewise denied. The parties shall contact JCP to schedule a further appearance.

This constitutes the decision and order of the court.

March 19, 2019

DATE



DEVIN P. COHEN
Justice of the Supreme Court

2019 APR 26 11:11:08
KINGS COUNTY CLERK
FILED