

Ruiz-Torres v Hibia & Hibia LLC
2019 NY Slip Op 31657(U)
June 11, 2019
Supreme Court, Kings County
Docket Number: 508605/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

JULIA RUIZ-TORRES,

Plaintiff,

-against-

HIBIA & HIBIA LLC and KHALID NAWAZ SHAFI,

Defendants.

DECISION / ORDER

Index No. 508605/17

Motion Seq. No. 1

Date Submitted: 4/11/19

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>11-23</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>26-54</u>
Reply Affirmation.....	<u>55</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 which occurred on September 14, 2016. Plaintiff was driving her car in the middle lane on Atlantic Avenue in Brooklyn near the intersection of Hendrix Street, when defendant Shafi, who was driving a yellow taxi owned by defendant Hibia & Hibia LLC, allegedly changed lanes improperly and came into plaintiff's lane and came into contact with plaintiff's vehicle. Plaintiff was seen in the emergency room as a "walk in" at Franklin General Hospital, located in Valley Stream, New York, near plaintiff's home, later on the date of the accident. At the time of the accident, plaintiff was approximately 55 years old.

In her bill of particulars, plaintiff alleges that as a result of the accident, she

sustained injuries to her neck, back, left shoulder and left knee. Plaintiff underwent arthroscopic surgery to her left shoulder two months after the accident. Shortly thereafter, she had lumbar epidural injections on three dates followed by a percutaneous lumbar laser disc decompression procedure on February 8, 2017. Physical therapy followed. The bill of particulars also states that plaintiff was confined to bed and home for approximately two days and she missed four days of work after the accident.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff merely had sprains and strains, which have resolved with no continuing disability. Movants support their motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript, photos of plaintiff's car, a copy of the police report, a report from Ronald A. Paynter, M.D., an emergency medicine doctor, plaintiff's emergency room records from Franklin General Hospital, the MRI report from plaintiff's left shoulder MRI taken on October 1, 2016, a report from defendant's independent radiologist, Eric L. Cantos, M.D. and affirmed IME reports from their examining orthopedist, Edward A. Toriello, M.D. and their examining neurologist, Michael J. Carciente, M.D.

Dr. Toriello examined plaintiff on May 30, 2018, almost two years after the accident. He also reviewed many of plaintiff's medical, physical therapy and chiropractic records, as well as Dr. Paynter's report with regard to the emergency room records. At the time of his exam, plaintiff had complaints of pain in her neck (cervical spine) and left shoulder. Dr. Toriello's range of motion testing of plaintiff's cervical spine was abnormal in flexion and extension, with a significantly restricted range of

motion. Plaintiff's range of motion in her right shoulder was normal, but her left shoulder demonstrated significant restrictions, "limited by pain." Plaintiff's elbows, wrists and hands produced completely normal results, as did the testing of plaintiff's thoracic spine. Lumbar flexion was restricted to 45 degrees, when normal is 60-75, "with complaints of pain." Plaintiff's knees were reported as having a normal range of motion.

Dr. Toriello concludes that the plaintiff suffered strains and contusions as a result of the accident, which have all resolved, and she is capable of working without any restrictions. He points out that "range of motion is a subjective finding under the voluntary control of the individual being tested." This is insufficient. Dr. Toriello further opines that plaintiff's shoulder surgery was not necessitated by the injuries she sustained in the accident, as she did not complain about her left shoulder in the emergency room and the MRI of her left shoulder does not reveal any "evidence of a causally related injury to the left shoulder that would have required surgery."

Michael J. Carciente M.D., a neurologist, examined plaintiff on May 15, 2018. On that date, plaintiff informed Dr. Carciente that she still was experiencing pain to her neck, lower back, left shoulder and left knee. He states that "the claimant has a completely normal neurological exam. There were no objective neurological findings. Specifically, there were no objective evidence of a cervical or lumbar radiculopathy, and there was no correlation between the findings allegedly found in the spine MRI reports and today's exam. As it is well known, bulges and herniations may also be seen in completely asymptomatic and atraumatic individuals . . . There is no evidence of an ongoing neurological injury, disability or permanency." The court notes that the doctor

does not provide any numerical findings with regard to any range of motion testing, if he conducted such testing.

Dr. Eric L. Cantos, a radiologist, reviewed the plaintiff's lumbar spine MRI taken on October 22, 2016. He states that "imaging depicts disc desiccation in the lower lumbar region. There is mild bulging of the disc annuli at L4-5 and L5-S1. No disc herniation is visualized. No intradural abnormality is noted." Dr. Cantos disputes the plaintiff's claim that she sustained injuries to her lumbar spine as a result of this accident. He says that, as the MRI was conducted one month after the accident, "there are underlying changes of degenerative disc disease. A pre-existent [*sic*] degenerative condition is felt to have been ongoing prior to the accident." Dr. Cantos also reviewed the MRI of plaintiff's left shoulder, taken on October 1, 2016, two weeks after the accident. He acknowledges that it is not a normal MRI, and that while he did not see a full thickness tear, "a partial tear [of the rotator cuff] cannot be excluded," and, with regard to the glenoid labrum, "a labral tear cannot be excluded," but the "findings suggest a chronic degenerative condition of the left shoulder in conjunction with impingement. These findings are felt to reflect a pre-existent condition having been present before the accident occurrence."

Dr. Ronald A. Paynter, board certified in emergency medicine, reviewed the plaintiff's emergency room records. He notes that her only complaint on the date of the accident was "aching" lower back pain. The examination of plaintiff's shoulders and knees were "unremarkable." The hospital diagnosed her with lumbosacral strain and told her to follow up with her primary care doctor. Dr. Paynter states that, after his review, "there is no indication that the plaintiff sustained any significant injury as a result

of this motor vehicle collision." He notes that no x-rays or other tests were conducted, and no equipment, such as a back or knee brace or shoulder immobilizer or sling, was given to her. He concludes that "the records reviewed are inconsistent with the injuries alleged in the bill of particulars" and "show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident on September 14, 2016. It is my opinion within a reasonable degree of medical certainty that there were no acute traumatic findings to causally relate [the plaintiff's] accident and the claimed injuries, other than a mild lumbosacral strain from the MVC." The court notes that the discharge instructions in plaintiff's emergency room records also state that she should not go to work for four days, should go to her primary care doctor within two days, and should seek immediate medical care for any new/worsening signs or symptoms.

The court finds that defendant has made a prima facie case only with regard to the category in Insurance Law §5102(d) "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident." However, as defendants have not sustained their prima facie burden as to all of the plaintiff's claimed injuries and as to all of the applicable categories of injury in Insurance Law §5102(d), it is unnecessary to consider the papers submitted by the plaintiff in opposition to the motion. (See, *Yampolskiy v Baron*, 150 AD3d 795, 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140, 1140 [2d Dept 2017]; *Koutsoumbis v Pacciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*,

148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017];
Weisberg v James, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d
Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v*
Kossoff, 90 AD3d 969 [2d Dept 2011].

Accordingly it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: June 11, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court