

Bell v Suzer
2019 NY Slip Op 31893(U)
May 15, 2019
Supreme Court, Queens County
Docket Number: 708394/2017
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREE A. BUGGS**

IAS PART 30

Justice

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Index No.: 708394/2017

CYNTHIA BELL,

Plaintiff,

Motion

Date: April 24, 2019

-against-

Motion Cal. No.: 3

EMRICAN SUZER, ERTAN EVINER and
ASHLEY T. LALCHAND,

Motion Sequence No.: 3

Defendants.

-----X

EMRICAN SUZER AND ERTAN EVINER,

Third-Party Plaintiffs,

-against-

NOEL S. KELLIER,

Third-Party Defendant.

-----X

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1-6 and efile papers numbered 48-59 fully submitted and considered on this motion by defendant Ashley T. Lalchand seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting summary judgment in her favor against plaintiff Cynthia M. Bell on the ground that plaintiff did not sustain a serious injury under New York State Insurance Law §5102(d).

**Papers
Numbered**

Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition-Affidavits-Exhibits....	EF 48-59
Reply Affirmation-Affidavits-Exhibits.....	5-6

This is a personal injury action arising from a motor vehicle accident which occurred on May 17, 2016 on the Eastbound Belt Parkway at or near 224th Street. Plaintiff Cynthia M. Bell (hereinafter "Bell" or "plaintiff") commenced the action on June 16, 2017 with the filing of a summons and verified complaint. Moving defendant Ashley T. Lalchand (hereinafter "Lalchand") filed a verified answer with cross-claims on or about July 16, 2017. A Note of Issue was filed by plaintiff on December 14, 2018. Lalchand moves for an Order pursuant to CPLR 3212 granting summary judgment in her favor on the basis that plaintiff failed to sustain a serious injury as defined by New York State Insurance Law §5102(d).

Plaintiff Cynthia M. Bell's Verified Bill of Particulars

Bell claimed in her verified bill of particulars that as a result of the accident she sustained injuries to her neck, back, right wrist and right shoulder. She stated that following the accident she was confined to bed and home for three days. Bell claimed that she sustained a serious injury under the permanent consequential loss of use of a body organ, member, function or system and/or the 90/180 day categories of the Insurance Law.

Deposition Testimony of Plaintiff Cynthia M. Bell

Plaintiff gave sworn testimony in this matter on September 4, 2018. Bell testified, in sum and substance, in relation to her claimed injuries, that initially she did not make any complaints related to her right arm, shoulder or neck. She received physical therapy, acupuncture, and chiropractic care following the accident, and recalled undergoing Magnetic Resonance Imaging (MRI) taken of her head, right wrist and head. She treated for about four months and stopped treating because the insurance coverage ceased. She did not have health coverage from her employer at that time. Bell stated that she did not have any prior or subsequent injuries to her neck, back, right wrist or right arm or right shoulder. Following the accident she was restricted to her home for three days.

Independent Medical Examination by Dr. Pierce J. Ferriter

Dr. Pierce J. Ferriter, Board Certified Orthopedist, performed an independent orthopedic examination of Bell on November 8, 2018. He reviewed various medical records and the verified bill of particulars and performed an examination. Range of motion testing was performed with a goniometer and was as follows (the Court only states the results related to plaintiff's claims of injury in her verified bill of particulars):

Right Wrist- dorsiflexion 70 degrees (70 degrees normal); palmar flexion 80 degrees (80 degrees normal); radial deviation 20 degrees (20 degrees normal); ulnar deviation 30 degrees (30 degrees normal);

Right Hand-MCP 0-90 (0-90 normal); PIP 0-100 (0 to 100 normal); DIP 0-70 normal (0-70 normal);

Cervical Spine- flexion 45 degrees (45 degrees normal); extension 45 degrees (45 degrees normal); right and left lateral flexion 45 degrees (45 degrees normal); right and left rotation 80 degrees (80 degrees normal);

Thoracloumbar Spine-flexion 90 degrees (90 degrees normal); extension 30 degrees (30 degrees normal); bilateral lateral bending 30 degrees (30 degrees normal).

Dr. Ferriter's impression was cervical sprain, lumbar sprain, resolved and right wrist/hand sprain, objectively resolved. He concluded that the injuries sustained were causally related to the accident, and there was no evidence of a disability.

Independent Radiological Report of Dr. Sheldon P. Feit

Dr. Sheldon P. Feit, Board Certified Radiologist reviewed MRI report of the cervical spine performed at Southwest Radiology on June 8, 2016 and rendered a report on December 24, 2017. His impression of the MRI was disc bulges at the C4-C5 and C5-C6 levels; scoliosis; and, no evidence of focal herniation. He stated the MRI showed pre-existing degenerative changes not related to the accident. No posttraumatic changes were identified which were causally related to the accident.

Law and Application

Summary judgment, a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Under New York's Insurance Law §5102(d) a "serious injury" is "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, or a medically determined injury or impairment of a non-permanent nature which prevents the injured person 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 eighty days immediately following the occurrence of the injury or impairment." Lalchand bears the burden of establishing, prima facie, that Bell 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 Lalchand failed to demonstrate her entitlement to judgment as a matter of law. Lalchand failed to adequately address the plaintiff's claim, set forth in her verified bill of particulars that she sustained a serious injury to her right shoulder (*see Hussein v Empire Paratransit Corp.*, 124 AD3d 725 [2d Dept 2015]; *Silan v Sylvester*, 122 AD3d 713 [2d Dept 2014]; *compare Staff v Yshua*, 59 AD3d 614 [2d Dept 2009]). Since the defendant failed to meet her prima facie burden it is not necessary for the Court to consider plaintiff's opposition papers (*see Tudy v Sandoval*, 97 AD3d 739 [2d Dept 2012]; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2011]).

Therefore, the motion by Ashley T. Lalchand seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting summary judgment in her favor against plaintiff Cynthia M. Bell on the ground that plaintiff did not sustain a serious injury under New York State Insurance Law §5102(d) is denied.

This constitutes the decision and Order of the Court.

Dated: May 15, 2019


Hon. Chereé A. Buggs, JSC

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY