SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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SHEDIA BURKE,

Plaintiff,

-against-

ROGER JR & PAMELA TRUCKING, LLC, REYNALDO DEIDA, JR. and RANDOLPH A. ENRIQUEZ,

Defendants.

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DECISION / ORDER

Index No. 511898/16E
Motion Seq. No. 5
Date Submitted: 6/13/19
Cal No. 6

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Roger Jr & Pamela Trucking LLC and Reynaldo Deida, Jr.'s motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	83-92
Affirmation in Opposition and Exhibits.....	94-103
Reply Affirmation.....	105-106

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is a personal injury action arising out of a motor vehicle accident. On August 5, 2015, plaintiff was a passenger in a vehicle owned and driven by defendant Enriquez which was rear ended by a vehicle owned and operated by defendants Roger Jr & Pamela Trucking LLC and Reynaldo Deida, Jr. Defendant Enriquez has been dismissed from this action following a motion for summary judgment on the issue of liability. Plaintiff was removed from the scene in an ambulance and taken to Brookdale Hospital. Plaintiff's bill of particulars alleges that she sustained injuries to, *inter alia,* her head, neck, back, right knee, right ankle, right hand and right shoulder. At the time of the

accident, plaintiff was approximately thirty-eight years old.

Defendants move for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Defendants support their motion with the pleadings, the plaintiff's bill of particulars, plaintiff's EBT transcript and an un-affirmed and thus inadmissible report from Dr. Robert B. Goldberg, who examined plaintiff on October 17, 2018, three years after the accident. The motion is timely, as defendants obtained an extension of time for the motion, as indicated in the court's order dated August 16, 2016 annexed as Exhibit 4.

The court finds that defendants have not made out a prima facie case for summary judgment dismissing the action. This is in part because Dr. Goldberg's report is not in admissible form, and is in part substantive, putting aside his failure to affirm. Dr. Goldberg examined plaintiff and tested her range of motion, but his report is missing both the source of the "normals" he reports and the method/item of equipment he used for the testing. In the defendants' reply, there is a supplemental "affirmation" from Dr. Goldberg, as plaintiff raised this issue in the affirmation in opposition. This document too is not affirmed, as calling a document an affirmation does not make it one. See CPLR 2106. Unfortunately, while Dr. Goldberg acknowledges that he "failed to list in my comprehensive medical report what objective test and tool I used in order to reach my medical conclusion that plaintiff had full ranges of motion," he then states "I performed objective range of motion measurements with the use of a hand-held goniometer," but does not reference the source of the "normals" he references. This is important, as several of the "normals" he references are not the "normals" in the "Guides to the Evaluation of Permanent Impairment" 5th Edition, published by the American Medical

Association, which is uniformly used in these motions.[1] Obviously, if the doctor makes up what is normal and then reports that the test results are normal, this is unreliable evidence. That is why the decisional law requires the doctor to state the source of the "normals" he or she reports.

Here, for example, Dr. Goldberg reports that plaintiff's right and left knee flexion was 120 degrees, which Dr. Goldberg states is normal, and extension was "full." However, "full" is not a measurement, and a normal knee range of motion is movement from 0 degrees (leg straight = extension) to 150 degrees (leg bent so heel is near buttocks = flexion). With regard to plaintiff's cervical spine range of motion, the AMA Guidelines, 5th Edition, as referenced by the New York State Office of Temporary and Disability Assistance, in its Reporting Requirements for Orthopedic Examinations, Appendix Q, revised June 2018, Pages Q-4 to Q-6 [2], states that normal cervical forward flexion (tilting the head forward) is 50 degrees, normal extension (tilting the head back) is 60 degrees, normal lateral flexion (tilting the head left and right) is 50 degrees and normal lateral rotation (turning the head left and right) is 80 degrees. But Dr. Goldberg states that his unidentified source states that normal cervical forward flexion is 45 degrees (not 50), normal extension is 50 degrees (not 60), and normal lateral flexion, which he calls "sidebending" is 45, not 50 degrees.

As defendants' doctor reports that plaintiff's range of motion testing is "normal" but fails to state the source of the results he has determined are "normal," which do not seem to be in line with what the court is familiar with seeing as "normal" results, his report is

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[1]The court notes that a 6th edition was issued ten years ago, but does not seem to have been adopted by New York State's Office of Temporary and Disability Assistance, and so is not used much in New York.

[2] http://otda.ny.gov/contracts/2018/MWSICE/18-MWSICE-AppQ.pdf

insufficient to meet the defendants' burden of proof. While the MRI of the cervical spine indicates a "massive thyroid goiter" as described by Dr. Goldberg on Page 8 of his report, which could have an effect on the range of motion testing of her cervical spine, he does not state that her abnormal results could be attributed to this, instead concluding that her results were normal. He similarly reports that her right knee range of motion was "normal," although flexion to 120 degrees is not normal, but the doctor indicates that she reported to him that her right knee "clicks" and once "gave out," which caused her to fall. He reviewed the MRI of the plaintiff's right knee, and states that "the meniscus injury is pre-existing." He provides no support for this conclusion. Dr. Goldberg summarizes the medical records he reviewed, and states, with regard to the emergency room records, plaintiff complained "of neck and knee pain. No pertinent past medical history." He reviewed her medical record for an initial visit two days later, at Physical Medicine and Rehab of NY, PC, and notes that it is reported "knee throbbing with clicking . . . difficulty with flexion and extension." An MRI of the plaintiff's right knee was taken a month after the accident. Dr. Goldberg reviewed the films and acknowledges the findings are not normal, but concludes that the absence of swelling indicates to him that there was no acute injury. He then diagnoses her right knee as "sprain and strain, contusion and internal derangement. Contusion is resolved. The meniscus injury is pre-existing."

In conclusion, with regard to the categories of injury "a permanent consequential limitation of use" and "a significant limitation of use" as defined by Insurance Law § 5102(d), defendants motion fails to make a prima facie case for dismissal.

With regard to the 90/180 category of injury, Dr. Goldberg's exam three years after the accident cannot satisfy the defendants' burden of proof. In her bill of particulars, dated October 7, 2016, more than a year after the accident, it states that plaintiff "has

been out of work since the accident." At plaintiff's EBT, taken on June 20, 2018, she testified that she went to physical therapy two to three times a week for six months after the accident [Page 49]. She testified that she was working at the time of the accident, and received Workers' Compensation Benefits [Page 51]. She had injections for pain in her neck from a pain management doctor, which did not help. She went to Workers' Comp doctors [Page 60]. She had a Workers' Comp attorney and attended a hearing [Page 66]. Her doctors told her not to return to work after the accident [Page 70]. She had not returned to work by the date of her EBT.

Since the defendants have failed to meet their burden of proof as to all applicable categories of injury in Insurance Law §5102(d), the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 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]; and *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

A further word is required. Not only is Dr. Goldberg's report not sworn to as is required, but it is single spaced, fourteen pages long, and the font size is too small. The motion could have been rejected on this basis alone. Section 202.5 (a) of the Uniform Rules for Trial Courts clearly states that all papers must be double spaced and have at least a one inch margin. CPLR 2101 unfortunately permits the font size to be 10 point, but custom and usage is to use 12 point type. To submit a document such as Dr.

Goldberg's invites the court to infer total ineptitude before reading the first sentence.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: July 15, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court