

Anderson v Singh
2019 NY Slip Op 34210(U)
December 17, 2019
Supreme Court, Westchester County
Docket Number: 58229/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
MAXINE BENT ANDERSON and HEATHER
BENT-TAMIR,

Plaintiff,

-against-

DECISION & ORDER
Index No. 58229/2016
Seq. # 12

GURMEET SINGH, NISHAN SINGH, BERNARD MORCHELES, and JOHN DOES 1-5 (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.
-----X

The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-N	1-16
Memorandum of Law/Exhibits o-q, 2-1-2-4	17-21
Affirmation in Opposition/Exhibits A-P	22-38
Reply Affirmation/Exhibits A-H	39-47

Upon the foregoing papers it is ordered that the motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, Maxine Bent Anderson ("Anderson") and Heather Bent-Tamir ("Bent-Tamir") commenced this action on May 7, 2015 in New York County, to recover

monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on December 8, 2013 at or near the intersection of 12th Avenue and West 57th Street in New York City. At the time of the accident, the plaintiffs were passengers in a taxi operated by the defendant, Gurmeet Singh and owned by the defendant Nishan Singh, and such taxi was struck in the rear by a vehicle owned and operated by the defendant, Bernard Morcheles ("Morcheles").

By Decision and Order entered on May 19, 2016, the New York Supreme Court transferred venue to Westchester County. Then, on or about October 20, 2016, Fiduciary Insurance Company of America A/S/O Maxine Bent-Anderson commenced a subrogation action (Index No. 19203/2016) in Queens County against Bernard Morcheles, with regard to the same accident, seeking reimbursement for Additional Personal Injury Protection benefits paid to or on behalf of Maxine Bent-Anderson. By Decision and Order dated and entered on December 7, 2018, this Court granted a motion to transfer the subrogation action to this Court and join the actions for the purposes of discovery and trial.

Morcheles now files the instant motion for summary judgment pursuant to CPLR 3212, dismissing Anderson's complaint with prejudice on the ground that she did not sustain a serious injury as defined by Insurance Law § 5102(d).

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the

denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato* , 141 AD2d 513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

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. (McKinney's

Insurance Law §5102(d))

The Court has already referred to the physicians and other experts who submitted reports. Therefore, it will not repeat those opinions and conclusions. The Court has also opined as to the admissibility of the plaintiffs' documentation submitted in support of their motion and has previously decided that Dr. Nelson's affidavit is in admissible form and will be considered by this Court.

The Court previously granted Anderson's summary judgment motion with regard to her sustaining a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her 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. Therefore, the Court will not address that category again. Anderson also alleges that she sustained 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.

Upon review and viewing the facts in the light most favorable to Anderson, this Court finds that Morcheles has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to those categories of serious injury. Both Dr. Elkin and Dr. Weinstein showed significant restrictions in Anderson's range of motion using a goniometer. Dr. Weinstein summarily states that Anderson's complaints of pain are subjective, but provides no explanation for her restrictions in his testing using the goniometer and Dr. Elkin makes an equivocal statement that the range of motion

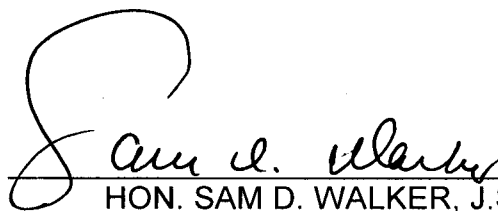
restrictions may be a result of the pre-existing degenerative spondylosis of Anderson's lumbar spine. The physicians also do not address Anderson's allegations of exacerbation of her pre-existing conditions and did not discuss her MRI's. Since the Court has found that Morcheles has not met his burden, the Court need not address the sufficiency of the affirmation of Howard Baum, M.D. and Anderson's opposition.

Accordingly, based upon the foregoing, it is

ORDERED that Morcheles' motion for summary judgment is DENIED. The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on January 14, 2020 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 17, 2019


HON. SAM D. WALKER, J.S.C.