

Anderson v Singh

2019 NY Slip Op 34211(U)

December 17, 2019

Supreme Court, Westchester County

Docket Number: 58229/2016

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

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. # 9

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-J	1-12
Affirmation in Support	13
Affirmation in Opposition/Exhibits A-I	14-23
Reply Affirmation	24
Reply Affirmation/Exhibits A-D	25-29
Supplemental Affirmation in Opposition/Exhibit A ¹	30-31

Normally, the Court will not consider the arguments made in a supplemental opposition (sur-reply), as such is not permitted by the CPLR. However, this Court will consider the supplemental opposition, to the extent that it addresses any late filing of the opposition and the movant's allegations of falsehoods perpetuated by Bent-Tamir, since

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

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, Maxine Bent 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, seeking dismissal of Bent-Tamir's complaint on the ground that she did not

the Court takes such allegations very seriously. The Court accepts all papers as timely filed and deems the explanations provided for any untimeliness of partial papers, to be adequate.

sustain a serious injury as defined under New York Insurance Law §§ 5102(d).

In support of the motion, Bent-Tamir relies upon an IME report, her deposition transcript, medical records and MRI reports, the police report, an attorney's affirmation and copies of the pleadings. Morcheles argues that Bent-Tamir's injuries do not constitute a serious injury under Insurance Law § 5102(d) and her alleged injuries are not causally related to the collision that occurred on December 8, 2013. Morcheles asserts that Bent-Tamir did not sustain a permanent loss of use of a body organ, member, function or system; or a permanent, consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which would qualify her under the 90/180 day rule.

Gurmeet Singh and Nishan Singh ("the Singhs") filed a separate motion for summary judgment on the issue of liability. However, in the event this Court does not grant that motion, the Singhs have also filed an affirmation in support of Morcheles' motion to dismiss Bent-Tamir's complaint on the ground that she did not sustain a serious injury as defined by Insurance Law § 5102(d).

In opposition, Bent-Tamir submits a physician's affirmation, medical records, ER records and deposition transcripts. Bent-Tamir argues that Morcheles failed to sustain his evidentiary burden of disproving that Bent-Tamir sustained a serious injury as a result of the December 8, 2013 accident. Alternatively, Bent-Tamir raises a question of fact as to whether she suffered a serious injury. The opposition further argues that the treating orthopedist raises questions of fact as to whether Bent-Tamir sustained a

permanent consequential limitation and/or a significant limitation in her right shoulder and lumbar spine, due to loss of motion.

The plaintiff filed a verified bill of particulars alleging that, as a result of the accident, she sustained serious personal injuries including but not limited to injuries to her head, cervical spine, shoulders, and lumbar spine, including bulging and herniated discs, as well as pain, tenderness, restriction of motion, restriction of use and weakness of the affected body parts; and aggravation and/or exacerbation of normal preexisting degenerative changes and/or pre-existing injuries.

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 determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of

motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, Bent-Tamir did not suffer death, dismemberment, significant disfigurement, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Bent-Tamir alleges that she sustained a fracture, permanent loss of use of a body organ, member, function or system; a 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 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. Morcheles argues that Bent-Tamir did not sustain any injuries corresponding to those categories and that bulging discs, sprains and strains and tears are not serious injuries.

Dr. Rene Elkin and Dr. Richard Weinstein performed an independent medical

examination on Bent-Tamir on May 7, 2018 and May 9, 2018 respectively and submitted reports of their conclusions. Dr. Elkin performed range of motion testing, using visual inspection, self-determination and use of a goniometer. She reported range of motion within the normal range in all testing. Dr. Elkin reported no objective findings for any structural neurological injury attributable to the subject accident and no objective findings for cervical or lumbar radiculopathy or cervical myelopathy. Dr. Elkin reported that Bent-Tamir's accident related symptoms are musculoskeletal in etiology and consistent with cervical and lumbar muscle sprain and that there is no accident related neurological explanation for her lower back pain.

Dr. Elkin stated that the MRI of the cervical spine revealed mild degenerative changes, as evidenced by disc bulging at C5-C6 and C6-C7, which cannot be attributed to the accident with any degree of medical certainty. She stated that it is unlikely that the mild degenerative changes would explain the persistence of her symptoms, the non-resolution of her symptoms and her reported limitations. Dr. Elkin states that there are no objective findings for neurological injury resulting from the accident that would impact on Bent-Tamir's ability to function at her pre-accident level without restrictions and there are no objective findings for neurological permanency or disability.

Dr. Weinstein also performed range of motion testing by visual inspection and use of a goniometer. He reported range of motion within the normal range in all testing. He also reported range of motion within the normal range in all testing. Dr. Weinstein concluded that Bent-Tamir's cervical, lumbar and right shoulder sprains are resolved. Dr. Weinstein stated that Bent-Tamir does not required any further treatment in relation

to the accident and has no disability and can work full duty without restrictions. Dr. Weinstein opined that, based on the medical records, the cervical sprain and shoulder sprain were causally related to the accident, but that any lower back injury is unrelated to the accident.

Upon review and viewing the facts in the light most favorable to Bent-Tamir, this Court finds that Morcheles has made a prima facie showing of entitlement to judgment as a matter of law with respect to Bent-Tamir suffering a 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.

The IME's of Bent-Tamir showed no range of motion deficiencies and revealed the cervical, lumbar and shoulder sprains to be all resolved. "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see *Kearse v New York City Transit Authority*, 16 AD3d 45 [2d Dept 2005]). Further, the evidence revealed that Bent-Tamir's alleged injuries did not prevent her from performing substantially all of the material acts which constituted

her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury.

In opposition, Bent-Tamir, by her attorney, argues that Morcheles failed to sustain his evidentiary burden of disproving that Bent-Tamir sustained a fractured sacrum and coccyx as a result of the subject accident. Alternatively, the attorney argues that there is an issue of fact with regard to Bent-Tamir's injuries, in that, Dr. Jonathan Gordon noted a fractured sacrum and cocyx, which satisfies the serious injury threshold under Insurance Law § 5102(d). The attorney also argues that Dr. Gordon raises questions of fact as to whether Bent-Tamir sustained a permanent consequential limitation and/or a significant limitation with noted loss of motion in 2013-2014 and in 2019 in her right shoulder due to a rotator cuff tear resulting from the collision, her cervical spine, and lumbar spine.

Dr. Gordon first treated Bent-Tamir on December 26, 2013 through March 17, 2014 and then examined her in May and June 2019. During his examinations in 2013-2014 and in 2019, Dr. Gordon also performed range of motion testing on Bent-Tamir using a goniometer to measure and found range of motion limitations in the right shoulder, and cervical and lumbar spine. He concluded, within a reasonable degree of medical certainty, that the subject accident was a substantial causative factor of Bent-Tamir's torn rotator cuff and an aggravation/exacerbation of a pre-existing condition in her right shoulder. Dr. Gordon also concluded that the restriction in motion of Bent-Tamir's right shoulder, constitutes 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 and

absent surgical intervention, her condition has reached maximum medical improvement and any further treatment would only be palliative.

Dr. Gordon also opined that the accident was a substantial causative factor of Bent-Tamir's fractured sacrum and cocyx, and her bulging discs, which caused restriction in the range of motion of her cervical spine and a substantial and significant limitation of use of her cervical spine. Dr. Gordon opined that the overall condition of Bent-Tamir's cervical spine has reached maximum medical improvement and any further treatment would only be palliative. Dr. Gordon opined the same for Bent-Tamir's lumbar spine.

Here, the Court finds that Bent-Tamir has produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. An evaluation of competing evidence (the battle of the experts), falls within the province of the trier of fact at trial, and it is not appropriate for the Court to dismiss the complaint on a motion for summary judgment, *Dietrich v. Puff Cab Corp.* 63 AD3d 778 [2d Dept 2009]; *Duffel v. Green*, 84 NY2d 795 [1995]; *Lopez v. Sanatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v. Chemical Bank*, 216 AD2d 231 [1st Dept 1995]; *Kaiser v. Edwards*, 98 AD2d 825 [3d Dept 1983]; *Slack v. Crossetta*, 75 AD2d 809 [2d Dept 1980]). Further, as to claims that medical records were not in admissible form, ' a plaintiff "may rely on unsworn reports and uncertified medical records if they were submitted by defendants...or were referenced in the reports of physicians who examined plaintiff on their behalf and [defendants] submitted the reports of their experts"' (*Siemucha v Garrison*, 111 AD3d 1398 [4th Dept 2013]). Also, the results of

the MRI report are referred to in the affirmed medical report of Bent-Tamir's examining Orthopedic Surgeon and therefore, Bent-Tamir and her treating physician properly submitted and relied on the MRI report in opposition to the motion (*Zarate v McDonald*, 31 AD3d 632 [2d Dept 2006]).

With regard to the fracture of Bent-Tamir's sacrum and coccyx, the bill of particulars includes fractures generally as an injury and Morcheles' attorney was provided with the note of the fractured sacrum and coccyx. Further, the Court finds that the limitations in the range of motion found by Dr. Gordon, caused by the bulging discs and sprains and strains, create issues of fact. Furthermore, issues of credibility are to be left to the finder of fact at trial and not to be resolved by the Court on a summary judgment motion (*Zarr v Riccio*, 180 AD2d 734 [2d Dept 1992]).

Additionally, the Court does not find the plaintiff's lack of treatment since 2014, to be a reason to deny the motion, since Dr. Gordon accounts for this in his report by stating that Bent-Tamir's injuries have reached their maximum medical improvement and any further treatment would only be palliative.

Bent-Tamir did not oppose that part of the motion asserting that she did not sustain 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. To sustain this category, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357

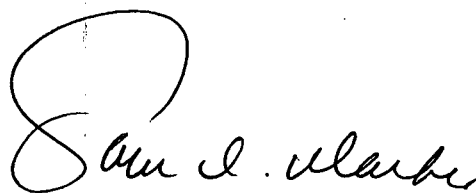
[2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). Therefore, that part of the motion is granted.

Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion for summary judgment is GRANTED in part and DENIED in part. 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 11, 2019



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