

<b>Parker v Arris Contr. Co. Inc.</b>
2019 NY Slip Op 34505(U)
March 26, 2019
Supreme Court, Dutchess County
Docket Number: 2017-51173
Judge: Maria G. Rosa
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

---

CLARICE PARKER,

Plaintiff,

DECISION AND ORDER

Index No. 2017-51173

-against-

ARRIS CONTRACTING COMPANY INC.  
and JOHN P. JACKSON,Defendants.  

---

The following papers were read on Defendants' motion for summary judgment:

NOTICE OF MOTION  
AFFIRMATION IN SUPPORT  
MEMORANDUM OF LAW IN SUPPORT  
EXHIBITS A - OAFFIRMATION IN OPPOSITION  
EXHIBIT 1

REPLY AFFIRMATION

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained when she was struck by a motor vehicle while riding a bicycle. Defendants move for summary judgment alleging Plaintiff has not sustained a "serious injury" as defined in Insurance Law §5102(d).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2<sup>nd</sup> Dep't 2009).

In support of the motion Defendants have submitted copies of the pleadings, Plaintiff's verified bill of particulars and medical records, the parties' deposition testimony and narrative reports from three independent medical examinations. Plaintiff's bill of particulars alleges she sustained injuries to her right ankle, lumbar and thoracic spine and fractured left ribs. She asserts these injuries constitute "serious injuries" as defined by Insurance Law §5102(d) in the following categories: permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a nonpermanent injury under the 90/180 category. See Insurance Law §5102(d). When a Plaintiff claims that she has suffered a serious injury due to a "significant limitation of use of a body function or system" she must demonstrate that the injury alleged has limited the use of the afflicted area in a significant way rather than a mild one. Licari v. Elliot, 57 NY2d 230 (1982). As a matter of law, mild, slight, or minor limitations are insufficient to constitute a serious injury under the Insurance Law. Id. The word "significant" means that the injury is important and relates to medical significance. Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 (2002). A medical significance of an injury "involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part." Id. at 353. On a motion for summary judgment, defendant has the threshold burden of establishing that a serious injury did not occur. See Serrano v. Canton, 299 AD2d 703 (3<sup>rd</sup> Dept 2002).

Defendant John Jackson ("defendant") struck Plaintiff with the front of his vehicle while she was riding a bicycle on Smith Street in the City of Poughkeepsie on September 25, 2014. Plaintiff states that just prior to the accident she was riding on the sidewalk and saw the defendant inside his vehicle speaking on his phone. His vehicle had stopped in the process of pulling out of a driveway and was blocking the sidewalk. Plaintiff thus rode her bicycle on the street in order to go around the front of defendant's vehicle. Defendant states that he let his foot off the brake to roll forward in an effort to get better visibility as to whether anybody was coming from his left. He did not see the plaintiff and the front of his vehicle struck her and her bicycle causing her to fall over. There was no apparent damage to the bicycle at the scene of the accident.

Following the accident, Plaintiff was transported by ambulance to the emergency room for complaints of foot and leg pain. X-rays of her right foot were negative and she was given Motrin and discharged with instructions to follow up with her primary care physician. Medical records from the emergency room indicate that an examination found her ankle, neck and back non-tender and displayed a normal range of motion. Plaintiff also made complaints of mild pain in the small toe of her right foot. Approximately one month prior to the incident Plaintiff had a bunionectomy performed on her right foot which involved inserting screws traversing the first metatarsal head and amputation of the fifth (little toe) middle phalanx.

Shortly thereafter Plaintiff saw her primary care physician complaining of back, foot and ankle pain. Her primary care physician advised her to see her podiatrist Dr. Eric Sims who had performed the bunionectomy. Dr. Sims diagnosed her with a contusion of the right foot and advised her to continue using an ace bandage and a walker boot that she had previously used post bunionectomy. He treated her through April 2015. As of January 2015 his records indicate that any foot injuries had essentially resolved. His treatment notes from April 2015 indicate no pain on direct

palpitation or with range of motion to the foot or ankle and stated there were no limitations on activity. On the advice of counsel, Plaintiff also began treating with Dr. Lewis Mendoza in October 2014. On her first visit on October 14, 2014 she complained of right foot, upper and lower back pain and numbness and tingling to her left lower extremity. Electromyography (“EMG”) performed was consistent with left L5-S1 radiculopathy. A January 2015 x-ray of the right ankle was unremarkable with no indication of a fracture. A whole body bone scan performed in January 2015 showed increase activity of the distal fibula, and a magnetic resonance imaging (“MRI”) showed a disc abnormality at L3-L4.

A report following Dr. Mendoza’s initial examination of the plaintiff in October 2014 diagnosed her with probable lumbar disc injuries, probable fractured left ribs, lumbar radiculopathy and neuropathy, probable torn ligaments in her right foot and ankle and a thoracic/lumbar sprain or strain. His subsequent treatment records reflect a diagnosis of a fractured right ankle and torn ligaments. The only objective finding in support of this conclusion is a repeated entry stating that “there was normal range of motion to all joints of the lower extremities except to the right ankle and foot that were in a brace.” He recommended Plaintiff begin physical therapy and undergo a whole body scan. Medical records show that Plaintiff continue to treat with Dr. Mendoza through December 2017. The treatment constituted physical therapy and then home therapy. Records of the physical therapy show that treatment was exclusively for the neck and back. Plaintiff, however, testified at her deposition that the physical therapy included treatment to her ankle.

Defendants have submitted a report of an independent medical examination Dr. Robert Hendler performed in June 2018. Dr. Hendler physically examined the plaintiff and reviewed her medical records, relevant x-rays and the whole body scans and MRI performed in January 2015. He states that the x-ray of Plaintiff’s right ankle does not reveal any evidence of a fracture. He states that the increased activity of the distal fibular noted in the whole body scan was of no clinical significance as it was done almost four months after the accident. He further found no “significant uptake in the right lateral malleolar area that would be consistent with a fracture” but acknowledged a mild bulging disc at L3-L4 revealed on the MRI of Plaintiff’s lumbosacral spine. At the time of the examination Plaintiff made no complaints about her ribs, stated that she had intermittent aches and pains in her lower back with no radiation and made only minimal complaints of aches and pains and minor swelling of her right ankle. Upon examination Dr. Hendler found full range of motion in both ankles, no swelling or pain and that Plaintiff was able to walk with a normal gait. He further found a full range of motion of the lumbar spine with no deficit and no deformities, pains or palpitations upon examination of her ribs. Dr. Hendler took x-rays of Plaintiff’s lumbar spine and ankles. The lumbar spine showed normal lumbar lordosis, well-maintained disc spaces and no evidence of spondylosis or spondylolisthesis. The right ankle x-ray was normal with the only abnormality revealed being the presence of metallic screws inserted during Plaintiff’s bunionectomy. Dr. Hendler concluded that Plaintiff may have sustained a contusion to her ribs, a mild contusion to the right ankle and a possible lumbosacral sprain as a result of the September 2014 accident. He found no present disability or permanency resulting from these conditions.

Defendants have also submitted reports from two independent no-fault medical examinations. Orthopedic surgeon Dr. Ronald Mann examined the plaintiff in May 2016. He concluded the

plaintiff did not sustain any fractures as a result of the accident. Her only complaint during the examination was a pain to her lower back, stating that she could stand for only two hours before having to sit and have to change positions sitting every hour. Dr. Mann found the plaintiff exhibited full ranges of motion in her lumbar spine, right ankle and right foot. He diagnosed Plaintiff as having suffered a sprain or strain of the lumbar spine that had resolved and found no evidence of any orthopedic disability. Michael Dudick, D.C. performed a chiropractic examination of the plaintiff in May 2016. At that examination Plaintiff complained only of suffering from lower back pain with difficulty sitting and bending. Plaintiff advised that her pain was a three out of ten, and that she had not missed any work as a result of the accident. Dr. Dudick observed Plaintiff to have a normal gait with no difficulty dressing and she reported no limitations on the performance of her daily living activities. He concluded that Plaintiff suffered a lumbar strain from the accident and found no objective evidence of disability. He did not find Plaintiff was at pre-injury status solely based on Plaintiff's subjective reports of being symptomatic. He found no need for additional chiropractic treatment.

The foregoing evidence is sufficient to demonstrate that the plaintiff did not sustain a "serious injury" under Insurance Law §5102. The reports of the independent medical examinations and medical records submitted demonstrate *prima facie* that Plaintiff did not sustain a permanent consequential limitation of use of a body organ or member, nor a significant limitation of use any body function or system as a result of the September 2014 accident. All three reports are based upon physical examination of the plaintiff in conjunction with a review of objective medical tests and access the qualitative nature of Plaintiff's claimed injuries. Each examining doctor concluded that Plaintiff did not sustain any significant limitation to her ankle, spine or ribs based upon a comparative determination of her condition to the normal function and purpose of these body parts. Plaintiff's own deposition testimony and the medical records further establishes defendant's *prima facie* entitlement to summary judgment on her 90/180 day claim. This evidence shows that Plaintiff did not miss any time from work as a result of the accident and was not limited in the performance of substantially all of her normal activities in the first 90 out of 180 days following the accident.

In opposition to the motion Plaintiff has submitted only an affirmation of counsel and a CPLR 3101(d) expert witness disclosure accompanied by a narrative report Dr. Mendoza prepared dated October 23, 2018. Dr. Mendoza's report was prepared after defendant filed the instant motion for summary judgment. There is nothing in the report indicating that Dr. Mendoza conducted an examination of the plaintiff in connection with preparing the report, nor any recent examination. The report only references the initial physical examination of the plaintiff on October 14, 2014. That portion of the report reflecting examinations of the neck, chest, abdomen, upper and lower extremities is identical to treatment records prepared during Dr. Mendoza's treatment of the plaintiff from the time of the accident through December 2017, although Plaintiff testified at her deposition that she stopped treating with Dr. Mendoza in August 2016. Dr. Mendoza's report indicates that Plaintiff had a boot cast on her right ankle and foot. This is further evidence that he did not examine the plaintiff in connection with the preparation of his report, as Plaintiff testified at her deposition that she no longer wears a boot cast.

In his report Dr. Mendoza references the x-rays of Plaintiff's right foot, the whole body scan, and MRIs of the lumbar spine and right ankle. He acknowledges that the September 2014 x-rays, the whole body scan, and the x-rays from January 2015 were unremarkable and noted only increased activity of the distal fibula. He cites a June 2018 MRI of the right ankle revealing degenerative joint disease in the area of the metatarsal bones but otherwise revealing nothing remarkable. Based upon his review of his treatment records and the diagnostic studies, Dr. Mendoza's report contains a "recent diagnosis" of a fractured right ankle, herniated lumbar discs, lumbar radiculopathy, thoracic/lumbar strain/sprain, right ankle sprain/strain, contusion to the right ankle/foot and thoracic/lumbar muscle spasms. He states that as a result of the September 2014 accident Plaintiff sustained a permanent partial disability of the muscular, skeletal and neurological systems, with a 26% loss of range of motion to her back and a 20% loss of strength to the right and left lower extremities. He concludes that she sustained a foraminal disc protrusion to the left at L3-L4 and a fracture to the right ankle. Dr. Mendoza based his diagnosis of a fractured right ankle based upon the January 2015 bone scan finding abnormal focal increased activity in the area of the distal fibula.

Plaintiff testified at her deposition that the only difficulty she presently had with her right ankle was that it became sore based on particular weather patterns. Dr. Mendoza did not conduct a recent examination of the plaintiff in support of his report offered in opposition to Plaintiff's motion. As his findings and conclusions were not based on a recent examination of the plaintiff, the report is insufficient to raise a triable issue of fact as to whether Plaintiff's alleged injuries constituted a serious injury. See Estrella v. Geico Ins. Co., 102 AD3d 730, 731 (2<sup>nd</sup> Dept 2013); Haniff v. Khan, 101 AD3d 643, 644 (1<sup>st</sup> Dept 2012).

Dr. Mendoza's conclusion that Plaintiff sustained a fracture is directly contradicted by Plaintiff's certified medical records reflecting she did not sustain a fracture. X-rays taken at the Westchester Medical Center on the date of the accident were interpreted to show no acute fracture and the treating physician found Plaintiff's ankle non-tender and displayed a normal range of motion. Plaintiff's podiatrist Dr. Sims has performed additional x-rays on October 10, 2014 and determined there was no fracture to the ankle. Upon review of these x-rays in October 2014, Dr. Mendoza's report references no fracture to the right ankle and that the only impression from that x-ray was post-surgical related to Plaintiff's prior bunionectomy. Dr. Mendoza's recent opinion that Plaintiff sustained a possible fracture is based entirely upon a bone scan performed in January 2015. Further, his report indicates that the impression from that bone scan noted that recent x-rays of the right ankle were unremarkable and found only an abnormal focal increased activity in the area of the distal fibular. This finding did not constitute a conclusion that Plaintiff sustained a fracture. It merely indicated the **possibility** of a fracture and a potential need for future testing. Therefore, Dr. Mendoza's opinion that Plaintiff sustained a fracture is not based upon any definitive finding, nor upon a recent examination of Plaintiff, nor upon the medical records of Plaintiff's treatment. A medical affidavit cannot defeat a motion for summary judgment where the lack of merit to a Plaintiff's serious injury claim is patent from the uncontroverted medical evidence submitted. See Covington v. Sinnirella, 146 AD2d 565 (2<sup>nd</sup> Dept 1989). Since Plaintiff has failed to submit objective diagnostic evidence demonstrating a fracture of the right ankle and testified at her deposition that she did not fracture her ribs as a result of the accident, she fails to offer competent evidence showing injuries to her ankle, spine, or ribs constituting a serious injury under the

Insurance Law.

Based upon the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is granted and this action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: March 26, 2019  
Poughkeepsie, New York

ENTER:

  
\_\_\_\_\_  
MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Sobo & Sobo, LLP  
1 Dolson Avenue  
Middletown, NY 10940

Nicoletti Gonson Spinner Ryan Guliano Pinter, LLP  
555 Fifth Avenue, 8<sup>th</sup> Floor  
New York, NY 10017