

Cole v Ugarte

2019 NY Slip Op 35173(U)

December 30, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30953/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 14**

-----X
COLE, TOTSEITA

Index No. **30953/2018E**

- against -

Hon. **JOHN R. HIGGITT,**

UGARTE, NELLY, et ano
-----X

A.J.S.C.

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **November 1, 2019** and duly submitted as No. **41** on the Motion Calendar of **December 20, 2019**

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	10-19
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	21-33
Replying Affidavit and Exhibits	34
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, defendants’ motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject motor vehicle accident is granted in part, in accordance with the annexed decision and order.

Dated: **12/30/2019**

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance Settle Order
- Fiduciary Appointment Submit Order
- Referee Appointment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
TOTSEITA COLE,

Plaintiff, DECISION AND ORDER

- against - Index No. 30953/2018E

NELLY UGARTE and MD A. REZA,

Defendants.

-----X

John R. Higgitt, J.

Upon defendants’ October 4, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s November 22, 2019 affirmation in opposition and the affidavit and exhibits submitted therewith; defendants’ December 19, 2019 affirmation in reply; and due deliberation; defendants’ motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject April 2, 2018 motor vehicle accident is granted in part.

Plaintiff claims injuries to her right knee and the cervical and lumbar aspects of her spine, and alleges “serious injury” under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, defendants submit the affirmed reports of orthopedic surgeon Dr. Buckner and radiologist Dr. Springer, and the transcript of plaintiff’s June 27, 2019 deposition testimony.

With respect to plaintiff’s knee injury, Dr. Springer reviewed the films from the April 15, 2018 MRI, finding that they depicted degeneration and no evidence of post-traumatic change causally related to the accident. Dr. Buckner examined plaintiff on August 26, 2019, concluding that any positive knee findings were superimposed on pre-existing degenerative disease. Dr.

Buckner found that plaintiff had sustained a knee injury causally related to the accident, and acknowledged that his findings were abnormal. Defendants thus failed to demonstrate, prima facie, that plaintiff's knee injuries were not caused by the accident (*see Curet v Kuhlor*, 172 AD3d 634 [1st Dept 2019]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]). Because Dr. Buckner did not correlate his range-of-motion findings to norms, defendants' proof was insufficient to demonstrate, prima facie, that plaintiff's limitations, if any, were not consequential or significant within the meaning of the statute (*see Campbell v Wendt*, 152 AD3d 413 [1st Dept 2017]; *Mirdita v Ash Leasing Inc.*, 101 AD3d 480 [1st Dept 2012]). Accordingly, defendants failed to meet their prima facie burden.

With respect to plaintiff's lumbar injury, Dr. Springer reviewed the films from the April 15, 2018 MRI, finding that they depicted degeneration and no evidence of post-traumatic change causally related to the accident. Dr. Buckner examined plaintiff on August 26, 2019. Dr. Buckner concluded that plaintiff did not sustain a lumbar injury in the accident because his examination yielded no objective evidence of injury, evidence of such injury was absent from plaintiff's treatment records, and any positive imaging results depicted degenerative disease but no trauma. Although Dr. Buckner declined to compare his range-of-motion findings to norms (*see Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]), his findings, together with defendants' radiologists opinions, were sufficient to establish, prima facie, that plaintiff did not sustain a lumbar injury causally related to the accident (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]; *Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]).

Defendants also point to plaintiff's deposition testimony regarding a prior back injury occurring at least 15 years before the subject accident. This testimony, however, arose primarily through the attorneys' colloquy and was insufficiently developed to require plaintiff's rebuttal.

In opposition, plaintiff submitted, among other things, an affirmed report from the Dr. Dassa, who performed plaintiff's knee arthroscopy, and an affidavit from plaintiff's treating chiropractor, Dr. Zeren. Drs. Dassa and Zeren measured reductions in plaintiff's ranges of motion shortly after the accident, during the course of treatment, and recently; opined that the MRI films depicted traumatically-induced injury; and opined that, given plaintiff's lack of contributory history, treatment, positive imaging, and their observations, plaintiff's injuries and limitations were attributable to the accident rather than degeneration. This was sufficient to raise an issue of fact (*see Hamilton v Marom*, 2019 NY Slip Op 08615 [1st Dept 2019]).

With respect to the 90/180-day injury claim, defendants met their prima facie burden with the statements in plaintiff's bill of particulars that she was confined to bed and home for only eight weeks, and her deposition testimony that she was not so confined until after the arthroscopy occurring ten days before the expiration of the statutory period (*see Williams, supra; Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Curet, supra; Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). In opposition, plaintiff raised a triable issue of fact. Plaintiff averred that she was unable to perform many daily tasks and was unable to work as a live-in caregiver for five and a half months, and Dr. Zeren averred that he deemed plaintiff incapacitated from her work during that time (*see McIntosh v Sisters Servants of Mary*, 105 AD3d 672 [1st Dept 2013]).

In opposition, plaintiff abandoned the "serious injury" claims under the Insurance Law §

5102(d) categories of significant disfigurement, permanent loss of use, and significant limitation, and the “serious injury” claims premised on injuries to her cervical spine (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry, supra*). Accordingly, the “serious injury” claims based on those categories and injuries are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).¹

Accordingly, it is

ORDERED, that the aspects of defendants’ motion for summary judgment dismissing plaintiff’s claims of “serious injury” with respect to her claimed cervical injuries, and under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use and significant limitation, are granted, and those claims are dismissed; and it is further

ORDERED, that defendants’ motion is otherwise denied.

The parties are reminded of the February 3, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: December 30, 2019



John R. Higgins, A.J.S.C.

¹ Dr. Buckner opined that, because his examination yielded no objective evidence of injury, evidence of such injury was absent from plaintiff’s treatment records, and there was no objective evidence of such injury (such as an MRI), plaintiff did not sustain a cervical injury in the accident, and plaintiff failed to raise an issue of fact. Accordingly, plaintiff cannot recover for injuries to her cervical spine, regardless of whether it is found that she sustained some other “serious injury” (*see Taylor v Delgado*, 154 AD3d 620 [1st Dept 2017]).