

Singh v Lachick

2019 NY Slip Op 35209(U)

November 7, 2019

Supreme Court, Queens County

Docket Number: Index No. 709958/2018

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

SARA SINGH, Index No.: 709958/2018

Plaintiff, Motion Date: 11/7/19

- against - Motion No.: 36

STEVEN LACHICK and LORINDA Motion Seq No.: 2
ENTERPRISES, LTD.,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 23 - 38
Affirmation in Opposition-Exhibits.....	EF 41 - 49
Reply Affirmation.....	EF 51

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on January 9, 2018. As a result of the accident, plaintiff alleges that she sustained serious injuries to her lumbar spine, Temporomandibular Joint (TMJ), and cervical spine.

Plaintiff commenced this action by filing a summons and complaint on June 27, 2018. Defendants joined issue by service of a verified answer dated July 17, 2018. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on November 15, 2018 and testified that she was involved in the subject accident. At the time of the accident she was a stay-at-home-mom. She was struck by a yellow school bus while crossing the street. Immediately after the accident, she felt pain to the back of her head, both shoulders, neck, lower back, and jaw. She was transported by ambulance to Jamaica Hospital where she complained of pain to the back of her head, both shoulders, neck, lower back, and jaw. After five to six hours, she was discharged. Two days after the accident, she visited her primary care physician and complained of pain to her jaw, back of her head, shoulders, neck, chest, and lower back. Approximately one week after the accident, she went for treatment at a physical therapy facility. She began treating three times per week for five to six months. Thereafter, she attended physical therapy twice per week. At the time of the deposition, she was undergoing physical therapy once per week. Approximately three weeks after the accident, she sought treatment for pain in her jaw. She never underwent any surgical procedures or injections as a result of the subject accident. There are no activities that she can no longer do as a result of the subject accident. She was involved in two prior motor vehicle accidents; one in 1997 and another in 2016. As a result of the 2016 accident, she suffered serious injuries to her spine.

Steven A. Renzoni, M.D. performed an independent orthopedic examination on plaintiff on March 4, 2019. Plaintiff presented with current complaints of neck, mid back, low back, and shoulder pain. Dr. Renzoni identifies the records reviewed prior to rendering the report. Dr. Renzoni performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's lumbar spine. Dr. Renzoni did note restricted ranges of motion in plaintiff's cervical spine regarding extension and lateral flexion. Dr. Renzoni concludes that the examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. Plaintiff is capable of working without restrictions. Plaintiff is able to perform normal activities of daily living without limitations.

Paul Lerner, M.D. performed an independent neurologic examination on plaintiff on March 12, 2019. Plaintiff presented with current complaints of neck, mid back, low back, and shoulder pain. Dr. Lerner identifies the records reviewed prior to rendering the report. Dr. Lerner also performed range of motion testing with an inclinometer and arthroidal protractor and noted restricted ranges of motion in plaintiff's cervical and lumbar spine. Dr. Lerner opines that cervical and lumbar issues may

represent an exacerbation of prior trauma, but nevertheless, these conditions are currently objectively resolved. Issues concerning temporomandibular joint disturbance should be referred to an independent dental examiner. Dr. Lerner concludes that he finds no objective evidence of causally related neurologic disability or impairment and no indication for any neurologic treatment.

Evan Temkin, D.M.D. performed an independent dental re-evaluation on February 19, 2019. Plaintiff presented with pain with mastication with harder foods and bilateral TMJ pain. Dr. Temkin identifies the records reviewed prior to rendering his report. Dr. Temkin opines that there is no disability causally related to the subject accident. From a dental perspective, there is no need for household help or ambulatory services. There are no objective findings related to the accident which would preclude her from pre-accident activities of daily living. Plaintiff can work.

Based on the submitted evidence, defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendants also contend plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of her usual daily activities.

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Drs. Renzoni and Lerner who examined plaintiff over a year after the subject accident and recorded objectively-measured limitations in range of motion (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985] [finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]). Neither doctor opines as to what extent the positive findings are self-imposed or affected by other variables.

Based on such, this Court finds that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence

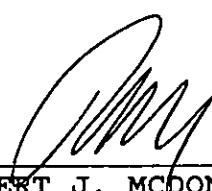
to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

In any event, even if this Court did find that defendants sustained their burden, in opposition plaintiff raised triable issues of fact by submitting, inter alia, the affirmations from Ahmed Elfiky, M.D. and Evan Mondshine, D.D.S. indicating that plaintiff sustained serious injuries as a result of the subject accident. Specifically, Dr. Elfiky performed range of motion testing and found restricted ranges of motion regarding plaintiff's cervical spine and lumbar spine both contemporaneously to the subject accident and in a recent examination. Dr. Elfiky indicates that there is a causal relationship between the subject injuries and the accident and that such injuries and physical restrictions are causing significant restrictions on plaintiff's daily activities. Dr. Mondshine concludes that plaintiff exhibited Temporomandibular Joint Dysfunction and Myofascial Pain Dysfunction as a result of the subject accident.

Accordingly, for the reasons set forth above and based on the conflicting expert medical opinions submitted by the parties (see Wilcoxon v Palladino, 122 AD3d 727 [2d Dept. 2014], it is hereby

ORDERED, that the summary judgment motion by defendants is denied.

Dated: November 7, 2019
Long Island City, N.Y.



ROBERT J. McDONALD
J.S.C.

