

Tymoc v Cannady

2020 NY Slip Op 30405(U)

February 11, 2020

Supreme Court, Kings County

Docket Number: 523260/2017

Judge: Debra Silber

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

ELIZABETH I. TYMOC,

Plaintiff,

-against-

MICHAEL L. CANNADY,

Defendant.

DECISION / ORDER

Index No. 523260/2017

Motion Seq. No. 1

Date Submitted: 1/16/20

Cal No. 57

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>19-26</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>30-36</u>
Reply Affirmation.....	<u>37</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident which took place on January 12, 2015 in Westchester County, New York. It apparently was a three-vehicle collision, where plaintiff was driving the vehicle in the middle and was hit in the rear and pushed into the car in front of her. In her Bill of Particulars, plaintiff alleges that she sustained injuries to her neck and back as a result of the accident. At the time of the accident, plaintiff was approximately 30 years of age.

The movant contends that plaintiff did not sustain a "serious injury" as a result of this accident. Defendant supports his motion with the pleadings, plaintiff's EBT transcript

and affirmed IME reports from a neurologist and an orthopedist, both of whom examined plaintiff in 2019, four years after the accident. The movant's attorney contends that plaintiff testified at her EBT that she returned to work two days after the accident, undercutting any claim under the 90/180 category of injury. He further notes that her Bill of Particulars does not state which categories of injury the plaintiff is claiming are applicable to her accident.

At plaintiff's EBT, when she was asked if she missed any days of work as a result of the accident, she said she didn't, although for a few days she worked from home [Pages 56-57]. Thus, if plaintiff has a claim for the 90/180 category of injury, defendant makes a prima facie case for dismissal based upon her deposition testimony.

The court next reviewed the defendant's affirmed medical reports. Dr. Daniel J. Feuer, a neurologist, examined plaintiff on February 20, 2019. He states that plaintiff reported that she was still having recurrent neck and low back pain. He also states that plaintiff told him that she had been involved in three motor vehicle accidents in 2012, in which she sustained injuries to the neck and the low back, but was "in her usual state of health until January 12, 2015," when she was involved in this accident. Not sure which of these conflicting statements is correct, the court went back to the EBT transcript. Plaintiff testified that she was seeing a chiropractor, Dr. Statler, once or twice a month "for maintenance" before this accident, and that she went to see him the day after this accident [Page 27]. She testified that she was in three car accidents in Connecticut in 2007 (not 2012) and has been seeing the chiropractor ever since, "like to maintain my spine, just like you might go and get your teeth cleaned to prevent cavities at the dentist" [Page 28]. She testified that she injured her neck and back in these prior accidents, and had an attorney for the last one, for her Workers' Compensation claim, whose office was

in Danbury, Connecticut [Page 30]. She testified that she was rear-ended in a car accident in Michigan in 2004, but did not seek any treatment [Pages 35-36]. It seems plaintiff had recovered from her 2004-2007 accidents by 2015, when she was in the accident at issue herein.

Dr. Feuer reports that he tested plaintiff's range of motion in her cervical and lumbar spine with a goniometer, and found "normal ranges of motion as per American Medical Association 'Guidelines to the Evaluation of Permanent Impairment' Fifth Edition." Dr. Feuer then states that plaintiff's "examination is within normal limits. . . . there are no clinical findings to support the diagnosis of cervical or lumbosacral radiculopathy." He then states that a review of plaintiff's medical records indicates conflicting reports, with one neurologist finding normal results and another finding abnormal results, and states that "abnormalities should be present no matter which doctor examines" the patient. He concludes that plaintiff "is neurologically stable and able to engage in full active employment as a salesperson as well as activities of daily living without restriction."

Dr. Alan R. Miller, an orthopedist, examined plaintiff on March 21, 2019. Plaintiff informed him that she was still treating with her chiropractor and still had neck and back pain. She told Dr. Miller that she has been treating with the chiropractor since her 2012 (which is wrong) accident in Connecticut, when she injured her neck and back. He tested the range of motion in her cervical and lumbar spine and reports tenderness but no spasm, and mainly normal results, with a reduction in the range of motion in one plane (extension 55 when normal is 60) in her cervical spine, and one plane (extension 20 when normal is 25) in her lumbar spine. Dr. Miller diagnoses plaintiff with "cervical, thoracic and lumbar sprains, objectively resolved." He states that the injuries which plaintiff sustained

in the accident, and which have resolved, were “a temporary aggravation and exacerbation of a preexisting condition from a previous motor vehicle accident.” Finally, he states that plaintiff has no orthopedic disability. He adds that if any “MRI report and studies” become available for his review, he will provide an addendum. This is puzzling, as he states on Page 2 of his report that he reviewed the MRI reports of plaintiff's cervical and lumbar spine taken in 2015 after the accident and the reports indicate a cervical herniation and a bulge, and a lumbar herniation and three bulges.

Plaintiff counters that there is ample medical evidence in her papers in opposition that she suffered injuries to her neck and back as a result of the subject accident, and that she sustained both a permanent consequential limitation and a significant limitation of use of a body function or system. Plaintiff further points out that Dr. Miller did not obtain normal results when he tested her range of motion. She argues that defendant does not make out a prima facie case for summary judgment, but if the court doesn't agree, then plaintiff claims that the competing expert reports raise issues of fact. Further, plaintiff maintains that despite returning to work, the significant impact her injuries had on her daily activities is sufficient to make out a claim under the 90/180 category. Plaintiff also avers that defendant hasn't made out a prima facie case as to this category of injury, as defendant hasn't provided any medical evidence concerning plaintiff's condition in the period immediately after the accident.

Conclusions of Law

Movant has not made a prima facie showing of defendant's entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Plaintiff's testimony at the EBT that she returned to work immediately after the

accident makes a prima facie showing that plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the accident (see *Kang v Bhullar*, 167 AD3d 726, 727 [2d Dept 2018] [“the defendants established, prima facie, that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) by submitting a transcript of the plaintiff’s deposition testimony, which demonstrated that she missed about one week of work during the first 180 days following the accident”]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

However, with regard to the other applicable categories of injury, defendant’s orthopedist Dr. Miller did not obtain normal test results from his tests of plaintiff’s range of motion of her cervical and lumbar spine, and he acknowledges that the MRI reports indicate a herniated disc in her cervical spine and a herniated disc in her lumbar spine as well as many bulges. Thus, defendant has not made a prima facie case for dismissal.

Even if defendant had made a prima facie case for summary judgment dismissing the complaint, plaintiff has come forward with sufficient evidence to overcome the motion and raise an issue of fact as to whether she sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system from the subject accident. Dr. Ali E. Guy’s affirmed report, dated October 7, 2019 (Ex. C) (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]), describes an examination of plaintiff conducted on that date and indicates significant and quantified limitations in plaintiff’s range of motion in her cervical and lumbar spine. Further, he states that the injuries to plaintiff’s neck and lower back are causally related to the subject motor vehicle accident, and are permanent and progressive. He opines that plaintiff may need cervical fusion surgery in the future.

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 11, 2020

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**