

Arnaut v Zaman

2020 NY Slip Op 30445(U)

February 18, 2020

Supreme Court, Kings County

Docket Number: 511792/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

_____ X

ELENA ARNAUT,

Plaintiff,

DECISION / ORDER

-against-

Index No. 511792/2018

Motion Seq. No. 1

FARDIN ZAMAN and GERRET HICKS,

Date Submitted: 1/16/20

Cal No. 4

Defendants.

_____ X

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>18-26</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>29-33</u>
Reply Affirmation.....	<u>41</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 November 2, 2017. Plaintiff was walking across the street when she was struck by defendants' vehicle at the intersection of Avenue I and East 18th Street in Brooklyn, New York. The vehicle was owned by defendant Hicks and driven by defendant Zaman. Plaintiff was removed from the scene in an ambulance and brought to the emergency room at Maimonides Hospital. She received stitches for a cut on her face, was given many tests and was released. In her Bill of Particulars, plaintiff, who was 26 at the time of the accident, alleges that as a result of the accident, she

sustained injuries to her hip,¹ right shoulder, left knee, neck and lumbar spine.

Defendants contend that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). They claim that her soft tissue injuries have fully healed, with no permanency, and that she has a non-traumatic degenerative shoulder condition unrelated to the accident. Further, defendants contend that plaintiff’s testimony that she began working at a new job a few months after the accident, and that she resumed going to the gym a month after the accident, demonstrates that plaintiff did not sustain a non-permanent injury which prevented her from performing substantially all of her usual and customary daily activities for 90 of the 180 days following the accident. Defendants submit the pleadings, plaintiff’s EBT transcript, an affirmed IME report from Joseph C. Elfenbein, M.D., who examined plaintiff on January 22, 2019, and an affirmed report from Michael Setton M.D., a radiologist, who reviewed the MRIs of plaintiff’s right shoulder which were taken on September 6, 2018.

Dr. Elfenbein, an orthopedist, examined plaintiff and reports normal ranges of motion in plaintiff’s cervical and lumbar spine, right shoulder, left hip and left knee, with negative test results, and an abnormal finding, a 5 degree deficit (25 degrees when normal is 30 degrees) in the right rotation of her thoracic spine. However, plaintiff has not indicated that she injured her thoracic spine in her Bill of Particulars or the two supplements to it. Dr. Elfenbein diagnoses plaintiff with resolved sprain/strain in her cervical, thoracic and lumbar spine, right shoulder, left hip and left knee. He opines that plaintiff “presents with a normal orthopedic examination . . . with no findings which

¹Which hip is not specified.

would result in limitations . . . in use of the body parts examined.” Defendants’ radiologist, Dr. Setton, who reviewed the MRI of plaintiff’s right shoulder, states that plaintiff has “mild supraspinatus tendinopathy. No rotator cuff or labral tear. Mild to moderate hypertrophic acromioclavicular joint degeneration . . . [which is] a chronic repetitive overuse type injury, with no causal relation to trauma.”

Plaintiff opposes the motion, and avers, *inter alia*, that defendants have failed to make a prima facie case with regard to the 90/180 category of injury, which requires the court to deny the motion.

Conclusions of Law

Defendants have not made a prima facie showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). In a motion for summary judgment, defendants have the burden of proof. For the 90/180 category of injury, defendants rely on plaintiff’s testimony at her EBT, held on December 11, 2018, as there is no other evidence in admissible form in the motion papers with regard to the first six months after the accident. Plaintiff testified at her EBT that she had arrived in the United States from Moldova about a week before the accident. She said she received a Master’s Degree in psychology in 2015 and a diploma from Sports University in Moldova in 2017, which qualified her to be a personal trainer for bodybuilders [Page 9]. She was not employed at the time of the accident, as she had only been in the U.S. for a week. She testified that she had an oral agreement to be a personal trainer at a gym called Match Point on Emmons Avenue in Brooklyn, but she did not start working there because of the accident. Instead, she started a job at the end of February, 2018 as a cashier in a

liquor store, more than 90 days after the subject accident. Further, while plaintiff testified that she resumed going to her gym in late December of 2017, she testified she was only able to do the exercises she had learned in physical therapy. Plaintiff was not asked any questions at the EBT about her usual and customary activities in the months following the accident. The only question she was asked was how many times per week she went to physical therapy. She was asked about her activities before the accident, which she responded to by saying she worked out regularly [Page 41].

Consequently, defendants have failed to make a prima facie showing with regard to the 90/180 category of injury (see *Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately address the plaintiff's claim . . . that [she] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]).

Since the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept

2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if defendants 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. Matthew Wert's affirmation (Ex. D) states that, to a reasonable degree of medical certainty, the “diagnostically confirmed injuries to Elena Arnaut's cervical spine, lumbar spine and right shoulder are causally related to the November 2, 2017 accident and are permanent in nature” (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]).

The court wishes to note that, with regard to Dr. Elfenbein's range of motion testing, which had no bearing on the decision herein, that the “normals” he indicates for shoulders and hips do not appear to correlate with recognized “normals.” For example, he states that extension of the plaintiff's right shoulder was 40 degrees, which is normal, while Dr. Wert, plaintiff's doctor, states that “normal” for that test is 60 degrees. The court's library does not have a copy of the AMA Guide to the Evaluation of Permanent Impairment, 5th Edition, but the New York State Workers' Compensation Board's “Workers' Compensation Guidelines for Determining Impairment” published in 2017 and available on their website, states that the normal range of motion for

extension of the shoulder is 60 degrees [Page 29], not 40 degrees. In an IME report in another case which was before this court, Dr. Elfenbein reported that right shoulder extension was "50 degrees (50 degrees normal)", not 40 degrees². Similarly, while Dr. Elfenbein states that plaintiff's forward flexion of her left hip was 100 degrees, which is "normal," the Workers' Comp Guidelines state that the normal range of motion for forward flexion is 120 degrees [Page 35]. His statement that hip adduction is normal at 20 degrees is contradicted by the Workers' Comp guidelines, which states that "normal" hip adduction is 35 degrees [Page35]. These inconsistencies should not occur in an expert's report.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 18, 2020

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

²*Russell v Verrier*, Ind. No. 34669/08.