

Barnes v Abdul-Mateen
2020 NY Slip Op 30539(U)
February 14, 2020
Supreme Court, Kings County
Docket Number: 506939/16
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of February, 2020.

PRESENT:

HON. WAVNY TOUSSAINT

Justice.

-----X

MARCIA BARNES,

Plaintiff,

- against -

NUMAIN R. ABDUL-MATEEN AND ERDAL TOKOGOZ,

Defendants.

-----X

DECISION AND ORDER

Index No. 506939/16

The following papers numbered 1 to 10 read herein:

Notice of Motion/Order to Show Cause/
 Petition/Cross Motion and
 Affidavits (Affirmations) Annexed _____
 Opposing Affidavits (Affirmations) _____
 Reply Affidavits (Affirmations) _____
 Supplemental Affidavit (Affirmation) _____

<u>Papers Numbered</u>	
1-2	3-4
5, 6	6
7, 8	9
	10

KINGS COUNTY CLERK
FILED

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Upon the foregoing papers, defendant Erdal Tokgoz ("Tokgoz") moves (motion sequence 006) for an order, 1) pursuant to CPLR 3212, granting him summary judgment on liability and/or serious injury threshold on the basis that he did not cause the subject motor vehicle accident, or based upon the threshold consideration that plaintiff, Marcia Barnes

("Barnes"), did not sustain a "serious injury" as defined in Insurance Law § 5102 (d);¹ or alternatively, 2) pursuant to CPLR 3126, to preclude Barnes from offering any evidence on damages at trial due to her willful failure to comply with outstanding discovery. Defendant Numain R. Abdul-Mateen ("Abdul-Mateen") cross-moves (motion sequence 007) for an order granting him summary judgment on the basis that Barnes did not sustain a causally related "serious injury" or, alternatively, precluding Barnes from offering any evidence on damages at trial due to her willful failure to comply with outstanding discovery.²

Background

Barnes brings this action for personal injuries she allegedly sustained on April 29, 2013, while a passenger in a vehicle driven by Abdul-Mateen drove which rear-ended a cab driven by Tokgoz.³ Tokgoz testified that, immediately before the accident, traffic conditions were heavy and slow (*see* Tokgoz tr at 17, lines 18-22, annexed as exhibit B to his motion

¹ Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

² Defendant Abdul-Mateen states that the factual basis and legal authorities in support of his motion were thoroughly presented in Tokgoz's motion and thus seeks to incorporate by reference all of the facts, testimony, documentation, evidence, law and arguments contained in Tokgoz's motion.

³ By order dated July 31, 2019, Barnes, in motion sequence 005, was found to be an innocent passenger in Abdul-Mateen's vehicle and was granted summary judgment against Abdul-Mateen on the issue of liability.

papers); he was stopped for 40 or 45 seconds because the vehicles ahead of him were stopped (*id.* at 21, lines 4-10); his vehicle was hit in the rear; and, because of the impact, was pushed into the vehicle in front of him (*id.* at 18, lines 18-22).

Barnes testified that she heard the Tokgoz vehicle hit a third vehicle ahead of him 30 to 40 seconds immediately before the Abdul-Mateen vehicle rear-ended Tokgoz's vehicle (*see* Barnes' January 30, 2015 tr at 270, lines 7 - 11, annexed as exhibit D to Tokgoz's motion papers). She further testified that Abdul-Mateen applied his brakes and reduced his speed before rear-ending Tokgoz's vehicle (*id.* at 267, lines 3-7; at 291, lines 3-15). Barnes had testified more than 13 months earlier that Tokgoz "stopped short basically" (Barnes December 12, 2013 tr at 28 lines 8-13, annexed as exhibit C to Tokgoz's motion papers), but later in that deposition admitted that she did not remember actually seeing Tokgoz stop short (*id.* at 29, lines 2-4).

Abdul-Mateen testified that there was "start and stop traffic" on the date of the accident (Abdul-Mateen tr at 13, lines 8-11), and he saw Tokgoz's collision with the third vehicle "seconds" before his vehicle came in contact with Tokgoz's vehicle (*id.* at 25, lines 8-13). Abdul-Mateen admitted that, before the accident, Tokgoz's cab was stopped (*id.* at 19, lines 3-6).

Barnes testified that as a result of the accident she was confined to her home and bed for more than 20 days (*see* Barnes January 30, 2015 tr at 75, lines 11-25). She stated that after her accident she relied upon her son to assist her with cleaning her home, cooking and

grocery shopping (*id.* at 78, lines 16-21; at 86, lines 4-10; at 87 lines 3-17). She also testified generally that she was unable to play basketball, go clubbing or engage in sexual activity after her accident, which she was able to do on a weekly basis before the accident (*id.* at 129, lines 14-24; at 130, lines 9-15; at 135, lines 9-16; at 141, lines 9-24). Barnes further testified that after her accident she was limited in the tasks she could complete at her job working in a shelter; specifically, she was unable to do inspections, walk-throughs and long conferences (*see* Barnes November 28, 2018 tr at 44, lines 9-22).

By Summons and Complaint dated October 7, 2013, Barnes commenced the instant action against defendants seeking to recover damages for injuries she sustained in the accident. Subsequently, Barnes filed a February 3, 2014 Bill of Particulars alleging various injuries, lumbar and cervical strains and radiculopathy, strains and contusions to both shoulders, right knee sprain and contusion, limited range of motion in all these areas and headaches. Plaintiff also alleges in a supplemental bill of particulars that left knee arthroscopy was necessary.⁴ Discovery is now complete, and the instant summary judgment motion and cross motion have been presented.

I. Tokgoz's Summary Judgment Motion As To Liability

Tokgoz claims entitlement to summary judgment as to liability as a matter of law

⁴ Plaintiff's additional amended bill of particulars dated May 17, 2019 is not considered given that "plaintiff [is] not entitled to a second supplemental bill of particulars, after the note of issue was filed, without leave of the court" (*Rosse-Glickman v Beth Isr. Med. Center-Kings Highway Div.*, 309 AD2d 846, 846 [2d Dept 2003]).

because Abdul-Mateen rear-ended his stopped vehicle and has failed to present a nonnegligent excuse for the accident. Tokgoz argues that even if he was involved in a prior collision, his motion would not be defeated because he was rear-ended while stopped. Tokgoz further highlights Barnes' testimony that there was a 30 to 40 second gap between the two collisions as clear evidence of his co-defendant's negligence in failing to react and avoid the collision.

In opposition, Abdul-Mateen argues that Tokgoz failed to show entitlement to summary judgment as a matter of law given his testimony that the collisions happened within seconds of each other. Abdul-Mateen argues that both his own testimony and Barnes' testimony create a question of fact as to whether Tokgoz's accident with the car ahead of him immediately before the subject accident created a sudden and unexpected event that Abdul-Mateen could not avoid.

In reply, Tokgoz highlights Abdul-Mateen's failure to provide details concerning the accident, including how much time passed between Tokgoz's impact with the third vehicle and the subject collision. He also contrasts Barnes' more detailed testimony which clearly and repeatedly described the gap between the collisions as 30 to 40 seconds apart.

"A rear-end collision with a stopped vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Martorell v Marcus*, 106 AD3d 883, 883-884 [2d Dept 2013]). Here, through Barnes'

testimony and his own, Tokgoz established his prima facie entitlement to judgment as a matter of law by demonstrating that his vehicle was stopped at the time of the accident (*id.* at 884; *see also Franco v Breceus*, 70 AD3d 767, 768-769 [2d Dept 2010]; *Hauser v Adamov*, 74 AD3d 1024 [2d Dept 2010]). Furthermore, although Barnes testified that Tokgoz stopped short, any claim by Abdul-Mateen that Tokgoz's stop was unanticipated fails where there was stop and go traffic and he saw Tokgoz's vehicle stopped before their impact (*see Harrington v Kern*, 52 AD3d 473, 473 [2d Dept 2008]). Abdul-Mateen has failed to rebut the inference of negligence and raise a triable issue of fact because, even if Tokgoz was stopped due to a prior collision with a third vehicle, as Abdul-Mateen had time to avoid a collision with Tokgoz's cab (*see Perez v Roberts*, 91 AD3d 620, 621-622 [2d Dept 2012]). Hence, Tokgoz is entitled to judgment as a matter of law based on liability.

II. Defendants' Threshold Motions

Tokgoz alleges that Barnes fails to meet the serious injury threshold, and Abdul-Mateen, via his cross-motion, joins in that application. Tokgoz's entitlement to summary judgment on the liability basis now results in considering his threshold arguments only in regard to Abdul-Mateen's summary judgment cross motion.

Abdul-Mateen, by incorporation of Tokgoz's motion papers, argues that Barnes' original bill of particulars is insufficient to meet the serious injury standard as a matter of law because there are no allegations of herniations, bulges or tears in this case, and, the mere fact that Barnes underwent a left knee arthroscopy procedure is not sufficient to defeat his

threshold motion. Abdul-Mateen further argues that Barnes did not plead exacerbation of prior conditions even though she had a prior car accident only four months before this accident in December 2012, for which she was diagnosed with a left knee sprain and an ankle sprain. He notes that Barnes' injuries could have been caused by her prior accidents in 1999, 2001, 2003, 2012, or from her subsequent accident in October 2015.

Abdul-Mateen also argues that summary judgment is appropriate considering the accident details and Barnes' subsequent treatment. He characterizes the instant 2013 accident, where air bags did not deploy, as minor, and recounts that afterwards Barnes went with him to return his rental vehicle before proceeding home without seeing a doctor. Abdul-Mateen contends that Barnes' treatment shows she was not seriously injured because she had a quick visit to the ER the day after the April 2013 accident, followed by a month gap in treatment for injuries from this accident (*see* Barnes December 12, 2013 tr at 39, lines 21-25). Abdul-Mateen notes that Barnes also did not report pain or limited range of motion in her spine and lower extremities when she went to New York Community Hospital for asthma and bronchitis on June 19, 2013. Abdul-Mateen claims Barnes eventually went to treat her 2012 and 2013 accidents six months after the 2013 accident and then another five-year treatment gap occurred.

Abdul-Mateen further argues that Barnes was not seriously injured because she started a new job on October 28, 2013, a few months after the April 2013 accident and worked 50-60 hours per week (Barnes January 30, 2015 tr at 15, lines 24-25; at 16, lines 1-4) as a shelter manager. Abdul-Mateen submits that Barnes should not be able to prove serious injury under

the 90/180 day category given these details about the April 2013 accident, as well as existing limitations attributable to her 2012 accident evidenced by doctor notes. One letter dated April 15, 2013, two weeks before the April 29, 2013 accident, stated that Barnes was totally disabled from the 2012 accident and could not return to work from April 15, 2013 to May 6, 2013. Further, in June 2013 plaintiff underwent weight loss surgery which also disabled her from work.

Abdul-Mateen further argues that Barnes is not a credible witness. He argues that Barnes' testimony is self-serving and altered depending on which collision she addresses. In support, Abdul-Mateen presents an arbitration decision concerning the December 2012 accident where the arbitrator rejected Barnes' testimony due to inconsistencies, and the claim was denied due to the lack of credible testimony supporting serious injury (*see* Khrintenko affirmation, dated April 26, 2019, exh. U at 3).

Abdul-Mateen notes that Barnes told each of Tokgoz's experts, neurologist Jean-Robert Desrouleaux, M.D. and orthopedist, J. Serge Parisien, M.D, when they examined her that she had no accidents before the April 2013 accident. On April 16, 2014, Dr. Desrouleaux did a full neurological examination and noted that the neurologic examination results were all within normal limits. Barnes was found to have full range of motion, normal strength, and normal gait, and Dr. Desrouleaux's impression was that both Barnes' cervical and lumbar myofascitis and posttraumatic headaches had resolved.

Next, Abdul-Mateen, through Tokgoz's motion papers, submits Dr. Parisien's affirmed orthopedic report. Dr. Parisien also saw Barnes on April 16, 2015, and performed

a full orthopedic examination. He, like Dr. Desrouleaux, looked for objective signs of serious injury, and his examination revealed negative objective tests, full range of motion in Barnes' back, neck and shoulders and a 10% limitation in her left knee. Dr. Parisien concluded that Barnes had a resolved sprain of the cervical/lumbosacral spine, a resolved bilateral shoulders' sprain and resolved right knee arthroscopic surgery.

Barnes, in opposition, asserts that Dr. Desrouleaux and Dr. Parisien's affirmations are insufficient because Abdul-Marteen, even though having been provided with medical authorizations, failed to provide those experts with complete medical records and information on which to base their conclusions. Further, Barnes argues that, because those evaluations occurred two years after the April 2013 accident, they have no significance in considering the 90/180 prong of the Insurance Law.

Barnes additionally argues that her own deposition transcript provides a sufficient basis for her injuries and limitations immediately following the April 2013 accident because she testified to her job and home limitations. She further responds that her bill of particulars pleads exacerbation, namely, an aggravation of prior injuries (*see* Matuza affirmation dated July 9, 2019, exh. M, ¶4).

Barnes supports her opposition by submitting, among other material, an affirmation from Dr. Raz Winiarsky, who started treating her regarding her December 2012 accident, and continued treating her for the April 2013 accident, including performing her left knee surgery on November 5, 2013. Dr. Winiarsky conducted Barnes' postoperative examinations and recorded her range of motion loss. Dr. Winiarsky also saw Barnes for her injuries regarding

her subsequent, 2015 accident. Most recently, he examined Barnes on June 13, 2019, and she relies on his affirmed independent medical examination report, which resulted after he also reviewed her medical records and performed range of motion tests on her. Dr. Winiarsky found range of motion limitations (as much as 50%) in her lumbar spine, right shoulder and bilateral knees. He also noted spasm in her cervical spine and opined that Barnes' cervical and lumbar spine injuries were aggravated and worsened by the April 2013 accident. He further stated that Barnes' pain and suffering in her knees and shoulders were caused by the 2013 accident. Dr. Winiarsky concluded that Barnes sustained permanent, partial and significant loss of function of her shoulders, knees and cervical and lumbar spine and that her injuries were causally related to this accident. He recommended various treatment for the rest of Barnes' life, including, steroid and nerve block injections, follow-up X rays, MRIs and orthopedic and physical therapy. Dr. Winiarsky explained that further surgeries might also be necessary, including: discectomy and fusion and shoulder and knee arthroscopy.

Barnes alleges that Dr. Winiarsky's submissions create a factual issue whether she suffered a "serious injury" from the April 2013 accident. Barnes contends that a disagreement between the opposing physicians and her physician represents an issue for a jury to determine and warrants denying the summary judgment cross motion.

Discussion

A. Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]; see CPLR 3212[b]).

To succeed on a motion based on the lack of a “serious injury,” a defendant must first tender evidence eliminating any material issues of fact with respect to the “serious injury” threshold (see *Ocasio v Henry*, 276 AD2d 611 [2d Dept 2000]). Once movant has fulfilled this burden, the nonmoving party must show “facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]). Parties opposing a summary judgment motion are entitled to every favorable inference, and the court must accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (see *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859, 862 [2d Dept 2009]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

Turning to the serious injuries categories in Insurance Law § 5102 (d) alleged in Barnes’ bill of particulars as applicable, it is undisputed that she did not sustain a fracture or significant disfigurement. With respect to the 90/180 claim, Barnes testified to various

limitations on her activities after the April 2013 accident. To the extent that Abdul-Mateen argues that Barnes' testimony regarding her limitations after the accident contradicts her testimony in other cases, an issue of fact as to credibility exists and must be resolved by the trier of fact (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"]).

In relation to the remaining categories, questions of fact exist which preclude awarding Abdul-Mateen summary judgment regarding whether Barnes suffered a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of a use of a body function or system. Dr. Winiarsky's affirmation supports finding that Barnes suffered permanent consequential limitations of the use of her knees, shoulders, cervical and lumbar spine. The affirmation contains observations both of Barnes' recent medical examination by Dr. Winiarsky, as well as his examinations performed shortly after the April 2013 accident. He noted test results indicating quantitative and restricted or abnormal ranges of motion of all the alleged injured areas. Dr. Winiarsky opinions are thus supported by objective medical testing and evidence (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied sub nom. Manzano v O'Neil*, 98 NY2d 728 [2002]). Furthermore, Dr. Winiarsky opined that the abnormal ranges of motion are causally related to the subject accident (*cf. Pommells v Perez*, 4 NY3d 566, 579-580 [2005] [no triable issue of fact where plaintiff's

doctor noted that pain was result of a condition that preceded the subject accident]), described plaintiff's treatment history since the date of the accident (including arthroscopic surgery) and concluded that further pain treatment, physical therapy and even surgery would be necessary.

“Whether a limitation of use or function is significant or consequential . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, 84 NY2d 795, 798 [1995] [internal quotation marks omitted]). Here, Dr. Winiarsky performed objective tests and found that the movements of plaintiff's shoulder, knees and back are restricted by specific amounts that are not insignificant as a matter of law (*cf. Waldman v Dong Kook Chang*, 175 AD2d 204 [2d Dept 1991] [15% restricted range of motion of cervical spine not significant for purposes of Insurance Law § 5102 (d)]).⁵ Thus, a factual issue exists as to whether Barnes sustained a “serious injury” as a result of the April 2013 accident (*see e.g. Toure*, 98 NY2d at 353).

B. Motion to Preclude

Abdul-Mateen also moves to preclude Barnes from offering any evidence on the issue of damages at the time of trial due to her alleged willful failure to comply with outstanding discovery (*e.g.* claiming that she failed to appear for an additional independent medical examination, failed to provide additional medical authorizations and failed to provide other

⁵Here, in contrast, Dr. Winiarsky, as mentioned earlier, found as much as 50% movement limitations, more specifically of Barnes' shoulder on abduction.

relevant discovery by court-ordered deadlines). Barnes, in opposition to this portion of the motion, asserts that she appeared for the ordered medical examinations and provides a copy of the additional discovery recently provided to the defendants.

“Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2d Dept 2012]). Given Barnes’ recent discovery disclosure and the history of significant discovery she produced in this matter, Abdul-Marteen’s motion to preclude Barnes from offering any evidence on the damages issue at the time of trial merits denial. Accordingly, it is

ORDERED that Tokgoz’s summary judgment motion (motion sequence 006) is granted based on liability, and the complaint is dismissed as against him; and it is further

ORDERED that the action is severed and continued as against the remaining defendant; and it is further

ORDERED that the caption shall hereinafter read:

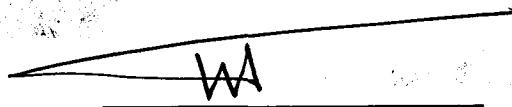
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MARCIA BARNES,
Plaintiff,
- against - Index No. 506939/16
NUMAIN R. ABDUL-MATEEN,
Defendant.

-----X; and it is further
ORDERED that Abdul-Mateen’s summary judgment cross-motion (motion sequence 007) based on threshold, or, alternatively, to preclude Barnes from offering any evidence on

the damages issue at the time of trial, is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,



J. S. C.

Hon. Wavy Toussaint
J.S.C.

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