Fulmore v Palash
2020 NY Slip Op 30653(U)
February 21, 2020
Supreme Court, Kings County
Docket Number: 507292/2017
Judge: Debra Silber

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

---x

EARLINE FULMORE and TYREEM ANDREWS,

Plaintiffs,

-against-

ROY C. PALASH and JENNIFER P. BOOKER,

Defendants.

---x

DECISION / ORDER

Index No. 507292/2017
Motion Seq. No. 2
Date Submitted: 11/21/19
Cal No. 20

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	15-26
Affirmations in Opposition and Exhibits Annexed.....	38-48
Reply Affirmation.....	49

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 October 16, 2016, at about 12:20 A.M. on Rockaway Avenue near its intersection with Pitkin Avenue in Brooklyn, New York. Plaintiffs Earline Fulmore and Tyreem Andrews, her grandson, were passengers in a green taxi owned and operated by defendant Roy C. Palash when the Palash vehicle collided with a vehicle owned and operated by Jennifer P. Booker.[1] In their Verified Bill of Particulars, Earline Fulmore, who was 57 years old at the

[1]Defendant Booker has not answered the complaint and has not appeared. Plaintiffs moved for a default judgment and pursuant to an order dated June 19, 2018, the court granted the motion and directed that an inquest would be held at the time of the damages trial.

time of the accident, alleges that as a result of the accident she sustained injuries to her neck, lower back, and both knees, and she has had surgery to her left knee.[2] Tyreem Andrews, who was 18 years old at the time of the accident, alleges that as a result of the accident, he sustained a torn meniscus in his left knee which required arthroscopic surgery, a herniated disc in his lumbar spine at L5-S1 and a disc bulge at L4-L5. Both plaintiffs were removed from the scene in an ambulance and taken to the emergency room at Brookdale Hospital.

Earline Fulmore

Defendant Palash contends that plaintiff Fulmore did not sustain a "serious injury" as defined by Insurance Law § 5102(d). He claims that her injuries are either pre-existing degenerative conditions or were caused by one or both of two prior accidents.[3] Defendant Palash argues that plaintiff Fulmore's normal orthopedic examination, combined with the defendant's radiologist's review of plaintiff's MRIs, which concludes that the films only show degenerative changes and no traumatically induced findings, establishes that plaintiff did not sustain a serious injury as a result of the subject accident. Further, as

---

[2]She testified [EBT Tr. Pages 106-109] that she also had surgery to her right knee as a result of the accident, but it is not clear that this is borne out in the medical records. There was colloquy at the EBT between the attorneys on this point [Pages 123-126].

[3]Plaintiff Fulmore was injured in a trip and fall in 2005 [Pages 48-60], and brought a lawsuit under Ind. No. 15555/2006. In her Bill of particulars, she claimed injures to her lumbar spine and right knee. She was awarded damages by a jury following a trial, and testified at her EBT that the case subsequently settled. In addition, plaintiff testified at her EBT that she was injured in an auto accident in 1998, which resulted in her being brought to an emergency room in an ambulance and having physical therapy thereafter. She testified that she also brought a lawsuit for this accident [Page 38]. In 2009, she was again injured in a trip and fall, and she brought a lawsuit in New York County under Ind. No. 106493/2010. This action settled in 2013, just before it went to trial. Plaintiff did not testify about this accident at her EBT, but instead said she had not had any other accidents [Page 123]. The court records are on the internet. She was represented by the same law firm for both trip and fall cases.

plaintiff testified that she was not working at the time of the accident, defendant contends that Fulmore did not sustain a non-permanent injury preventing her from performing substantially all of her usual and customary daily activities for 90 of the 180 days following the accident.

Defendant Palash submits the pleadings, plaintiff's EBT transcript, an affirmed IME report from Ronald L. Mann, M.D., who examined plaintiff Fulmore on January 9, 2019, and an affirmed report from Jessica F. Berkowitz, M.D., a radiologist, who reviewed the MRIs of plaintiff's cervical and lumbar spine, which were taken on October 31, 2016, an MRI of her left knee taken on November 1, 2016, and MRIs of plaintiff's right knee, which were taken on November 21, 2016 and January 9, 2017.

Dr. Mann, an orthopedist, examined plaintiff and reports that the range of motion in her cervical spine was restricted, and the range of motion in her lumbar spine was significantly restricted, as was the range of motion in both of her shoulders and both of her knees. He states that plaintiff informed him that she had arthroscopic surgery to her left knee on January 27, 2017, which she said was as a result of this accident, that she informed him that she had arthroscopic surgery to both knees in 2005, and he observed that she was walking with a cane and limping. Plaintiff complained to Dr. Mann that she is still experiencing pain in her neck and back, both shoulders and both knees. There is no claim in her Bill of Particulars that she injured her shoulders. Dr. Mann diagnoses plaintiff with "resolved cervical, lumbar and bilateral shoulder sprain/strain"; "status post left knee arthroscopy on 01/27/2017 - healed." Dr. Mann opines that plaintiff "presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in no orthopedic limitations

in use of the body parts examined."

Dr. Berkowitz, who reviewed the MRIs of plaintiff Fulmore's cervical and lumbar spine and of both knees, reports that Fulmore's injuries are all long-standing degenerative conditions that are not traumatic in origin and are not causally related to the subject accident.

With regard to the 90/180 day category of injury, defendant contends that there is no medical evidence that supports plaintiff's alleged inability to engage in substantially all of her usual and customary daily activities in the 180 days following the accident. That is, they unwittingly acknowledge that they cannot meet their burden of proof to make a prima facie case for dismissal as to this category of injury.

Plaintiff Fulmore opposes the motion, contending defendant has failed to make a prima facie showing of entitlement to summary judgment. Plaintiff points out the abnormal findings in Dr. Mann's report, from his examination of her range of motion. Counsel argues that, in the alternative, plaintiff has raised issues of fact as to whether she sustained a serious injury. Plaintiff Fulmore provides affirmed treatment records from her doctors, Gautam Khakhar, M.D. and Steven Ross, M.D., affirmed MRI reports, and an affirmation from her orthopedic surgeon, Shahid Mian, M.D., who performed the 2017 arthroscopic surgery on her left knee. Drs. Khakhar and Ross both report significant limitations in the range of motion in plaintiff's cervical and lumbar spine and in both of her knees, as well as other positive test results. They both opine that plaintiff's injuries are causally related to the subject accident. Dr. Mian opines that the injuries to plaintiff Fulmore's knees and spine, as well as her need for the knee surgery, are causally related to the car accident on October 16, 2016, and are not the result of any pre-existing

condition nor are they due to degeneration.

Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161

AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]).

Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). 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, 1115 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Conclusions of Law: Earline Fulmore

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]).

In light of plaintiff's testimony at her EBT that at the time of the accident she only worked summers for the New York City Parks Department, at city pools, [Page 16] the fact that she returned to work in June of 2017 following this October 2016 accident fails to make a prima facie showing that plaintiff was not prevented from performing substantially all of the material acts which constituted her usual and customary daily activities for not

less than 90 of the 180 days following the accident (*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 [he] 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]). Plaintiff was not asked any questions at her EBT about the six months following the accident, other than with regard to how many times per week she went to physical therapy. Thus, with no evidence in admissible form with regard to this category of injury, defendant fails to make a prima facie case for dismissal.

Moreover, as defendant's orthopedist found plaintiff had significant and quantifiable restrictions in the range of motion in her neck, back and knees, defendant has failed to make a prima facie showing of his entitlement to summary judgment with respect to "a permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system" (*see Czach v O'Neill*, 44 AD3d 818, 818 [2d Dept 2007]). Defendant's orthopedist has failed to explain or to substantiate with any objective medical evidence that the restrictions he reports are unrelated to the accident (*see Ambroselli v Team Massapequa, Inc.*, 88 AD3d 927, 928 [2d Dept 201] ["While Dr. DeJesus opined that those limitations were "subjective" in nature, she failed to explain or substantiate, with any objective medical evidence, the basis for her conclusion that the noted limitations were self-imposed"]; *Chun Ok Kim v Orourke*, 70 AD3d 995, 995–96 [2d

Dept 2010] ["he failed to explain or substantiate, with any objective medical evidence, the basis for his conclusion that the noted limitations were self-restricted" (internal quotation marks omitted); *Colon v Chuen Sum Chu*, 61 AD3d 805, 806 [2009] ["His explanation that said limitations were "voluntary" was insufficient by itself to remedy those findings"]).

Since the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied as to plaintiff Fulmore, and it is unnecessary to consider the papers submitted by this 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]).

The court notes that, had defendant made a prima facie case for dismissal, plaintiff has overcome the motion and raised a triable issue of fact as to whether she sustained a "serious injury." Her doctors provide affirmed reports which describe examinations of plaintiff shortly after the accident and recently. They state that with a reasonable degree of medical certainty, plaintiff's injuries are causally related to the accident of 10/16/16 and are not due to a pre-existing condition or degeneration. Dr. Mian's most recent affirmed report includes range of motion test results and indicates significant reductions in the range of motion in plaintiff's cervical and lumbar spine and in both knees.

Tyreem Andrews

Defendant Palash contends that plaintiff Andrews did not sustain a "serious injury"

as defined by Insurance Law § 5102(d). Defendant Palash argues that plaintiff's normal orthopedic examination, combined with defendant's radiologist's review of plaintiff's MRI studies, establishes that plaintiff did not sustain a permanent consequential limitation or a significant limitation of use as a result of the subject accident. Further, defendant contends that plaintiff Andrews' own testimony that he only missed a day or two from school after the accident shows that he did not sustain a non-permanent injury which prevented him from performing substantially all of his usual and customary daily activities for 90 of the 180 days following the accident. Defendant Palash submits the pleadings, plaintiff's EBT transcript, an affirmed IME report from Ronald L. Mann, M.D., who examined plaintiff Andrews on January 28, 2019, and the affirmed reports of Jessica F. Berkowitz, M.D., who reviewed an MRI of Andrews' lumbar spine taken on November 5, 2016, an MRI of his right knee taken on January 18, 2017 (but not the MRI of the plaintiff's left knee, taken on the same date) and an MRI of his cervical spine taken on February 2, 2017.

Dr. Mann, an orthopedist, finds mostly normal ranges of motion in plaintiff Andrews' cervical spine with the exception of a 10-degree deficit in extension.[4] The range of motion in plaintiff's lumbar spine is reported to be in excess of normal (that plaintiff is more flexible than normal), normal ranges of motion in both knees and otherwise negative test results. Dr. Mann diagnoses Andrews with "resolved cervical, lumbar and right spine [sic] sprain/strain" [5] and "status post left knee surgery on 02/03/2017 - resolved." Dr. Mann opines that Andrews "presents with a normal orthopedic examination on all objective

---

[4]There were no allegations with respect to Andrews' cervical spine in the Bill of Particulars.

[5]Presumably, this was intended to refer to the right *knee*.

testing . . . The orthopedic examination is objectively normal and indicates no findings which would result in limitations in use of the body parts examined." Defendant Palash's radiologist, Dr. Berkowitz, reviewed the MRIs of plaintiff Andrews' cervical and lumbar spine and right knee. The court notes that plaintiff had MRIs of both knees. She finds his cervical spine and right knee to be completely normal and states that, with regard to the lumbar spine, that "Andrews has a minimal disc bulge, L4-L5," and "a very small central disc herniation, L5-S1. Similar disc herniations are common findings in the general population and are unlikely to be related to an acute traumatic injury." Dr. Berkowitz concludes that there is "no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

Finally, defendant contends that he has made a prima facie case with regard to the 90/180-day category of injury as plaintiff testified that he missed only one or two days of high school after the accident.

Plaintiff opposes the motion, contending defendant has failed to make a prima facie showing of entitlement to summary judgment based upon defendant's orthopedist's findings of a reduced range of motion in Andrews' cervical spine and defendant's radiologist's failure to mention the MRI of Andrews' left knee. At the very least, plaintiff maintains, he has raised issues of fact as to whether he sustained a serious injury. Plaintiff Andrews' opposition consists of his attorney's affirmation, his own affidavit, affirmed treatment records of his doctor, Gautam Khakhar, M.D., four affirmed MRI reports (cervical and lumbar spine and both knees), an affirmation from Shahid Mian, M.D., the orthopedic surgeon who performed the arthroscopic surgery on his left knee, and several affirmed reports from Dr. Mian.

Conclusions of Law : Tyreem Andrews

Plaintiff's testimony at his EBT that he only missed one or two days of high school after the accident makes a prima facie showing that plaintiff was not prevented from performing substantially all of his 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]).

With regard to the other applicable categories of injury, "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," Dr. Mann's orthopedic exam was completely normal with regard to plaintiff's lumbar spine as well as his right knee and left knee (post-surgery). Plaintiff did not make a claim for a cervical spine injury, so the restriction Dr. Mann found in the range of motion of plaintiff's cervical spine is not relevant. Additionally, Dr. Mian, plaintiff's doctor, states in his affirmation that plaintiff had another accident on April 2, 2017, after the subject accident and before Dr. Mann's exam, in which he injured his neck and back. He states therein that the cervical herniation and new lumbar disc bulges found on subsequent MRIs were caused by this later accident. The report for the cervical MRI performed after the instant accident and prior to the subsequent accident states that plaintiff's cervical spine has no bulges or herniations (Exhibit D to plaintiff's opposition).

The fact that Dr. Berkowitz, defendant's radiologist, did not review the MRI of the plaintiff's left knee is of no consequence, contrary to plaintiff's argument, as it was taken before his arthroscopic surgery, which Dr. Mann reports has returned him to a normal

range of motion.

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether he sustained a "serious injury." Doctors Mian and Khakhar provide affirmed reports which describe examinations of plaintiff shortly after the accident and recently. Dr. Mian states that the MRI of plaintiff's left knee indicates an "undersurface tear of the posterior horn of the medial meniscus, grade II signal in the anterior horn of the lateral meniscus and suprapatellar joint effusion." Dr. Mian states that with "a reasonable degree of medical certainty, it is my medical opinion that Mr. Andrews' injuries to his left and right knees, lumbar and cervical spines as well as his need for left knee surgery are causally related to his accident of 10/16/16 and not due to a pre-existing condition or degeneration." Dr. Mian's affirmed report dated March 8, 2019 includes range of motion test results and indicates significant reductions in the range of motion in plaintiff's lumbar spine. Dr. Khakhar's affirmed reports are similar.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 21, 2020

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court