

Bolatova v Shah

2020 NY Slip Op 30681(U)

February 19, 2020

Supreme Court, Kings County

Docket Number: 509645/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of February, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
ALINA A. BOLATOVA,
Plaintiff,

Index No.: 509645/2018

- against -

DECISION AND ORDER

AZHAR HUSSAIN SHAH, and MOHAMED ABONAM,
Defendants.

Motion Sequence #1

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3, _____
Reply Affidavits (Affirmations).....	4, _____

After a review of the papers and oral argument the Court finds as follows:

This action concerns a motor vehicle incident that occurred on August 7, 2017. The Plaintiff Alina Bolatova (hereinafter "the Plaintiff"), a pedestrian, was involved in a motor vehicle accident with a vehicle owned by Defendant Azhar Hussain Shah and operated by Defendant Mohamed Abonaam (hereinafter "the Defendants"). The alleged accident occurred while the Plaintiff was on the street abutting the Premises known as 1415 Sheepshead Bay Road, in Brooklyn, New York.

The Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit C, Paragraph 10), that as a result of the accident she sustained a number of serious injuries including, but not limited to, injuries to her right knee, thoracic spine, head trauma, bilateral shoulder contusion and left knee contusion. The Plaintiff also alleges, *inter alia*, that she has sustained "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 (90) ninety days during the one hundred (180) eighty days immediately following the occurrence of the injury or impairment.”

The Defendants move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). The Plaintiff opposes the motion and argues that it should be denied.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘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 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In support of their motion the Defendants proffer affirmed medical reports from Scott A. Springer, D.O., Alan J. Zimmerman, M.D., and Rikki Lane, M.D. Dr. Springer reviewed the MRI of the Plaintiff's right knee performed on November 30, 2017. Dr. Springer states that a review of the "MRI of the right knee performed three months and 23 days following the incident reveals a chronic tear of the posterior horn of the medial meniscus." Dr. Springer continues by opining that "[t]his is a chronic finding that could not have occurred in the short time interval between the incident and the examination." (Defendants' Motion, Exhibit D)

Dr. Zimmerman examined the Plaintiff on June 12, 2019 and conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, thoracic spine, shoulder tests, elbows, wrists, and found no limitations in the Plaintiff's range of motion. Dr. Zimmerman opined that "[t]he orthopedic examination is objectively normal, and indicates no findings which would result in orthopedic limitations in use of the body parts examined." (Defendants' Motion, Exhibit E)

Dr. Lane did not examine the Plaintiff but reviewed the MRI of the Plaintiff's lumbar spine and cervical spine performed on August 7, 2017. Dr. Lane opines that the "records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and cannot be demonstrated to be causally related to the accident on 8/7/17." Dr. Lane also stated that "there were no acute traumatic findings to causally relate the Plaintiff's accident and the claimed injuries other than minor abrasions to the right upper extremities, muscle spasm and headache." (Defendants' Motion, Exhibit F)

While the Plaintiff sets forth in the subject verified Bill of Particulars 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, where

the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. In her deposition, the Plaintiff states that she was confined to her home for a “couple of weeks” after the accident (See Defendants’ Motion, Exhibit H, Page 59-60). Plaintiff’s Bill of Particulars represents that she was confined to home for a period of four months.

Accordingly, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. In addition to the inconsistent representation in relation to her 90/180 claim, Dr. Zimmerman conducted range of motion testing and did “compare those findings to the normal range of motion...” *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2nd Dept, 2005]. As the Defendants have met their initial *prima facie* burden, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102 in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, Plaintiff Bolatova must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff’s injuries, as defined by statute. *See Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

Plaintiff in opposition proffers purported medical records from Dr. Michael Bernshteyn. Dr. Bernshteyn performed range of motion testing using a goniometer on the Plaintiff’s cervical spine, lumbar spine and right knee. Dr. Bernshteyn found limited range of motion and use of the

Plaintiff's cervical spine, lumbar spine and right knee. Dr. Bernshteyn also opined that "I have not found the injuries to be the result of any degenerative condition." Dr. Bernshteyn also opined that "I have determined that the motor vehicle collision which occurred on August 7, 2017 was the direct and proximate cause of the injuries discussed above and that these injuries are permanent in nature and have resulted in a permanent partial disability to the patient which will continue to worsen over time." (Plaintiff's Affirmation in Opposition, Exhibit "A") "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendants (motion sequence #1) is denied.

This constitutes the Decision and Order of the Court.

ENTER:


 Carl J. Landicino
 J.S.C.

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 KINGS COUNTY CLERK
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