

Blumenberg v Lora

2020 NY Slip Op 30869(U)

February 26, 2020

Supreme Court, Bronx County

Docket Number: 23971/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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RAFAELA BLUMENBERG,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 23971/2017E

RUBEN LORA and BENYCOL TRANSPORTATION
CORP.,

Defendants.

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John R. Higgitt, J.

Upon defendants’ August 8, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s February 14, 2020 affirmation in opposition and the affidavit and exhibits submitted in support thereof; defendants’ February 19, 2020 affirmation in reply; and due deliberation; defendants’ motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject September 9, 2016 motor vehicle accident is granted.

Plaintiff alleges injuries to her left shoulder, and claims “serious injury” under the Insurance Law § 5102(d) categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendants submit the affirmed reports of orthopedic surgeon Dr. Mann and radiologist Dr. Setton, the records of an initial evaluation conducted by Dr. Altai at VS Sunrise Medical, PC on January 9, 2017, and the transcript of plaintiff’s May 17, 2018 deposition testimony.

Dr. Mann examined plaintiff on August 2, 2018, approximately two years after the accident. Dr. Mann measured reduced ranges of motion of plaintiff’s left shoulder. Impingement and apprehension tests were negative, and the neurological examination of the upper extremities

yielded normal results.¹ Dr. Mann concluded that the examination was objectively normal with no findings that would result in orthopedic limitation.

Dr. Altai examined plaintiff on January 9, 2017, approximately four months after the accident, and noted that plaintiff's shoulder ranges of motion were normal.

Dr. Setton reviewed the films from the October 7, 2016 MRI of plaintiff's shoulder, finding that they depicted tendinopathy and acromioclavicular joint degeneration, without evidence of tears or traumatically-induced injury.

Defendants' proof was sufficient to meet their prima facie burden of demonstrating that plaintiff did not sustain a permanent consequential or signification limitation of use. Although Dr. Mann measured ranges of motion that differed from norms in several planes, the ranges of motion of plaintiff's left shoulder were identical to those of her right, uninjured shoulder (*see Campbell v Drammeh*, 161 AD3d 584 [1st Dept 2018]; *Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]; *Camilo v Villa Livery Corp.*, 118 AD3d 586 [1st Dept 2014]). Defendants' proof was also sufficient to demonstrate, prima facie, that plaintiff's claimed injuries were not causally related to the accident (*see Bianchi v Mason*, 2020 NY Slip Op 00504 [1st Dept 2020]).

In opposition, plaintiff submitted her affidavit, the affirmation of orthopedic surgeon Dr. Berkowitz, who examined plaintiff on December 26, 2019, in response to the motion; unsworn and uncertified medical records; and unsworn and uncertified emergency room records.

Plaintiff's proof was insufficient to raise an issue of fact as whether plaintiff's injuries are "serious" within the meaning of the statute. Plaintiff did not submit objective evidence of injury. Furthermore, Dr. Berkowitz measured limitations in plaintiff's shoulder ranges of motion that cannot be considered significant or consequential (*see Style v Joseph*, 32 AD3d 212, 215 n [1st

¹ Dr. Mann also measured plaintiff's cervical and lumbar ranges of motion. Because plaintiff did not allege a cervical or lumbar injury, the court disregards these gratuitous findings.

Dept 2006]). In addition, plaintiff's medical records are devoid of evidence that any limitations in ranges of motion persisted for such a duration as to constitute a significant limitation or permanent consequential limitation (*see Dieujuste v Kiss Mgt. Corp.*, 60 AD3d 514 [1st Dept 2009]; *see also Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013] [assessment of limitation requires consideration of its duration]), and plaintiff failed to reconcile Dr. Berkowitz's findings with the findings in her own medical records that she had full ranges of motion within four months after the accident (*see Bianchi, supra; Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]; *see also Reynoso v Tradore*, 2020 NY Slip Op 01130 [1st Dept 2020]).

With respect to plaintiff's 90/180-day injury claim, her statements in her bill of particulars that she was confined to bed for only two days and to home for only three days following the accident, and her deposition testimony that she missed one week from her work as a personal trainer following the accident and three weeks from work following the February 7, 2017 arthroscopy, were sufficient to meet defendant's prima facie burden and warrant dismissal of the claim (*see Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Curet v Kuhlör*, 172 AD3d 634 [1st Dept 2019]; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). Plaintiff's proof was insufficient to raise issue of fact as to whether she was prevented from performing substantially all of the material acts constituting her usual and customary daily activities for the statutory period (*see Pouchie, supra; Moreira, supra; Sanchez, supra;*

Fernandez, supra), even if she was receiving treatment (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]). A reduced or changed work schedule is insufficient to raise an issue of fact (*see Colon v Tavares*, 60 AD3d 419 [1st Dept 2009]).

It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*see Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]; *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Accordingly, it is


ORDERED, that defendants' motion for summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of

defendants dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: February 26, 2020



John R. Hight, J.S.C.