Lavrova v Zheng
2020 NY Slip Op 31121(U)
April 13, 2020
Supreme Court, Kings County
Docket Number: 502017/18
Judge: Debra Silber

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

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OLGA LAVROVA,

Plaintiff,

-against-

PEIBAO ZHENG,

Defendant.

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DECISION / ORDER

Index No. 502017/18
Motion Seq. No. 1
Date Submitted: 2/27/20
Cal No. 28

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

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	13-23
Affirmation in Opposition and Exhibits Annexed.....	26-35
Reply Affirmation.....	

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 June 13, 2017 in Brooklyn, NY. Defendant moves for summary judgment dismissing the complaint, contending that plaintiff did not sustain a "serious injury" as a result of the accident, as defined by Insurance Law § 5102(d).

In her Bill of Particulars, plaintiff alleges that she sustained injuries to her neck and back and to both knees. She subsequently had arthroscopic surgery to both knees. At the time of the accident, she was 45 years old. She did not go to an emergency room after the accident. About a week later, she testified that she went to a facility for

physical therapy that had advertised in a Russian language newspaper, at a medical office called “Art of Healing.”

The movant contends that plaintiff did not sustain a “serious injury” as a result of this accident, and claims plaintiff’s neck, back, and knee injuries are degenerative in nature, were pre-existing and are unrelated to the subject accident, or, if caused by the accident, that they have resolved. In addition, movant contends that since plaintiff testified that she returned to work as a gymnastics, yoga and dance teacher for children only two months after the accident, she has no claim under the 90/180 category of injury.

Defendant supports his motion with an attorney’s affirmation, the pleadings, plaintiff’s EBT, the affirmed IME reports of an orthopedist, Alan J. Zimmerman, a neurologist, Michael J. Carciente, M.D., and a report from a radiologist, Jessica F. Berkowitz, M.D.

Plaintiff counters that defendant fails to meet his burden of proof for summary judgment and that there is ample medical evidence that she sustained “serious” injuries to her knees, lower back and neck as a result of the subject accident sufficient to overcome the motion and raise a triable issue of fact. Plaintiff provides an attorney’s affirmation, her own affidavit, an affirmation from her treating doctor, Lyudmila Poretskaya, M.D., affirmations from her orthopedic surgeon, Andrew Dowd, M.D., and affirmations from her radiologist, William A. Weiner, M.D. Plaintiff claims she was confined to her home for a month after the accident and missed about two months from her job as a dance teacher. In a supplemental bill of particulars, plaintiff claims she underwent trigger point injections in her left shoulder in May of 2018. However, she

does not claim she injured her shoulder. Plaintiff had approximately six months of treatment, which included physical therapy, chiropractic and acupuncture after the accident and then for another three months following the knee surgeries. Her knee surgeries took place in November of 2017 and January of 2018.

Conclusions of Law

Defendant has made a *prima facie* showing of his 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]). The affirmed reports of Dr. Alan J. Zimmerman, an examining orthopedist, Dr. Michael J. Carciente, an examining radiologist, and Dr. Jessica F. Berkowitz, who reviewed the plaintiff's MRIs, demonstrate that, as a matter of law, plaintiff did not sustain a "serious injury" from the subject accident.

Dr. Zimmerman examined plaintiff on November 20, 2018, and reports that he tested her range of motion and that the range of motion in her cervical and thoracic spine and knees was normal, and that the range of motion in her lumbar spine exceeded the normal range of motion in all planes. All the other tests he performed were negative. Dr. Zimmerman's concludes that plaintiff had a normal orthopedic examination and that plaintiff's subjective complaints "do not correlate with the negative clinical test results", and no findings that would result in "orthopedic limitations in use of the body parts examined." He concludes that plaintiff is "capable of functional use of the examined body parts, for normal activities of daily living . . . as well as regular work duties". Moreover, he states that there was no medical necessity [in connection with the accident, presumably] for either the right or left knee surgery, and opines that the reported mechanism of injury to the plaintiff's knees--striking the dashboard—"precludes

a meniscal tear from being causally related," because, in order to tear a meniscus, "the claimant must sustain a twisting injury to a weight bearing extremity."

Dr. Michael J. Carciente, examined plaintiff on October 16, 2018, and indicates that" there are no objective neurological findings" and" no evidence of radiculopathy." He concludes that "the neurological examination does not support the presence of an ongoing neurological injury, disability or permanency in reference to the subject accident."

Dr. Jessica F. Berkowitz, a radiologist, undertook an independent review of the MRIs of plaintiff's cervical and lumbar spine, taken on 7/15/17, and the MRIs of both knees, taken on 10/1/17. She acknowledges plaintiff has disc bulges and spondylosis in the cervical spine, which she describes as "chronic and degenerative in origin, with no evidence of acute traumatic injury, and no causal relationship between the subject accident and the MRI findings." Dr. Berkowitz states that the plaintiff's lumbar spine MRI is "normal, unremarkable, . . . with no disc bulges or herniations and no evidence of trauma." With respect to plaintiff's left knee, Dr. Berkowitz finds "a slight lateral patellar tilt that is developmental; chondromalacia and a subchondral cyst that are degenerative; as well as internal degeneration of the posterior horn of the medial meniscus." She finds no evidence of an acute traumatic injury and no causal relationship between the subject accident and the findings on the MRI examination. Similarly, with respect to plaintiff's right knee, Dr. Berkowitz finds "a very small popliteal cyst of nonspecific etiology; chondromalacia patella with subchondral edema/cystic change, a small focal area of subchondral edema in the medial femoral condyle, all of which are degenerative; a small amount of edema in the suprapatellar quadriceps fat pad related

to chronic repetitive microtrauma; and internal degeneration of the posterior horn of the medial meniscus." Dr. Berkowitz states that there is "no evidence of acute traumatic injury and no causal relationship between the subject accident and the findings on the MRI examination."

Plaintiff's EBT testimony, that she returned to work full time approximately two months after the accident, makes a prima facie showing that plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the accident (*see Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180–day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]).

However, plaintiff has come forward with sufficient evidence to overcome the motion and raise a triable 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, as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). Dr. Poretskaya's affirmation (of Art of Healing Medicine, P.C.) incorporates by reference her narrative report and other records and describes a recent examination of plaintiff conducted on June 25, 2019. She indicates that plaintiff had significant and quantified limitations in the range of motion in both of

her knees as well as in her back and neck, both contemporaneously with the accident and recently. She opines that, inasmuch as plaintiff continues to demonstrate subjective and objective evidence of disability two years after the subject accident, the injuries to plaintiff's knees, neck, and back are permanent. Further, in the absence of a prior history of any injury, complaints or other physical limitations with respect to her knees, neck or back, Dr. Poretskaya opines that plaintiff's current injuries, physical limitations and complaints are attributable to the June 13, 2017 accident.

Likewise, Andrew Dowd, M.D., who performed arthroscopic surgery on both plaintiff's left and right knees on November 15, 2017 and January 31, 2018 respectively, makes a post-surgery diagnosis as to both knees of medial and lateral meniscal tears, chondromalacia patella femoral joint, and synovitis multiple compartments. Further, he finds that the conditions of both of plaintiff's knees are causally related to the June 13, 2017 accident and that the arthroscopic surgeries were medically necessary.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 13, 2020

ENTER:

Hon. Debra Silber, J.S.C.