

Patrick v Ka
2020 NY Slip Op 31209(U)
April 6, 2020
Supreme Court, Kings County
Docket Number: 518338/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____x

ROBIN PATRICK,

Plaintiff,

-against-

HAMADY KA and DANORCHE CORPORATION,

Defendants.

_____x

DECISION / ORDER

Index No. 518338/17

Motion Seq. No. 1

Date Submitted: 2/20/20

Cal No. 38

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>16-24</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>32-44</u>
Reply Affirmation.....	<u>45</u>

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 occurred on July 5, 2017. Plaintiff was removed from the scene in an ambulance and taken to Kings County Hospital. At the time of the accident, plaintiff was fifty-six years old.

In her Bill of Particulars, as supplemented by a Supplemental Bill of Particulars, plaintiff alleges that as a result of the accident, she sustained injuries to her left shoulder, right foot and lumbar spine, with sprains and strains to her cervical spine. She had arthroscopic surgery to her left shoulder and surgery to her right foot, described as a "metatarsophalangeal joint total replacement with a Swanson great toe #3 implant

with grommets.” Plaintiff was a paraprofessional family assistant, which she describes as an “office job” for the NYC Department of Education at the time of the accident (EBT Page 7) and she testified that she missed over a year of employment following the accident (EBT at Page 68).

Defendants move for summary judgment, and contend that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).¹ They rely on the pleadings, plaintiff’s EBT transcript, and affirmed reports from a neurologist Michael J. Carciente, M.D., an orthopedist Jeffrey Guttman, M.D., and a doctor of emergency medicine Timothy G. Haydock, M.D., who reviewed the records of plaintiff’s treatment in the emergency room immediately following the accident.

Dr. Carciente, who examined plaintiff on January 30, 2019, reports that plaintiff had a completely normal neurological examination, with no objective evidence of radiculopathy. He did not perform any range of motion testing. Plaintiff informed Dr. Carciente that “she no longer has any symptoms in the left shoulder or right foot.” Dr. Carciente concludes that his examination “does not support the presence of ongoing neurological injury, disability or permanency.”

Dr. Guttman, an orthopedist, examined plaintiff on December 13, 2018, and reports that plaintiff had a normal range of motion in her cervical spine, but he reports that the range of motion in her lumbar spine was restricted in all planes. He finds normal ranges of motion in plaintiff’s shoulders and ankles. He did not examine her right foot, although he notes that she presented with complaints of pain in her neck, back, shoulders and feet. His impression

¹The court’s order of September 12, 2019, which granted the defendants’ motion on default, was vacated by a So-Ordered Stipulation and the motion was restored to the court’s motion calendar.

is “alleged injury to the cervical and lumbar spine, right and left shoulder and left and right ankle, resolved.” He concludes that there is no objective evidence in the medical chart, imaging or examination to substantiate that plaintiff incurred traumatic injuries in the subject accident and that “There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. There is no permanency as a result of the claimed injuries listed on the bill of particulars.” The court notes that Dr. Guttman incorrectly states that plaintiff had arthroscopic surgery to her left knee for injuries following the accident, and does not mention the surgeries that she did have.

Dr. Haydock states that plaintiff complained in emergency room of pain in her lower back, left shoulder and right foot. He states that there is no indication in plaintiff’s emergency room records that the plaintiff sustained any significant injury as a result of this motor vehicle accident other than neck strain and back strain. He concludes that the injuries claimed in the Bill of Particulars are inconsistent with her initial presentation and documentation in the medical record.

Finally, defendants contend that by eliminating the accident as the cause of the injuries alleged, the defendants have eliminated all categories of injury in the statute, and they note that missing more than 90 days of work is not determinative of the 90/180 category.

Plaintiff counters that defendants have failed to meet their prima facie burden with regard to the 90/180 category of injury, as Dr. Guttman and Dr. Carciente examined plaintiff more than six months after the date of the accident and both neglected to address the plaintiff’s claim under the 90/180-day category. Further, plaintiff contends that Dr.

Guttman's finding of a 33% limitation in flexion in plaintiff's lumbar spine, along with a significant limitation in extension and in left and right lateral flexion, more than a year after the accident also fails to make a prima facie showing of defendants' entitlement to summary judgment. In addition, plaintiff contends she has submitted evidence which would overcome the motion and raise an issue of fact as to whether she sustained a serious injury as a result of the accident, had defendants made a prima facie case for dismissal. She relies on her medical records and affirmed reports from her doctors. She provides an affirmed report from Barry M. Katzman, M.D., who first examined plaintiff approximately a month after the accident, on August 7, 2017, and performed the left shoulder arthroscopy on September 29, 2017. She provides an affirmed report from Steve M. Yager, D.P.M., who performed the joint replacement on her right foot. In a recent follow up visit on July 1, 2019, Dr. Katzman tested plaintiff's range of motion. He reports that plaintiff has a reduced range of motion in her left shoulder, with forward flexion and abduction at 140 degrees, when 180 degrees is normal. His impression is "status post left shoulder surgery, with improvement but a residual loss of motion." He finds the injuries causally related to the July 5, 2017 accident and finds they are permanent, given the surgery and her limited range of motion. Steve M. Yager, D.P.M., in a follow up visit on June 4, 2019, finds that plaintiff continues to complain of pain and tenderness in her right foot. He opines that, "if plaintiff's statements are true and correct, that there is a direct causal relationship between her current complaints of pain and difficulty walking and the July 5, 2017 accident."

Conclusions of Law

The defendants have failed to make a prima facie showing with regard to the 90/180-day category of injury, specifically 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]). Indeed, plaintiff testified at her EBT that she was out of work for over a year, following the accident (EBT 67) and she received disability letter from various medical providers.

Moreover, defendants' orthopedist found plaintiff had significant restrictions in the range of motion in her lumbar spine that he failed to even attempt to explain (*see Ambroselli v Team Massapequa, Inc.*, 88 AD3d 927, 928 [2d Dept 2011] [“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”]; *Czach v O'Neill*, 44 AD3d 818 [2d Dept 2007] [defendants failed to establish their prima facie entitlement to summary where defendants' examining orthopedist found significant limitations in range of motion in the plaintiff's lumbar spine]).

Since the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, 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]).

In any event, had defendants made a prima facie case for dismissal, plaintiff has come forward with sufficient evidence to overcome the motion and raise issues 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 caused by the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]).

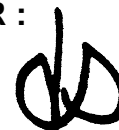
Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 6, 2020

ENTER:



Hon. Debra Silber, J.S.C.