

Harding v Dolganovski
2020 NY Slip Op 31223(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 518704/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____x

ADRIANA HARDING,

Plaintiff,

-against-

IGOR DOLGANOVSKI,

Defendant.

_____x

DECISION / ORDER

Index No. 518704/2017

Motion Seq. No. 1

Date Submitted: 2/20/20

Cal No. 24

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.....	<u>19-29</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>37-44</u>
Reply Affirmation.....	<u> </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 took place on October 23, 2015 on St. Johns Place near the intersection with Underhill Avenue in Brooklyn, NY. Plaintiff Adriana Harding was sitting in the driver’s seat of her friend’s car, which she double-parked to wait for someone to come outside with an item that she had ordered, when her car was hit in the rear by a vehicle owned and operated by defendant Igor Dolganovski. Defendant moves for summary judgment, contending that plaintiff did not sustain a “serious injury” from the accident, as defined by Insurance Law § 5102(d).

In her Bill of Particulars, plaintiff alleges that she sustained injuries to her lumbar spine as a result of the accident, in particular, a herniated disc at L5/S1 and bulging discs at L3/4 and L4/5. Sometime the same day of the accident, plaintiff went to the emergency room at Brooklyn Hospital, where she was treated and released. Plaintiff then went to her primary care doctor and treated with physical therapy for approximately eight months. She also had two injections in her spine for pain. She was 26 years old at the time of the accident.

The movant supports his motion for summary judgment with an affirmation of counsel, the pleadings, plaintiff's EBT transcript, an affirmed report from a neurologist, Daniel J. Feuer, M.D., who examined plaintiff on October 3, 2018, an affirmed report from Bernard C. Chang, M.D., a doctor of emergency medicine, who examined plaintiff's emergency room records, and affirmed reports from a radiologist, David A. Fisher, M.D., who reviewed the x-rays of plaintiff lumbar spine taken on 11/10/15 and 4/17/17. Movant contends that by eliminating the accident as the cause of the injuries to plaintiff's lumbar spine, defendant eliminates all categories of injury in the statute. With regard to the 90/180 category of injury, defendant claims that since plaintiff testified at her examination before trial that she did not lose any time from her job as a meter reader for Con Edison as a result of the accident, but was placed on restricted, light duty for three months (EBT Page 49), and that there was nothing that she could not do after the accident that she did before, although afterwards she experienced pain while doing some activities, that this testimony plus Dr. Chang's affirmation support his motion and are evidence that she did not sustain a "90/180-day" injury.

Plaintiff opposes the motion and counters that defendant has failed to meet his burden of proof for summary judgment as he has not addressed whether plaintiff sustained an injury that prevented her from performing substantially all of her usual and customary daily activities for at least 90 of the first 180 days immediately following the accident. Plaintiff further contends that her opposition papers, which contain her medical records in admissible form and her affidavit, overcomes defendant's claim that plaintiff did not sustain a serious injury and are sufficient to raise triable issues of fact and defeat summary judgment.

Conclusions of Law

Movant makes a *prima facie* showing of his entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). The affirmed report of Dr. Daniel J. Feuer, who examined plaintiff on October 3, 2018, the report of Dr. Bernard C. Chang, who examined plaintiff's emergency room records, and the report of the radiologist, Dr. David A. Fisher, who reviewed the plaintiff's X-rays, all demonstrate that plaintiff did not sustain a serious injury as a result of the subject accident.

Dr. Feuer finds that plaintiff has a full range of motion in her cervical and lumbar spine, with negative test results and a normal neurological exam. He finds no objective clinical deficits referable to the central or peripheral nervous system to support what he describes as her subjective complaints. He concludes that plaintiff does not demonstrate any objective neurological disability or neurological permanency and that she is able to engage in full active employment as well as the activities of daily living, without restriction.

Dr. Bernard C. Chang, who examined plaintiff's emergency room records, finds no indication that plaintiff sustained any significant injury as a result of the subject motor vehicle accident. He finds that the injuries claimed in the Bill of Particulars are inconsistent with the plaintiff's initial presentation at the emergency room and the documentation in their records. Dr. Chang notes that the alleged injuries to plaintiff's lumbar spine are unsupported by plaintiff's complaints to the emergency room staff or the staffs' findings and examinations; that there is no indicia of the alleged injury present. He concludes that the injuries claimed in the Bill of Particulars do not have an acute traumatic origin and could not be causally related to the 10/23/15 accident.

David A. Fisher, M.D, reviewed the plaintiff's X-rays from two-and-a-half weeks after the accident as well as from a year-and-a-half after the accident taken at Doshi Diagnostic and finds that in both instances plaintiff's lumbar vertebral bodies were normal in height and alignment with no fractures and with all disc spaces well preserved. He concludes that there is no radiographic evidence of a traumatic injury or an injury causally related to the accident.

Defendant next provides one of plaintiff's medical records, from DHD Medical P.C. dated December 23, 2015. In this report, it states that plaintiff had an MRI of her lumbar spine on November 29, 2015, and that it showed a herniation and two bulges. It is not clear why defendant's radiologist did not review this MRI. Dr. Gross recommends that plaintiff continue physical therapy three times per week and gave plaintiff a letter that she can only do light duty at work and not her regular job. She recommended that plaintiff return in six to eight weeks. However, Dr. Gross tested plaintiff's range of motion in her lumbar spine and it was normal.

Plaintiff's testimony at her EBT that she returned work immediately after the accident, albeit with restricted duties (EBT 49), 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 A.D.3d 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 an 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]). The affirmed report of David H. Delman, M.D., describing a September 10, 2019 examination of Plaintiff (last report in Ex. D), indicates significant and quantified limitations in plaintiff's range of motion in her lumbar spine, and reports that the multiple disc bulges and herniation were causing persistent pain and spasm. He further states that they are permanent, as the reductions in her range of motion were nearly four years post-trauma. Dr. Delman also opines that there is a direct causal relationship between the October 23, 2015 motor vehicle accident and plaintiff's complaints, injuries and disabilities. Finally, Dr. Delman avers that the "normal

ranges of motion” indicated by Dr. Feuer in his report are intended to be used for testing with a dual inclinometer, rather than the goniometer he states that he used, resulting in Dr. Feuer’s erroneous conclusion that plaintiff had normal ranges of motion in her lumbar spine.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 2, 2020

ENTER :



Hon. Debra Silber, J.S.C.