

**Paul v Kelton**

2020 NY Slip Op 32028(U)

May 1, 2020

Supreme Court, Bronx County

Docket Number: 29208/2017E

Judge: John R. Higgitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA PART 14

-----X  
TIARA PAUL,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 29208/2017E

ROBERT C. KELTON, LARRY WALKER, JR., and  
KIM C. JOHNSON,

Defendants.  
-----X

Present: John R. Higgitt, J.S.C.

Upon the September 20, 2019 notice of motion of defendants Kelton and Walker and the affirmation and exhibits submitted in support thereof; defendant Johnson’s September 27, 2019 notice of cross motion and the affirmation and exhibits submitted in support thereof; plaintiff’s January 28, 2020 affirmation in opposition and the exhibits submitted therewith; and due deliberation; the moving defendants’ motion and defendant Johnson’s cross motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject June 10, 2016 motor vehicle accident are granted in part.

Plaintiff claims injuries to the lumbar aspect of her spine and to her left knee and ankle, and alleges “serious injury” under the Insurance Law § 5102(d) categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, the moving defendants submit various of plaintiff’s medical records, the affirmed report of orthopedist Dr. Hillsman, and the transcript of plaintiff’s deposition testimony. Defendant Johnson adopts the moving defendants’ arguments and proof.

Dr. Hillsman examined plaintiff on September 5, 2019, measuring full or near-normal ranges of motion in all tested planes of movement of plaintiff’s lumbar spine, left knee and left

ankle. All objective provocative testing yielded negative results, and the neurological examination was normal. Dr. Hillsman concluded that plaintiff had sustained resolved lumbar sprain/strain and resolved knee and ankle strain/contusion, without objective findings to support plaintiff's subjective complaints. Dr. Hillsman concluded that there was a causal relationship between the accident and her diagnoses of plaintiff.

The moving defendants' proof was sufficient to demonstrate, prima facie, that plaintiff did not sustain a permanent consequential or significant limitation of use of her knee or ankle (*see Stovall v New York City Transit Auth.*, 2020 NY Slip Op 01705 [1st Dept 2020]; *Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020]). Plaintiff's medical records disclose that imaging revealed only tendinosis of her knee and ankle, and that she had full ranges of motion in those body parts within three months after the accident. The moving defendants thus demonstrated that plaintiff's knee and ankle injuries are not "serious" within the meaning of the statute (*see Torres v Etilee Taxi, Inc.*, 136 AD3d 437 [1st Dept 2016]), and plaintiff failed to raise an issue of fact. Nevertheless, because the moving defendants did not raise an issue as to a causal connection between the accident and the knee and ankle injuries, if it is ultimately found at trial that plaintiff's lumbar injuries are "serious" within the meaning of the statute, plaintiff may recover for all other injuries causally related to the accident (*see id.*).

With respect to plaintiff's lumbar injuries, the moving defendants' proof was sufficient to establish, prima facie, that plaintiff did not sustain a permanent consequential limitation (*see Stovall, supra; Bianchi, supra*). Dr. Hillsman was not required to review plaintiff's medical records or imaging reports prior to reaching her conclusions (*see Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Chintam v Fenelus*, 65 AD3d 946 [1st Dept 2009]). Because plaintiff did not submit evidence of recent limitations, she failed to raise an issue of fact as to a permanent

consequential limitation (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]). With respect to the significant limitation category, because the medical records submitted by the moving defendants included findings of reduced ranges of motion contemporaneously with and ten months after the accident, the moving defendants' proof was insufficient to establish, prima facie, that plaintiff did not sustain a significant limitation of use of her lumbar spine (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]).

The moving defendants did not clearly and unequivocally interpose a gap-in-treatment argument with respect to this plaintiff's medical history, and it is apparent that plaintiff did not perceive the need to address such argument, the court does not address same.

With respect to plaintiff's 90/180-day claim, the moving defendants' proof included medical reports and disability certificates demonstrating that plaintiff was unable to return to work for at least 90 days following the accident. The moving defendants did not submit other proof in support of their assertion that plaintiff did not sustain a 90/180-day injury, and thus failed to meet their prima facie burden (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]; *Seepersaud v L&M Bus Corp.*, 140 AD3d 579 [1st Dept 2016]). Their reference to plaintiff's deposition testimony that she was cleared to return to work within two weeks is erroneous.

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

Accordingly, it is

ORDERED, that the aspects of the moving defendants' motion for dismissal of plaintiff's claims of "serious injury" premised on knee and ankle injuries, and under the Insurance Law § 5102(d) categories of permanent loss of use and permanent consequential limitation are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the 9:30 a.m. April 24, 2020 status conference before the undersigned is adjourned to **August 21, 2020** in Part 14, courtroom 407.

This constitutes the decision and order of the court.

Dated: May 1, 2020



Hon. John R. Higgitt, J.S.C.