

Perry v 31 N. Blvd, Inc.
2020 NY Slip Op 32053(U)
June 24, 2020
Supreme Court, Kings County
Docket Number: 519471/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____X

MINNIE PERRY,

Plaintiff,

-against-

**31 NORTHERN BLVD, INC., GABRIEL LAGUERRE,
CENTURY WASTE SERVICES, L.L.C. and
SERGIO GALICIA-SARMIENTO,**

Defendants.

_____X

DECISION / ORDER

**Index No. 519471/2018
Motion Seq. No. 3 & 6
Date Submitted: 6/18/20**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants 31 Northern Blvd, Inc. and Gabriel Laguerre's motion, and defendants Century Waste Services LLC and Sergio Galicia-Sarmiento's cross motion, for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>54-62</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>90-91</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>86-89, 92</u>
Reply Affirmation.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident that took place on July 14, 2018, at the intersection of Nostrand Avenue and Martense Street in Brooklyn, NY. At the time of the accident, plaintiff was a passenger in the vehicle (a taxi) owned by defendant 31 Northern Blvd, Inc. and operated by defendant Gabriel Laguerre, which was in an accident with a vehicle owned by defendant Century Waste Services, L.L.C. and operated by defendant Sergio Galicia-Sarmiento. Plaintiff declined medical attention at the scene and the driver took her home. The next day, her son called an

ambulance and she was taken to the emergency room at Downstate University Hospital. In her bill of particulars, plaintiff alleges that as a result of the accident, she sustained injuries to her cervical and lumbar spine, both hips, both knees and both hands. At the time of the accident, she was seventy-one years old.

Defendants move and cross-move for summary judgment dismissing the complaint. They contend that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). Defendants 31 Northern Blvd, Inc. and Gabriel Laguerre submit the pleadings, plaintiff’s EBT transcript and affirmed reports from an orthopedist, Dana Mannor, M.D. and a radiologist, Mark Decker, M.D. The other defendants have merely made a “me too” motion, with no additional evidence.

Dr. Dana Mannor an orthopedist, examined plaintiff on October 10, 2019. He states in his affirmation that he was not given any of plaintiff’s medical records to review. He tested the range of motion in her spine. He reports significant restrictions in her cervical spine. Dr. Mannor states “active range of motion is flexion to 50 degrees (50 degrees normal), extension to 40 degrees (60 degrees normal) and right rotation to 40 degrees (80 degrees normal) and left rotation to 40 degrees (80 degrees normal).” Similar and significant restrictions were found in plaintiff’s lumbar spine. He reports that plaintiff had normal range of motion in her hips, knees and hands, with otherwise negative test results. He concludes that plaintiff sustained sprains and strains as a result of the accident, and they have fully resolved. Dr. Mannor opines that “[t]here is no evidence of an orthopedic disability, permanency or residuals. Limited ranges of motion are considered subjective in the absence of any positive objective clinical findings.” He notes that she uses a cane to ambulate and says, “there is evidence of contributing preexisting arthritis in bilateral knees.”

Dr. Mark Decker reviewed the MRIs of plaintiff's right knee, taken on 8/24/18, her lumbar spine, taken on 8/23/18, and her cervical spine, taken on 8/23/18. His report is in tiny type and covers the whole page, with almost no margins. Documents submitted to the court need to be in larger type and double spaced with normal margins. In any event, he states that plaintiff has degenerative disc disease in her spine. He lists her many bulges and herniations, stenosis and retrolisthesis, impingements and spondylolisthesis, and says "[t]hese findings are all long standing and not causally related to the date of accident of 07/14/2018. No evidence to suggest that an acute traumatic injury was sustained." He then lists all of the abnormalities in her right knee, but also concludes that all of the abnormalities are unrelated to the accident.

With regard to the 90/180-day category of injury, defendants contend in counsel's affirmation (¶35) that "[p]laintiff testified that she was never confined to her bed, therefore defendant's [sic] meet the 90/180 requirement as per §5102(d)." Plaintiff was not asked any questions at her EBT about this category of injury. On Page 48 of the transcript, she testified that she could not shop or do laundry at the time of her exam, in July of 2019, but the exam was a year after the accident.

Conclusions of Law

Defendants have failed to make a prima facie showing 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 [she] 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]). Plaintiff testified that she was retired on the date of the accident, and she was not asked any questions about her ability to function during the months after the accident. She apparently went to physical therapy five times a week in the weeks right after the accident. If a person is retired, and there are no medical records submitted for the months immediately following the accident, unless questions are asked at the plaintiff's deposition that are focused on this category of injury, it is not possible for a defendant to make a prima facie case that the plaintiff did not sustain an injury in this category. Counsel's argument that a plaintiff must testify that she was confined to her bed for 90 days after the accident, on instruction from a medical doctor, is inaccurate.

With regard to the other categories of injury, defendants have similarly failed to make a prima facie case for summary judgment. While plaintiff acknowledges that she sometimes used a cane before the accident, and that she had been diagnosed with arthritis in her back before the accident, none of plaintiff's medical records were given to Dr. Mannor, nor was he even given the defendants' radiologist's reports. Therefore, he was unable to make a sound determination whether she had sustained new injuries in the accident, had exacerbated her prior injuries, or if she was equally injured before the accident as she was afterwards. His opinion that her abnormal ranges of motion in her cervical and lumbar spine "are considered subjective in the absence of any positive objective clinical findings" thus makes no sense. He had no information about any clinical findings.

As defendants have failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, it is unnecessary to consider the papers submitted by the 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 provides medical evidence which overcomes the motion and raises a triable issue of fact. Dr. Yolande Bernard provides an affirmation dated April 16, 2020, which summarizes her annexed records of plaintiff's treatment, which commenced about a week after the accident, and concludes "[i]t is in my opinion within a reasonable degree of medical certainty that the patient has sustained significant and permanent injuries to the cervical spine, lumbosacral spine, left hip, and right knee. Based upon the patient's ongoing symptoms, her loss of range of motion approximately 1 year and 8 months post motor vehicle accident, it is evident her injuries are traumatically induced, permanent in nature and causally related to the accident of July 14, 2018. The patient's prognosis for a full and complete recovery remains poor."

Plaintiff also provides an affirmation from the radiologist who read her MRI films. Dr. Narayan B. Paruchuri states, with regard to her left hip MRI (which was not reviewed by defendants' radiologist) that plaintiff has an "intermediate grade partial-thickness tear at the origin of the common hamstring tendon."

These reports create a “battle of the experts” and raise an issue of fact as to whether plaintiff sustained a “serious injury” as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is **ORDERED** that the motion and cross motion are denied.

This constitutes the decision and order of the court.

Dated: June 24, 2020

ENTER :



Hon. Debra Silber, J.S.C.