

Gusef v Leviev

2020 NY Slip Op 32337(U)

July 15, 2020

Supreme Court, Kings County

Docket Number: 516485/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

x

JENNA GUSEF,

Plaintiff,

DECISION / ORDER

-against-

Index No. 516485/2018

Motion Seq. No. 3

SYOMA LEVIEV,

Date Submitted: 7/9/20

Defendant.

x

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>23-32</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>33-37</u>
Reply Affirmation.....	<u>39-40</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 February 23, 2017 in Brooklyn, New York. Plaintiff was a pedestrian hit by defendant's vehicle while she was crossing the street. In her Bill of Particulars, plaintiff alleges that she sustained injuries to her left knee as a result of the accident. She was removed from the scene in an ambulance and treated at the emergency room at Coney Island Hospital. She subsequently had physical therapy treatment for several months.

The movant contends that plaintiff did not sustain a "serious injury" as a result of this accident. Defendant supports his motion with the pleadings, plaintiff's EBT transcript, plaintiff's emergency room records, plaintiff's MRI report following an MRI of her left knee,

and an affirmed IME report from an orthopedist, Edward Toriello, who examined plaintiff approximately two years after the accident.

The movant's attorney contends that plaintiff testified at her EBT that she returned to work as a case manager for Goodwill Industries three days after the accident, and was promoted around a month after the accident, undercutting any claim under the 90/180 category of injury. Defendant makes a prima facie case for dismissal of her claim in the 90/180 category of injury, based upon her deposition testimony.

The court next reviewed the defendant's affirmed medical report. Dr. Edward Toriello, an orthopedist, examined plaintiff sometime around May 8, 2019. That is the date on his affirmation, but he doesn't say what date the exam took place. Plaintiff informed him that she still had left knee pain. Dr. Toriello examined her knees, shoulders, elbows, wrists and hands. He reports that she had a full range of motion in all of these body parts, and with respect to her left knee, he states that "examination of the left knee reveals full pain free range of motion, . . . no erythema, ecchymosis, swelling, or tenderness." His impression is "evidence of a resolved left knee contusion. No objective evidence of continued disability . . . Prognosis is good."

The MRI report written by Dr. Michael D, Green following the study taken on March 30, 2017 of plaintiff's left knee at Citywide Health Facility, Inc. states "small knee effusion consistent with synovitis. Grade II signal in the posterior horn of the medial meniscus as noted above . . . No tears seen." The emergency room records indicate that she complained of pain in her left knee and right hand. They noted "superficial abrasions" to her right hand and left knee. X-rays were taken to her right hand and left knee and no fractures were found.

Plaintiff's testimony at the EBT that she returned to work a few days 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 *Kang v Bhullar*, 167 AD3d 726, 727 [2d Dept 2018] [“the defendants established, prima facie, that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) by submitting a transcript of the plaintiff’s deposition testimony, which demonstrated that she missed about one week of work during the first 180 days following the accident”]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

With regard to the other applicable categories of injury, defendant’s orthopedist Dr. Toriello reports completely normal test results from his tests of plaintiff’s range of motion of her left knee. Thus, defendant has made a prima facie case for dismissal with regard to the other claimed categories of injury as well.

Plaintiff opposes the motion with an attorney’s affirmation and two exhibits, E-file Docs 34 and 35. To the extent plaintiff complains that Dr. Toriello did not sign his affirmed report, the court notes that defendant submitted a signed copy subsequently, and that no prejudice resulted to plaintiff, as Dr. Toriello’s report had been exchanged with plaintiff after the IME, a year ago.

Plaintiff’s treating doctor, Dr. Vitaly Volovoy, provides an affirmation which describes his treatment of plaintiff, which commenced a few days after the accident. He sent plaintiff for an IME of her left knee and referred her to physical therapy. She went to physical therapy for five months. He then (August 2017) recommended that she have arthroscopic surgery to her left knee, but plaintiff declined to do so, and told him she was afraid to have surgery. He did not see her again until December 1, 2019, when he examined her in order to respond to this motion. At the exam, he reports that her range of motion in her knee was

significantly restricted. Dr. Volovoy reviewed her emergency room records and other medical records, including, inexplicably, a report dated May 23, 2018 from Dr. Thomas Kolb, a radiologist, who reviewed the MRI films taken on March 30, 2017 and has a different interpretation of the films than Dr. Green, who read the films initially. Dr. Volovoy concludes “she requires a left knee arthroscopy, as the more that she walks on her left knee, she is probably increasing the post-traumatic arthritis that she has already in her left knee. The left knee permanently lost its stability with onset of scar tissue, loss of range of motion, and pain, which the patient will have for the rest of her life. Surgery may stop or delay the post-traumatic arthritis and may help with the swelling and pain. Based upon physical examinations, diagnostic test results and history presented it is my opinion within a reasonable degree of medical certainty, that the above-stated injuries sustained by Ms. Gusef are permanent and causally related to the automobile accident of February 28, 2017. It is my opinion, within a reasonable degree of medical certainty, that the injuries sustained by Ms. Gusef have resulted in a permanent consequential limitation of use and a significant limitation of her left knee.”

The other medical affirmation provided by plaintiff is from Dr. Thomas Kolb, a radiologist. He states that he reviewed the MRI films taken on March 30, 2017 and finds:

- tear of the inferior articular surface of the posterior horn of the medial meniscus
- 1.1cm nondisplaced subchondral fracture/ trabecular fracture in the central aspect of the lateral tibial plateau with adjacent chondral injury at the inferior articular aspect of the junction of the posterior horn and body of the lateral meniscus
- partial tears of the anterior posterior cruciate ligaments

- partial tear of the femoral origin of the medial collateral ligament
- joint effusion

The court is constrained to conclude that 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 from the subject accident, with regard to her left knee. While it is unusual for a plaintiff to retain a second doctor to review MRI films, there is no prohibition on doing so. A plaintiff need not disclose his or her experts before summary judgment motions are made. Here, Dr. Volovoy describes an examination of plaintiff conducted on December 1, 2019, and indicates significant and quantified limitations in plaintiff's range of motion in her left knee. Further, he states that the injury to plaintiff's left knee is causally related to the subject motor vehicle accident, and is permanent and progressive. He opines that plaintiff needed surgery in 2017 and still needs surgery. Dr. Kolb describes the MRI films of plaintiff's left knee, and states that he sees three partial tears and several other abnormalities. Dr. Volovoy states that his clinical exam of plaintiff was consistent with Dr. Kolb's report. There are issues of fact that require a trial.

Accordingly it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: July 15, 2020

ENTER :



Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER
JSC