

Jean-Baptiste v Moganna-Gowda

2020 NY Slip Op 32510(U)

July 16, 2020

Supreme Court, Kings County

Docket Number: 512494/2018

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of July, 2020.

PRESENT:
HON. CARL J. LANDICINO,

Justice.

JESSICA JEAN-BAPTISTE,
Plaintiff,

Index No. 512494/2018

- against -

DECISION AND ORDER

SHAMANTH MOGANNA-GOWDA,
Defendant,

Motion Sequence # 1

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:
Papers Numbered (e-file)

Notice of Motion and Affidavits (Affirmations) Annexed	<u>11-19</u>
Opposing Affidavits (Affirmations)	<u>22-25</u>
Memorandum of Law	<u>13</u>

After a review of the papers and oral argument the Court finds as follows:

The instant action is a claim for damages for personal injuries sustained by the Plaintiff, Jessica Jean-Baptiste (hereinafter referred to as the "Plaintiff"), as a consequence of a motor vehicle accident, which occurred on the Belt Parkway, approximately 1/10 mile west of Flatbush Avenue, Brooklyn, in Kings County, on or about March 2, 2018. The Plaintiff's Complaint alleges that the Defendant, Shamanth Moganna-Gowda's (hereinafter referred to as the "Defendant") negligence in operating his motor vehicle caused the accident and that, her injuries are serious within the meaning of New York Insurance Law §5102(d).

The Defendant now moves (motion sequence #1) for an order, pursuant to CPLR 3212, granting the Defendant summary judgment and dismissing the Plaintiff's Complaint. The Plaintiff

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opposes the motion and argues that the Plaintiff did suffer serious injury as such term is defined in Insurance Law §5102(d).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’ *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Graham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 A.D. 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

§5102 of the Insurance Law defines a “serious injury” as

... a personal injury which result in death; dismemberment; significant disfigurement; a fracture; a loss of a fetus; permanent loss or use of a body organ, member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during

the one hundred eighty days immediately following the occurrence of the injury or impairment.

In order to prove the extent or degree of physical limitation, it is appropriate to use either (i) an expert's designation of a numeric percentage of a plaintiff's loss of range of motion to substantiate a claim of serious injury or (ii) an expert's qualitative assessment of a plaintiff's condition, provided that the evaluations have an objective basis and compare the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, or function. *McEachin v. City of New York*, 137 A.D.3d 753, 25 N.Y.S.3d 672 [2d Dept 2016]. Minor, mild or slight limitations of use of body functions or systems are insignificant. *Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982] and *Nolasco-Ochoa v. Kollanethu*, 181 A.D.3d 689, 117 N.Y.S.3d 865 [2d Dept 2007].

Here, the Defendant relies on the Plaintiff's testimony, during her deposition (see Defendant's Motion, Exhibit D, Examination Before Trial of Jessica Jean-Baptiste), and the August 8, 2019, medical examination report of Dr. Dana A. Mannor, M.D., a board-certified orthopedic surgeon (see Defendant's Motion, Exhibit E), in support of his motion (motion sequence #1). The Defendant contends that the Plaintiff:

- (i) was not bleeding, unconscious, or bruised from the accident and did not require assistance exiting her vehicle, immediately after the accident (see Plaintiff's Deposition, pages 26-27);
- (ii) refused to seek medical attention at the scene of the accident, after the Police asked if she would like to obtain same (see Plaintiff's Deposition, page 29);
- (iii) was diagnosed with a regimen of physical therapy including strength training, stimulation, and exercise, a month after the accident and continued treatment for only 6 months (see Plaintiff's Deposition, pages 35-36);

- (iv) did not undergo any acupuncture or chiropractic treatment for her injury (see Plaintiff's Deposition, page 41);
- (v) was not recommended any surgery to address her injuries (see Plaintiff's Deposition, page 38);
- (vi) can perform all the activities she used to do before the accident (see Plaintiff's Deposition, page 46-47);
- (vii) missed one day of work after the accident and had no medical restrictions on her job, following the accident (see Plaintiff's Deposition, pages 31 and 51).

With regard to Dr. Mannor's report, Dr. Mannor examined the Plaintiff on August 8, 2019. Dr. Mannor represented that she tested the Plaintiff in accordance with the AMA Guidelines, 5th Edition. Dr. Mannor was of the opinion that the Plaintiff had a normal range of motion without atrophy, deformity, or swelling within her (i) cervical spine, (ii) thoracic spine, (iii) lumbar spine, (iv) right and left shoulder, and (v) right and left wrist/hands. The doctor found that the Plaintiff's muscle strength was normal in all areas examined. These findings apparently informed Dr. Mannor's opinion that (i) any of the Plaintiff's injuries were resolved (ii) there was no need for continued orthopedic treatment and (iii) there was no evidence of permanency or residual injury.

The Plaintiff, in opposition, relied on the Plaintiff's medical records and the affirmation of Dr. Yolande Bernard, M.D. (see Plaintiff's Opposition to the Defendant's Motion, Exhibit 2). According to Dr. Bernard's report, the Plaintiff was examined by Dr. Bernard, for the first time, 6 days after the accident, on March 8, 2018. Thereafter, Dr. Bernard prepared reports dated March 8, 2018, June 5, 2018, August 22, 2018, and November 18, 2019. All examinations were conducted according to the standards as published in the NYS Division of Disability

Determination, NYS Workers' Compensation Guidelines for Determining Impairment, 2018 and the Manual of Structural Kinesiology, 2012.

Dr. Bernard stated that the Plaintiff had physical therapy for 6 months. It was Dr. Bernard's opinion that at the end of this period the Plaintiff had, "achieved maximum medical improvement and was unlikely to improve with continuing rehabilitative treatment" (see Bernard Reports, page 1). Notably, Dr. Bernard's evaluation on August 22, 2018 indicated that the Plaintiff had "reached the maximum medical benefit from formal physical therapy..." However, "... this does not mean that she is cured... due to the nature of her injuries, I would expect that she will continue to suffer from periodic exacerbations in her pain and limitations in her abilities" (see Bernard Reports, page 12).

In Dr. Bernard's November 18, 2019 evaluation, the Plaintiff disclosed that she had not been, "... involved in any new accidents and she has not sustained any new injuries" (see Bernard Report, page 14). The doctor stated that the Plaintiff complained of pain in her neck, upper and lower back, right shoulder and right hand and that she also complained that she had difficulties with heavy lifting. Dr. Bernard determined that the Plaintiff was suffering a diminished range of motion in her (i) cervical spine, (ii) thoracic spine, (iii) lumbar spine, and (iv) right shoulder. The doctor also found that the Plaintiff also had a diminished motor system in the bilateral shoulder abductors. Dr. Bernard concluded that the Plaintiff, "... sustained significant and permanent injuries to her neck, back, and right shoulder" (see Bernard Reports, page 16). Dr. Bernard causally related the Plaintiff's injuries to the subject motor vehicle accident on March 2, 2018.

The Plaintiff also provided her affidavit, dated January 20, 2020, in support of her opposition to the Defendant's motion. In the Plaintiff's Affidavit, she alleges that, "as a result of [her] injuries, [she] was prevented from substantially performing all of the activities of my daily

life as they were before the aforementioned accident for a significant period of time and remain limited to the present date (see Plaintiff's Affidavit, page 2). The Plaintiff acknowledged that she missed one day of work due to the accident; however, she contends that she has had to obtain accommodations from her workplace to be able to function (see Plaintiff's Affidavit, page 2). The Plaintiff alleges that she was unable to do household chores for 3 months and can only do so, at the time of her affidavit, at a much slower pace than before the accident. (see Plaintiff's Affidavit, page 2). The Plaintiff also claims that she could not grocery shop alone, for 3 months, due to being unable to stretch for items stored on high shelves and lifting heavy bags of goods. (see Plaintiff's Affidavit, page 3).

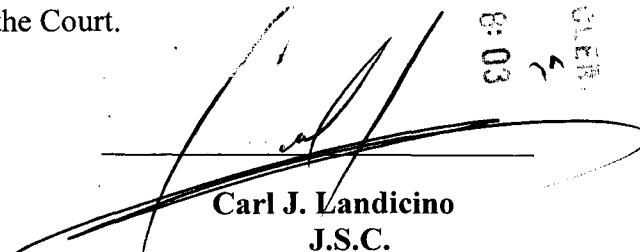
The Court finds that the Defendant has met his *prima facie* burden; however, the Plaintiff has proffered sufficient evidence to establish the existence of a material issue of fact on the issue of serious injury. There is a clear divergence of expert opinion on the Plaintiff's alleged injuries. The Court does not make credibility findings, its role is limited to issue finding not issue resolution. *Shabat v. State*, 177 A.D.3d 1009, 113 N.Y.S.3d 174 [2d Dept 2019]. Therefore, the Defendant's motion is denied.

Based upon the foregoing, it is hereby Ordered that:

The Defendant's motion (motion sequence #1) is denied.

This constitutes the Decision and Order of the Court.

ENTER:


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 J.S.C.

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