

**Battle v Rolon**

2020 NY Slip Op 32674(U)

August 10, 2020

Supreme Court, Kings County

Docket Number: 507041/2018

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 507041/2018  
Motion Date: 7-20-20  
Mot. Seq. No.: 3

-----X  
BRENDA BATTLE,

Plaintiff,

-against-

**DECISION/ORDER**

ELANIO ROLON AND KPRM ENTERPRISES, INC.,

Defendants.  
-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

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KINGS COUNTY CLERK  
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Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident that occurred on August 13, 2016, the defendants, MELANIO ROLON and KPRM ENTERPRISES, move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury as defined under Insurance Law 5102(d).

Assuming without deciding that the defendants made out a prima facie case of entitlement to summary judgment dismissing the action on the ground that plaintiff did not suffer a serious injury as a result of the accident, in opposition to the motion, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury to the cervical and lumbar regions of her spine (*see Austin v. Dominguez*, 79 A.D.3d 952, 952, 913 N.Y.S.2d 757; *Casiano v. Zedan*, 66 A.D.3d 730, 730, 887 N.Y.S.2d 613).

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In opposition to the motion, the plaintiff submitted the affirmation of Dr. Daniel Khaimov. Dr. Khaimov first examined the plaintiff on October 27, 2016 and saw her periodically up until October 22, 2019. He reports that on the first visit, she complained that she had been suffering from severe pain and limitation of movement in her neck and back since the accident and had been asymptomatic prior thereto despite have suffered an injury to her neck in a prior motor vehicle that occurred approximately 20 years before the accident. Using a goniometer, Dr. Khaimov performed range of motion studies of plaintiff's cervical and lumbar spine which revealed significant limitations and deficits. Thereafter, plaintiff returned to his office for follow-up visits on or about November 10, 2016, November 15, 2016, November 22, 2016, November 27, 2016, December 8, 2016, December 16, 2016 and January 19, 2017 during which Dr. Khaimov performed physical examinations, range of motion studies of plaintiff's cervical spine and lumbar spine and administered a series of cervical and lumbar injections to help alleviate the plaintiff's pain.

Dr. Khaimov stated that on or about December 16, 2016, plaintiff underwent a lumbar discectomy after which she returned to his office for post-surgery follow-up visits. When he examined her on October 22, 2019, she continued to complain of pain and limitation of movement in her neck and back. At that time, he conducted range of motion studies which revealed the following:

**Range of Motion of Plaintiff's Cervical Spine:**

Flexion: 35 degrees (normal 50 degrees)

Extension: 45 degrees (normal 60 degrees)

Right lateral flexion: 30 degrees (normal 45 degrees)

Left lateral flexion: 40 degrees (normal 45 degrees)

Right rotation: 60 degrees (normal 80 degrees)

Left rotation: 75 degrees (normal 80 degrees).

**Range of Motion of The Lumbar Spine:**

Flexion: 50 degrees (normal 80 degrees)

Extension: 20 degrees (normal 25 degrees)

Right lateral flexion: 15 degrees (normal 25 degrees)

Left lateral flexion: 15 degrees (normal 25 degrees)

While Dr. Khaimov did not see the plaintiff from January of 2017 to October 22, 2019, he explained that the reason for the gap in treatment was that as of the January 2017 visit, even though plaintiff continued to have complaints of aches, pains, stiffness, spasms, soreness and diminished range of motion in her neck and back, he determined that she had achieved maximum benefits from surgery and the regimen of treatment that she had received and further treatment would be palliative in nature.

In sum, based on both his contemporaneous and most recent examinations of the plaintiff, Dr. Khaimov opined that there were limitations in the plaintiff's cervical and lumbar range of motion, which were significant, permanent, and causally related to the subject accident. Accordingly, there are triable issue of fact as to whether plaintiff sustained a serious injury under the significant limitation of use and/or the permanent consequential limitation of use category of Insurance Law § 5102(d) as a result of the subject accident (*see Dixon v. Fuller*, 79 A.D.3d 1094, 1094, 913 N.Y.S.2d 776; *Ortiz v. Zorbas*, 62 A.D.3d 770, 771, 878 N.Y.S.2d 442; *Azor v. Torado*, 59 A.D.3d 367, 368, 873 N.Y.S.2d 655).

Contrary to the defendants' contention, Dr. Khaimov provided an adequate explanation for the lengthy gap in plaintiff's treatment history. Dr. Khaimov stated in his affirmation that in early January of 2017, he concluded that plaintiff had reached her maximum medical improvement and that any further treatment at that time would have been merely palliative in nature (*see Pommells v. Perez*, 4 N.Y.3d at 577, 797 N.Y.S.2d 380, 830

N.E.2d 278; *see also Shtesl v. Kokoros*, 56 A.D.3d 544, 546-547, 867 N.Y.S.2d 492; *Bonilla v. Tortoriello*, 62 A.D.3d 637, 639, 878 N.Y.S.2d 187, 188).

The Court has considered the remaining arguments raised by the defendants in support of the motion and find them to be without merit.

Accordingly, it is hereby

**ORDRED** that defendants' motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: August 10, 2020

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**PPS**

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020 .