Lindor v Ali
2020 NY Slip Op 33776(U)
November 10, 2020
Supreme Court, Kings County
Docket Number: 510956/17
Judge: Bruce M. Balter

At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of November, 2020.

P R E S E N T:
HON. BRUCE M. BALTER,
Justice.

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KISHANA LINDOR,

Plaintiff,

- against -

DECISION & ORDER

Index No. 510956/17
Mot. Seq. Nos. 4 & 5

SYED M. ALI, AMERICAN UNITED TRANSPORTATION, INC. and CARMEN GALLARDO,

Defendants.

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The following e-filed papers read herein:	Papers Numbered
Notice of Motion and Affidavits (Affirmations) Annexed	38, 39, 44, 45; 50-51
Opposing Affidavits (Affirmations)	62, 63, 65, 67,68;
Reply Affidavits (Affirmations/Affidavits)	69, 70, 72, 74

Upon the foregoing papers, defendants American United Transportation, Inc. (defendant American) and Carmen Gallardo (defendant Gallardo) move, pursuant to CPLR 3212, in motion sequence (seq.) number (no.) 4, for an order granting summary judgment in their favor dismissing the action. Defendant Syed M. Ali (defendant Ali) moves, pursuant to CPLR 3212, in motion seq. no. 5, for an order granting summary judgment dismissing the action.

Background

Plaintiff Kishana Lindor (plaintiff Lindor) commenced this personal injury action with the filing of a summons and complaint, wherein she alleges that she suffered personal injuries as a result of a motor vehicle accident. She specifically asserts that on January 16, 2017, a motor vehicle owned and operated by defendant Ali came into contact with a motor vehicle owned by defendant American and operated by defendant Gallardo, in which she was a passenger. The aforementioned contact allegedly caused severe and permanent personal injuries to plaintiff Lindor.

Subsequently, defendants filed answers asserting various affirmative defenses and cross-claims. Soon thereafter, plaintiff Lindor submitted a verified bill of particulars wherein she averred that she suffered serious and permanent injuries to her right knee and non-permanent injuries to the same preventing her from performing substantially all her usual and customary daily activities for a period of 90 out of 180 days (90/180 days) following the accident.

A period of discovery took place and various motion practice ensued. Defendant American and defendant Gallardo now jointly move for an order granting them summary judgment dismissing the complaint on the basis that the alleged injuries fail to satisfy the serious injury threshold requirement mandated by Insurance Law § 5102 (d). Defendant Ali, essentially joining defendant American and defendant Gallardo's motion, moves for the same relief and incorporates by reference his co-defendants' moving papers.

The Parties' Positions

In support of their motions, defendants proffer, among other evidence, plaintiff Lindor's deposition testimony and the affirmations of Dr. Joseph C. Elfenbein and Dr. Michael Setton.[1] Defendants argue that plaintiff Lindor's alleged injuries fail to satisfy the requisite standards for serious injury under Insurance Law § 5102 (d). Specifically, defendants contend that plaintiff Lindor did not suffer any permanent injuries, nor was she prevented from performing her usual and customary daily activities for a period of 90/180 days immediately following the accident due to medically determined non-permanent injuries.

Dr. Setton avers that his examination of plaintiff Lindor, specifically an MRI of her right knee on March 21, 2017, permitted him to conclude there was no soft tissue injury or abnormality to the right knee. Dr. Elfenbein likewise avers that his examination of plaintiff Lindor led him to conclude the capabilities and range of motion of plaintiff Lindor's right knee all aligned with normal function. Both Dr. Elfenbein and Dr. Setton opine, within a reasonable degree of medical certainty, that plaintiff Lindor does not suffer from a permanent injury or limitation of use with regards to the right knee.[2]

[1] Dr. Elfenbein is a board certified orthopedic surgeon, duly licensed to practice medicine in the State of New York. Dr. Setton is a radiologist duly licensed to practice medicine in the State of New York.

[2] Both Dr. Setton and Dr. Elfenbein opined with specificity of the various medical examinations and reviews they undertook in examining plaintiff Lindor's right knee. They both concluded with a reasonable degree of medical certainty that plaintiff Lindor did not suffer injuries which would constitute permanent limitation or use of a body party.

In addition, defendants maintain that the proffered deposition testimony of plaintiff Lindor clearly establishes she did not suffer non-permanent injuries which interfered with her daily activities. Defendants specifically highlight various statements in which plaintiff Lindor minimized the injuries and testified to performing her routine and daily activities after the accident. Among other statements, plaintiff Lindor testified that she walked away from the accident under her own power, that she was able to continue working at her same job in the same role, and only missed two days of work due to the accident.[3] Thus, defendants maintain plaintiff Lindor did not suffer a non-permanent injury limiting her daily activity for a period of 90/180 days following the accident.

In opposition, plaintiff Lindor proffers, among other evidence, the affirmations of Dr. Laxmidhar Diwan and Dr. Harold S. Parnes, as well as a personal affidavit.[4] Plaintiff Lindor's core position is that contrary to defendants' assertions, she suffered serious injuries within the meaning of Insurance Law § 5102 (d). Critically, plaintiff Lindor argues that her proffered expert evidence creates triable issues of fact defeating defendants' motions for summary judgment.

In his affirmation, Dr. Parnes averred that his examination of MRI films of plaintiff Lindor's right knee in March 2017 revealed swelling of the anterior patella, a partial tear

[3] Defendants also reference plaintiff Lindor's testimony wherein she avers to travelling to Aruba in January 2019 without the need of medical assistance.

[4] Dr. Diwan is a board certified orthopedic surgeon, duly licensed to practice medicine in the State of New York. Dr. Parnes is a duly licensed physician in the State of New York specializing in the field of radiology.

of the mid-and-distal anterior cruciate ligament, and a torn root of the posterior horn of the medial meniscus. Dr. Diwan avers that, among other treatments, plaintiff Lindor attended physical therapy three times per week for six months following the accident, and underwent arthroscopic surgery on the right knee. Further, Dr. Diwan attests that during surgery there was a visualized partial tear of the medial meniscus. Beyond the visualized tear, Dr. Diwan opines that the injuries plaintiff Lindor sustained were a consequence of the accident and resulted in permanent impairments, including limited range of motion, to the right knee.

In her affidavit, plaintiff Lindor avers that prior to undergoing arthroscopic surgery on her right knee, she was forced to attend physical therapy two-to-three times a week for a period of six months immediately following the accident. Further, she attests that subsequent to the surgery, she attended physical therapy for a period of time. Plaintiff Lindor also swore to suffering from pain and discomfort which affected her ability to perform daily activities, resulting in hindrance to walking, going up and down stairs, kneeling and performing her household activities.[5]

Discussion

[5] Plaintiff Lindor's affidavit aligns and expands upon her deposition testimony; it neither conflicts with nor seeks "to avoid the consequences of her deposition testimony," and therefore is admissible (*cf. Tejada v Jonas*, 17 AD3d 448, 448 [2d Dept 2005]).

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, "plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept

2015] [internal citations omitted]). "To grant summary judgment *it must clearly appear that no material and triable issue of fact* is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted] [emphasis added]). Further, "[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Critically, where there are conflicting and competing expert affidavits, summary judgment is inappropriate (*see Wilcoxen v Palladino*, 122 AD3d 727 [2d Dept 2014] [wherein the Second Department affirmed the trial court's finding of question of fact as to whether a serious injury was sustained pursuant to Insurance Law § 5102 [d], when parties proffered competing sworn statements from medical experts]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

Insurance Law § 5102 (d) defines "serious injury" as:

> "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or 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."

To succeed on the motion based on the lack of a serious injury, a defendant must first tender evidence eliminating any material issues of fact with respect to the serious injury threshold (*see generally Ocasio v Henry*, 276 AD2d 611 [2d Dept 2000]). Typically, it is necessary that defendants proffer medical evidence in the form of expert opinion, demonstrating the absence of a serious injury to be entitled to accelerated judgment dismissing the action (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-51 [2d Dept 2005]; *cf. Sequeira v W&E Auto Repair, Inc.*, 17 AD3d 442, 442-443 [2d Dept 2005]). Such evidence must affirmatively attest, within a reasonable degree of medical certainty, that the alleged injury did not result in a fracture or permanent injury limiting use of the body part's function, or a non-permanent injury limiting plaintiff's ability to perform her daily activities for a period of 90/180 days (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002], citing *Dufel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]). Plaintiff's own sworn statements may also be proffered to demonstrate that she did not suffer injuries or that her daily activities were not limited (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]; *Ocasio*, 276 AD2d at 612 [plaintiff missed only two weeks of work and school, thus failing to demonstrate she was prevented from performing substantially all material acts constituting her customary daily activities]).

In the instant action, defendants proffered sufficient evidence in admissible form demonstrating their prima facie case dismissing the action on the grounds that plaintiff Lindor did not suffer serious injuries as prescribed by Insurance Law § 5102 (d) within the category of permanent injury limiting use and/or function of a body part. The expert medical evidence of Dr. Elfenbein and Dr. Setton established, within a degree of medical certainty, that plaintiff Lindor's did not suffer any injuries resulting in permanent or significant limitation of use of her right knee, nor did either find any evidence that she suffered a fracture of any kind. Dr. Setton averred that his review of plaintiff Lindor's MRI revealed no tears of ligaments or other internal structures which would result in limitation of use. Specifically, Dr. Setton opined:

> "There is *no evidence of meniscal tear*, *nor* is there evidence of any recent *traumatic meniscal or ligament injury*. There is *no acute fracture* identified nor is there evidence of abnormal bone marrow signal to suggest a recent dislocation or any other occult osseous injury. There is *no articular cartilage abnormality, traumatic or degenerative*. There is minimal joint fluid present, the quantity of which is within physiologic range to allow for normal lubrication of the articular surfaces. There is *no evidence of a significant joint effusion*, a finding which strongly mitigates the likelihood of any recent traumatic internal joint derangement. There are no periarticular fluid collections identified. There is mild superolateral Hoffa's fat pad impingement, reflecting an inflammation of this intra-articular fat pad secondary to a chronic repetitive pinching type overuse injury, unrelated to trauma. Furthermore, there is *no abnormality of the para-articular soft tissues to suggest any type of recent traumatic injury to the right knee*" (NY St Cts Elec Filing [NYSCEF] Doc No. 44 at 2 [emphasis added]).

Similarly, Dr. Elfenbein reported that his examination of plaintiff Lindor's right knee revealed no limitations in the range of motion (NYSCEF Doc. No. 45 at 3-4). He catalogues various metrics, in numerous form, demonstrating a full range of motion (*see id*.; *see also Toure*, 98 NY2d at 350, ["In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury"]).

However, to the extent that defendants seek to dismiss plaintiff Lindor's claim as to the category of a non-permanent injury limiting material acts constituting daily activities for a period of 90/180 days, defendants failed to establish their prima facie case. While plaintiff Lindor does testify to being able to walk away from the collision and missing only two days of work due to the accident, the deposition testimony is opaque and does not provide a specific time frame as to her limitations with her employment, which she does attest were limited and altered due to the alleged injuries she sustained to her right knee (*see generally* plaintiff Lindor deposition tr at 11; 12-13; 78; 80-82). Thus, defendants are not entitled to dismissal of that category of claim.[6]

6

While the Second Department routinely holds that a defendant is entitled to summary judgment upon showing plaintiff only missed minimal days of work due to the alleged injuries (*see Sanchez*, 48 AD3d at 665; *Ocasio*, 276 AD2d at 612), the proffered affirmation is deficient to establish summary judgment in the instant matter. Though plaintiff Lindor does testify to missing only single digits days of work due to the alleged injuries, she also testified that her work function has changed, that she is not able to perform all the functions she did prior to the accident, she was forced to attend physical therapy several times a week, and she is unable to participate in interactions with her family members. Beyond this, there is a distinct lack of a definitive time frame or clear evidence that she continued her daily activities fully during the period of 90/180 days following the accident. Thus, at the present time, defendants are not entitled to accelerated judgment based upon the proffered evidence on this category of claim.

Going forward, the burden shifts to plaintiff Lindor to proffer sufficient evidence rebutting defendants' prima facie case dismissing her claim to the extent she did not suffer an injury resulting in a permanent limitation of use of her right knee.

In reply, plaintiff Lindor raised a triable issue of fact defeating defendants' prima facie case. The sworn statements of Dr. Diwan and Dr. Parnes rebut defendants' medical expert testimony. Dr. Parnes opines that his review of plaintiff Lindor's MRIs demonstrated clear tears and permanent damage to plaintiff Lindor's right knee caused by the accident, including damage and tears to the meniscus (NYSCEF Doc. No. 65 at 5; *see also Machat v Mazzarino*, 59 AD3d 500, 501 [2d Dept 2009] [wherein plaintiff defeated defendant's prima facie case by proffering expert evidence demonstrating surgery was performed on plaintiff's knee and MRIs revealed tears in the knee's meniscus and cruciate ligaments]). Dr. Diwan opines that plaintiff Lindor's right knee range of motion was significantly limited due to the alleged injuries resulting from the accident (*see* NYSCEF Doc. No. 63 at 6 & 9). Dr. Diwan also provides various numerical measurements which he attests supports this finding. Likewise, plaintiff Lindor's own deposition testimony and her affidavit in opposition to the motions attest that her right knee function remains limited. She specifically avers that "injuries continued to affect [her] ability to perform daily activities such as walking, going up and down stairs, kneeling, bending and squatting. [Plaintiff Lindor] had difficulty with household activities such as shopping and cleaning [her] home. The pain was so great it interfered with [her] sleep" (aff of plaintiff Lindor at

2, ¶ 10; plaintiff Lindor deposition tr at 12-13; 81-83). Thus, plaintiff Lindor raised triable issues of fact as to whether she suffered a serious injury as defined by Insurance Law § 5102 (d).

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and found to be either meritless and/or moot. Accordingly, it is

ORDERED that defendant American and defendant Gallardo's motion for summary judgment (motion seq. no. 4) is hereby denied, and it is further;

ORDERED that defendant Ali's motion for summary judgment (motion seq. no. 5) is hereby denied.

This constitutes the decision and order of the court.

Bruce M. Balter

Honorable Bruce M. Balter
Justice of the Supreme Court