

Almady v Martinez

2020 NY Slip Op 34872(U)

January 6, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 51094/18

Judge: Maria G. Rosa

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

AHMED M. ALMADY and HANIN ELHASSANIN,

Plaintiffs,

DECISION AND ORDER

Index No. 51094/18

-against-

MARISSA A. MARTINEZ and DAWN M. MARTINEZ,

Defendants.

The following papers were read on Defendants' motion for summary judgment per Insurance Law Section 5102(d), and Plaintiffs' cross-motion for summary judgment on liability:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - N

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - O
AFFIDAVIT IN SUPPORT
AFFIDAVIT IN SUPPORT

REPLY AFFIRMATION

This is a negligence action in which Plaintiffs seek damages for injuries allegedly sustained in a motor vehicle accident on December 29, 2017. Plaintiff Ahmed Almady ("Plaintiff") was driving westbound on Route 82 in the Town of Fishkill. His wife, Plaintiff Hanin Elhassanin, was the front seat passenger. Defendant Marissa Martinez ("Defendant") was stopped in the eastbound lane on Route 82 with her left turn signal activated. Her intention was to make a left turn across the westbound lane of Route 82 onto Riverview Drive. There was a light at the intersection which all parties testified was green immediately preceding the accident. As Defendant began making a left turn the front of Plaintiff's vehicle struck the passenger side of Defendants' vehicle. Defendants move for summary judgment alleging that neither Plaintiff sustained a "serious injury" within the meaning of Insurance Law §5102(b). Plaintiffs cross-move for summary judgment on the issue of liability and on the issue of whether Plaintiff Almady sustained a serious injury.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented “in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion.” Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

New York has enacted a no-fault system of automobile insurance that provides that a person injured in a motor vehicle accident may only recover damages in court if he or she has sustained a serious injury. See Insurance Law §5104(a). As relevant here, Insurance Law §5102(d) defines “serious injury” as a bodily injury resulting in: “permanent consequential limitation of a 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 or customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.” A defendant moving for summary judgment on the ground that an accident did not cause a serious injury must submit competent medical evidence to make a *prima facie* showing of entitlement to summary judgment. See Howard v. Espinosa, 70 AD3d 1091 (3rd Dept 2010). If a defendant meets this burden, to avoid summary judgment the plaintiff must come forward with objective medical evidence sufficient to create a question of fact regarding the existence of a serious injury caused by the accident. *Id.* As with any summary judgment motion, the court must view the evidence in a light most favorable to the non-moving party. Vega v. Resteni Const. Corp., 18 NY3d 499 (2012).

A plaintiff claiming to have sustained a “significant limitation of use of a body function or system,” must demonstrate that the injury alleged has limited the use of the afflicted area in a significant way rather than a mild one. Licari v. Elliot, 57 NY2d 230 (1982). Mild, slight or minor limitations are insufficient to constitute a serious injury under Insurance Law §5102(d). *Id.* The word “significant” means that the injury is important and relates to medical significance. Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 (2002). The medical significance of an injury “involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part.” *Id.* at 353. Moreover, a plaintiff’s serious injury claim must be supported by objective evidence. *Id.*

Plaintiff Almady alleges in his bill of particulars to have sustained a serious injury under the permanent loss of use, permanent consequential limitation, significant limitation of use and 90/180 day category of Insurance Law §5102(d). He claims to have sustained such injury to the neck, shoulders, left knee and back. In support of their claims that Plaintiff did not sustain a serious injury, Defendants have submitted copies of the pleadings, the Plaintiffs’ deposition testimony, medical treatment records, reports of magnetic resonance imaging (“MRI”) of his cervical and lumbar spine

and a report of an independent medical examination conducted by Dr. Adam Soyer. The foregoing establishes that following the accident Plaintiff was transported to Vassar Brothers Medical Center Emergency Department for complaints of neck, head, back, shoulder and left leg pain. He was treated and released but returned the next day complaining he was in significant pain. X-rays were taken of his cervical spine, left ribs and chest. All were normal. On January 9, 2018, Plaintiff began treating with Dr. Louis Mendoza for complaints of severe pain to the neck, shoulders, left knee and upper and lower back. Dr. Mendoza diagnosed Plaintiff with cervical/lumbar disc injuries, radiculopathy and neuropathy, a torn meniscus in the left knee and sprains/strains with muscle spasms of the cervical, thoracic and lumbar spine. He directed Plaintiff to participate in physical therapy and found he was temporarily totally disabled. An MRI of the cervical spine in January 2018 revealed mild right foraminal stenosis at C2-C3 and C4-C5 with a shallow annular disc bulge, spondylotic ridging and uncovertebral joint hypertrophy resulting in mild central canal stenosis and moderate bilateral foraminal stenosis at C3-C4. A shallow annular disc bulge with mild central canal stenosis and mild bilateral foraminal stenosis was reported at C6-C7. An MRI of the lumbar spine showed mild foraminal stenosis at L3-L4 and mild canal stenosis at L4-L5. Plaintiff was subsequently diagnosis with a partial left knee medial meniscus tear and complete anterior cruciate ligament ("ACL") tear. He underwent a left knee arthroscopic partial medial and lateral meniscectomy in June 2018. Plaintiff testified at his deposition that during the accident his left knee hit the dashboard. For three months prior to the knee surgery he wore a brace but stated it did not help. After the accident he wore a different brace and used crutches for approximately two weeks. Plaintiff further testified to having two post-operative surgical follow-ups where fluid was drained from his left knee to alleviate swelling. He states his knee is still painful when he walks long distances and up stairs.

Dr. Adam Soyer performed an independent medical examination of Plaintiff in April 2019. He performed range of motion tests on the cervical, thoracic and lumbar spines, both shoulders and both knees using a hand-held goniometer or an inclinometer. He found significant range of motion limitations to the cervical spine, the thoracic spine was normal with the exception of right and left lateral flexion being 30° (normal 45°), normal range of motion in the shoulders with the exception of adduction right shoulder being 150° (normal 180°) and zero degrees (normal 30°), left shoulder 155° (normal 180°) and zero degrees (normal 30°). The flexion of the right knee range of motion was 138°, left knee 125° with normal being 150°. Based upon his review of Plaintiff's post-accident treatment records and his physical examination, Dr. Soyer diagnosed Plaintiff with a cervical spine strain, superimposed on a pre-existing degenerative disc disease that had resolved. He diagnosed Plaintiff with having resolved sprains of the thoracic and lumbar spine and left shoulder. He states that Plaintiff's left knee was in post arthroscopic surgical status. He found no objective evidence of disability and that Plaintiff was capable of performing his customary activities of daily living without limitation.

The foregoing is sufficient to establish *prima facie* that Plaintiff Almaydi did not sustain a serious injury under the permanent loss of use and permanent consequential limitation of use categories. Plaintiff's deposition testimony is further sufficient to establish that he did not sustain an injury that qualifies as serious under the 90/180 day category. However, Defendants have failed

to establish a *prima facie* case that Plaintiff did not sustain a significant limitation of use of his left knee. The record is unrefuted that Plaintiff Almaday had a medial meniscus and ACL tear of the left knee that required surgery to repair. Plaintiff testified at his deposition that his ability to walk was significantly impaired following the accident based upon the pain in his left knee. He states that even after the surgery it is still painful if he walks long distances and that he is no longer able to do much exercise. He further stated that going up and down the stairs could be painful. The mere fact that Dr. Soyer's range of limitation test of the left knee did not reveal a significant limitation in the range of motion does not establish that Plaintiff did not sustain a serious injury. He sustained a torn medial meniscus and tear of the ACL which required repair through arthroscopic surgery. This is sufficient to constitute a significant injury within the meaning of the Insurance Law. See Vargas v. Moses Taxi, Inc., 117 AD3d 560 (1st Dept 2014).

While Defendants' evidence establishes that Plaintiff Almaday did not sustain a serious injury under the significant limitation category to his neck, shoulders or back, if the trier of fact determines that he sustained a serious injury to his left knee he can recover for any other injuries shown to be causally related to the accident even if they did not independently meet the serious injury threshold. See Rubin v. SMS Taxi Corp., 71 AD3d 548, 549 (1st Dept 2010). Wherefore, it is

ORDERED that Defendants' motion for summary judgment on Plaintiff Almaday's claims based on allegations that he did not sustain a serious injury as a result of the subject motor vehicle accident is denied. It is further

ORDERED that Plaintiff Almaday's cross-motion on whether he sustained a serious injury under Insurance Law §5102(d) is granted. As set forth above, the medial meniscus injury and full ACL tear of his left knee resulting in pain and physical limitations qualifies as a serious injury.

Plaintiff Elhassanin asserts in her bill of particulars that as a result of the motor vehicle accident she sustained moderate to severe pain to the neck, right and left shoulders, anterior chest wall and upper and lower back with numbness and tingling to the back lower extremity. Plaintiff Elhassanin testified that during the accident the seatbelt bruised her chest and she hit her head. She stated that the next day she woke up with chest and back pain and went to the Vassar Brothers Hospital Emergency Room. At the hospital a computed tomography ("CT") scan was done of the cervical spine, chest and abdomen. The CT scan of her cervical spine revealed no evidence of a fracture, reversal of the normal cervical lordosis without subluxation which was attributed to a possible muscular spasm. The scan further revealed mild spondylosis at the anterior arch of C1-C2 and C6-C7. The CT scans of the chest, abdomen and pelvis were normal with the exception of mild to moderate compression fractures at C10-L2, determined to be likely chronic and without significant canal stenosis. She treated with orthopedist Louis Mendoza for complaints of pain in her neck, right shoulder and back. He diagnosed her with a sprain/strain of the cervical, thoracic and lumbar spine with lumbar radiculopathy and neuropathy and compression fractures to T10 to L2. He referred Plaintiff Elhassanin to physical therapy and acupuncture which she did twice a week for approximately six months. MRIs of the cervical, thoracic and lumbar spine were performed in late January 2018. The MRI of the cervical spine found minimal central canal stenosis at C5-C6 and C6-

C7. The MRIs of the lumbar and thoracic spine were normal. A whole body bone scan was also unremarkable. Plaintiff asserts that following the completion of physical therapy she was given two cortisone shots and referred to a neurosurgeon who recommended surgery for the vertebrae in her neck. She stated she declined the surgery because it was too invasive. As of the date of her deposition she had stopped treating. She stated that her back and shoulder felt “okay,” but that she had some discomfort in her neck and upper extremities when standing for long periods of time. A report of an independent medical examination Dr. Soyer performed in May 2019 found significant range of motion limitations to the cervical spine, minimal range of motion limitations of the lumbar spine and none for the thoracic spine. Range of motion tests for the right and left shoulders found some limitations. Dr. Soyer diagnosed Plaintiff Elhassanin as having sustained sprains of her shoulders, left wrist, left elbow and lumbar, thoracic and cervical spines, all resolved. He concluded the range of motion limitations were voluntary based on his detecting no objective signs of cervical/lumbar radiculopathy or internal derangement of the shoulders, left elbow or left wrists. He noted that diagnostic imaging revealing chronic compression fractures at T10-L2 was due to a pre-existing degenerative disc disease.

The foregoing is sufficient to establish *prima facie* that Plaintiff Elhassanin did not sustain a serious injury within the meaning of the Insurance Law. At her deposition she did not allege that she sustained a permanent loss or limitation of any body part. Her deposition testimony that she only missed five days of work because of the accident demonstrates that she did not sustain a serious injury under the 90/180 day category. Dr. Soyer’s report also demonstrates that Plaintiff did not sustain a significant limitation of use of her neck, shoulders or back. Dr. Soyer noted that the diagnostic imaging of these body parts were essentially normal with the exception of revealing a degenerative condition at T10-L2. His physical examination coupled with his review of the diagnostic imaging tests supports his assertion that any diminished range of motion was subjective and self-imposed. *cf. Roc v. Doman*, 88 AD3d 862 (2nd Dept 2011). The court rejects Plaintiff’s assertion that the medical reports Defendants submitted were not certified and thus not competent evidence to sustain a motion for summary judgment. A defendant can meet its initial burden of establishing the nonexistence of a serious injury by submitting an affidavit or affirmation of a medical expert who examined a plaintiff and opines that he or she was not suffering from a disability or injury resulting from an accident in conjunction with submitting medical records and reports prepared by Plaintiff’s treating physicians. See *Franchini v. Palmieri*, 1 NY3d 536 (2003).

In opposition, Plaintiff Elhassanin has submitted copies of her medical records and a narrative report of a physical examination Dr. Sathish Modugu performed in August 2019. CT scans taken at Vassar Brothers Medical Center in the days following the accident were essentially normal with the exception of a finding of mild to moderate anterior compression deformities at T10-L2 of an indeterminate age. The records reflect an impression that this condition was likely chronic based on a finding of no acute displaced fracture. The scans further revealed mild to moderate compression fractures at T10-L2, also likely chronic and without significant canal stenosis. Based on these findings and a physical exam, Dr. Mendoza diagnosed Plaintiff Elhassanin with only sprains/strains of the cervical, thoracic and lumbar spine and right and left shoulders. Plaintiff also submitted medical records of her treatment from the Orthopedic Associates of Dutchess County

which diagnosed a cervical strain with no evidence of cervical radiculopathy. Plaintiff's opposition to Defendants' motion is primarily based upon Dr. Modugu's report of his August 2019 examination. During that examination he noted Plaintiff reported right-sided neck pain that radiated into her right hand with hand numbness occurring approximately two to three times per week, right shoulder pain and low back pain. His physical examination of Plaintiff with a goniometer revealed cervical spine range of motion limitations with 60° rotation to the left, 50° rotation to the right (normal being 90°); and lumbar flexion of 65° with 15° extension (normal being 60° to 90° and normal extension being 20° to 30°). Based on his examination he diagnosed Plaintiff Elhassanin with a cervical disc herniation at C3-4 being the cause of her right neck pain complaints and having disc herniation at C5-C6 and C6-C7 with a guarded prognosis for recovery. While a disc herniation accompanied by objective evidence of physical limitation is sufficient to establish a serious injury within the meaning of the Insurance Law, Dr. Modugu fails to address the medical records, imaging study and Dr. Soyer's findings that any range limitation motions to the cervical spine was due to a likely chronic and degenerative condition and not caused by the motor vehicle accident. As the defendants presented competent evidence that Plaintiff's alleged injuries were due to a degenerative condition of the cervical spine, Plaintiff has the burden of coming forward with evidence addressing Defendants' claimed lack of causation. See Vaughan v. Leon, 94 AD3d 646, 655 (1st Dept 2012). A plaintiff does not meet this burden by simply offering a conclusory expert opinion that the injuries were causally related to the accident without directly addressing the defendants' theory that the injuries resulted from degenerative changes. Id; See also Pommells v. Perez, 4 NY3d 566 (2005). Defendants present competent evidence that Plaintiff Elhassanin suffered only strains and/or sprains of the cervical spine with no significant stenosis and that such condition was chronic. By failing to address this claim, Dr. Modugu's report is insufficient to defeat Defendants' motion for summary judgment on the ground that Plaintiff Elhassanin did not sustain a serious injury within the meaning of the Insurance Law. Wherefore, it is

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff Elhassanin's damages claim for injuries she sustained in this motor vehicle accident is granted as her claims are insufficient as a matter of law for failing to meet the "serious injury" threshold of Insurance Law §5102(d). It is further

ORDERED that Plaintiffs' cross-motion for summary judgment on the issue of liability is granted. Plaintiffs have established a *prima facie* case of negligence on the issue of liability through the submission of deposition testimony, affidavits and a certified police report demonstrating that Defendant Marissa Martinez violated Vehicle and Traffic Law §1141 by making a left turn into the path of the Plaintiffs' oncoming vehicle without yielding the right-of-way. See Foley v. Santucci, 135 AD3d 813 (2nd Dept 2016). Plaintiff Almady had the right-of-way while proceeding on Route 82 and was entitled to anticipate that Defendant Martinez would obey the traffic laws which required her to yield. Plaintiff Almady testified that he was lawfully proceeding and had only seconds to react upon observing Defendant Martinez pull her vehicle across his lane of travel. To be entitled to summary judgment on liability the plaintiff does not bear the burden of establishing the absence of his own comparative fault. Rodriguez v. City of New York, 31 NY3d 312, 324 (2018). The court rejects Defendants' contention that the court must deny the cross-motion as

procedurally deficit because Plaintiffs did not annex a copy of the pleadings to their cross-motion. Defendants annexed copies of the pleadings as an exhibit to their motion. Under such circumstances, the plaintiffs' failure to also provide the court with copies of the pleadings in support of the cross-motion is not fatal to the motion. The court further rejects Defendants' claim that it should not consider the plaintiffs' affidavits because the originally submitted affidavits were not signed. Four days after the cross-motion was filed Plaintiffs filed executed versions of the affidavits. Based upon the brief delay in submitting the signed affidavits, the public policy preference of adjudicating actions on their merits when possible and the lack of any prejudice, the court deems it appropriate to consider the executed affidavits.

The foregoing constitutes the decision and order of the Court. The caption of this action shall be amended to remove Hanin Elhassanin as a Plaintiff. The parties are directed to appear for a pre-trial conference on February 3, 2020 at 9:15 a.m. They are reminded that jury selection is scheduled for June 8, 2020.

Dated: January 6 2020
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Basch & Keegan, LLP
307 Clinton Avenue
Kingston, NY 12401

Keane & Bernheimer, PLLC
400 Columbus Avenue, Suite 100S
Valhalla, NY 10595