Marefat v Rivera
2020 NY Slip Op 35508(U)
May 22, 2020
Supreme Court, Bronx County
Docket Number: Index No. 34623/2018E
Judge: Mary Ann Brigantti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____

----------X

TALA MAREFAT Index №. 34623/2018E

-against- **Hon. MARY ANN BRIGANTTI**

HAILYN P. RIVERA, et al. Justice Supreme Court

----------X

The following papers numbered 1 to _____5____ were read on this motion (Seq. No. ____1_____) for ____**SUMMARY JUDGMENT**_____ noticed on November 25, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1, 2
Answering Affidavit and Exhibits	No(s).	3, 4
Replying Affidavit and Exhibits	No(s).	5

Upon the foregoing papers, the defendants Hailyn P. Rivera and City Bronx Leasing Two Inc. (collectively, "Defendants") move for summary judgment dismissing the complaint of the plaintiff Tala Marefat ("Plaintiff") for her failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the summary judgment motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept 2011]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v Go On Time Car Serv.*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or "significant" limitation as a result of this accident. Defendants accomplished this by submitting the sworn IME report of orthopedist Dr. Steven Renzoni, who found that Plaintiff had normal ranges of motion in her cervical, thoracic, and lumbar spine, upon a physical examination, and negative clinical results (*Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]). Defendants also submitted the sworn reports of radiologist Dr Jessica Berkowitz, who reviewed Plaintiff's cervical and lumbar spine MRIs taken shortly after the subject accident. Dr. Berkowitz opined that the cervical and lumbar spine MRIs showed no evidence of a causally related injury (*see Pastora L. v Diallo*, 167 A.D.3d 424 [1st Dept 2018], citing *Hernandez v Marcano*, 161 A.D.3d 676 [1st Dept 2018]). The Court notes that Defendants did not submit any evidentiary proof with respect to Plaintiff's alleged thoracic spine injury, as noted in the bill of particulars. Therefore, without providing any detailed "objective, quantitative evidence" as to Plaintiff's thoracic spine injury, Defendants did not meet their prima facie burden with respect to that body part (*Gorden v Tibulcio*, 50 A.D.3d 460, 463 [1st Dept 2008]).

Accordingly, Defendants' submissions established that Plaintiff's injuries to her cervical, lumbar spine have resolved, and do not constitute either a "permanent consequential" or "significant limitation" category of injury (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436, 436-437 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendants demonstrated that Plaintiff's alleged cervical and lumbar spine injuries are unrelated to this accident, thereby shifting the burden to Plaintiff to adequately address the issue of causation with respect to those body parts (*see Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020], citing *Blake v Cadet*, 175 A.D.3d 1199, 1199-1200 [1st Dept 2019]).

In opposition to the motion, Plaintiff raised an issue of fact as to whether she sustained a "significant limitation" to her cervical and lumbar spine as a result of this accident. At the outset the Court notes that it will consider the unaffirmed hospital and medical records contained in Exhibits C, G, and H,

for the limited purpose of demonstrating that Plaintiff sought medical treatment for her claimed injuries contemporaneously with the subject accident, since those documents do not constitute the sole basis for Plaintiff's opposition (*see Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577 [1st Dept 2014]; *see also Vishevnik v Bouna*, 147 A.D.3d 657, 659 [1st Dept 2017]; *Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]).

Plaintiff submitted the affirmation of Dr. Olanrewaju Adeosun, who first examined Plaintiff shortly after the subject accident on February 2, 2016, and on several more occasions throughout 2016. During these examinations, Dr. Adeosun found, among other things, pain and range of motion limitations in Plaintiff's cervical and lumbar spine, and causally related those injuries to the subject accident. Plaintiff also included the affirmed reports of Drs. Luluenesh Belayneh and Ross Nochimson, who examined Plaintiff on several occasions throughout 2016. The Court notes that those reports do not compare any range of motion testing results to normal ranges, thereby leaving the Court to speculate as to the meaning of those figures (*Mickens v Khalid*, 62 A.D.3d 597 [1st Dept 2009]). Nevertheless, Plaintiff additionally submitted the affirmation of Dr. Gabriel Dassa, who recently examined Plaintiff on November 18, 2019, and found among other things, pain and range of motion limitations in Plaintiff's cervical and lumbar spine, and causally related those injuries to the subject accident (*see Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

Although Plaintiff's experts do not directly address the issue of degeneration, by ascribing Plaintiff's injuries to a different, yet equally plausible explanation — the accident — their opinions were sufficient to raise an issue of fact as to causation (*Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]). Defendants' argument relating to Plaintiff's alleged gap in treatment cannot be considered because it is was raised for the first time in reply papers (*see Paulling v City Car & Limousine Servs., Inc.*, 155 A.D.3d 481 [1st Dept 2017], citing *Sylla v Brickyard Inc.*, 104 A.D.3d 605 [1st Dept 2013]). In any event, Plaintiff submitted an affidavit wherein she stated that she stopped treating because her "no-fault benefits were

denied" and she "did not have health insurance" (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 N.Y.3d 905, 906-907 [2013]). This evidence is sufficient to explain her cessation in treatment.

With regard to Plaintiff's allegation that she sustained a "90/180-day" injury as a result of this accident, Defendants failed to establish their entitlement to dismissal of this claim. Plaintiff's bill of particulars states that she was confined to bed and home "for a period in excess of ninety (90) days." In addition, Plaintiff testified that she missed work for approximately "seven months" following the subject accident (Pl. EBT at 12; *compare Hayes v Gaceur*, 162 A.D.3d 437, 439 [1st Dept 2018]). Although Plaintiff testified that the first time she left her home was "[t]wo days" following the subject accident, she was not asked, nor did she say, for what reason she left her home. As a result, Defendants failed to submit admissible evidence disproving Plaintiff's "90/180-day" injury claim (*see Seepersaud v L&M Bus Corp.*, 140 A.D.3d 579 [1st Dept 2016]).

However, there is no evidence on this record that Plaintiff sustained a "total loss of use" of any body part, and therefore, the claim that she sustained a "permanent loss of use" of any body part is dismissed (*see Swift v New York Tr. Auth.*, 115 A.D.3d 507, 509 [1st Dept 2014]).

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted only to the extent that Plaintiff's claim that she sustained a "permanent loss of use" of any body part is dismissed and the motion is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: 5/22/20 **Hon.** _____ **J.S.C.**

4

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT