

Smith v McIntosh

2020 NY Slip Op 35662(U)

September 28, 2020

Supreme Court, Bronx County

Docket Number: Index No. 25506/18E

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

001

PART 14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SMITH _____X

Index No. 25506/18E

- against -

Hon. HON. BEN R. BARBATO

Justice.

McINTOSH _____X

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is decided in accordance
with memorandum decision filed
herewith

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 9/28/2020

Hon. [Signature]
J.S.C.
HON. BEN R. BARBATO

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 14**

Present: Honorable Ben R. Barbato

FARAH SMITH,

Plaintiff,

-against-

TREVOR O. McINTOSH,

Defendant.

DECISION/ORDER

Index No.: 25506/18E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Affirmation in Opposition and Exhibit Annexed	2
Affirmation in Reply	3

The instant action sounds in personal injury arising from a motor vehicle accident occurring on February 17, 2017, on the FDR Highway at the intersection of 71st Street, in the County, City and State of New York. Defendant moves this court for an Order pursuant to CPLR §3212 awarding Summary Judgment in favor of the Defendant and dismissing Plaintiff's Complaint claiming that the Plaintiff, Farah Smith, cannot meet the serious injury threshold requirement mandated by Insurance Law §5102(d).

Defendant offers the Affirmed reports of Dr. Johnathan Lerner, a radiologist who reviewed the MRI of the cervical and lumbar spine taken at MRI/NYU Langone on 2/17/17. As to the cervical spine Dr. Lerner determined that the MRI of the cervical spine revealed C5/6, C6/7 disc bulges with osteoarthritis. The lumbar spine MRI reveals L4/5 disc bulge with facet osteoarthritis and effacement of the thecal sac and L5/S1 disc protrusion and osteoarthritis. Dr.

Lerner opines that the MRIs reveal no causal relationship to the subject accident.

Defendants also offer the Affirmed report of Dr. Marianna Golden, a Board Certified Neurologist, who examined the Plaintiff on September 24, 2019. Dr. Golden determined that as a result of the accident Plaintiff suffered cervical and lumbar sprains that at the time of her examination had resolved. Dr. Golden further opines that Plaintiff showed no evidence of neurological disability or permanent injury.

Defendant submits the Affirmed report of Dr. Lisa Nason, a Board Certified Orthopedic Surgeon, who examined Plaintiff on September 26, 2019. Dr. Nason conducted range of motion tests on Plaintiff and determined that the cervical, thoracic and lumbar spine revealed normal ranges of motion except lumbar flexion which revealed a 20 degree deficit. Dr. Nason opines that Plaintiff suffered cervical and lumbar sprain which at the time of the examination had resolved. Dr. Nason further opines that Plaintiff showed no evidence of orthopedic disability or permanent injury. Dr. Nason further states that Plaintiff's injuries as diagnosed were causally related to the accident.

Plaintiff submits the Affirmed report of Dr. Orsuville Cabatu, Physical Medicine and Rehabilitation, who initially examined Plaintiff on February 24, 2017. Dr. Cabatu's examination of Plaintiff reveals a limited range of motion in Plaintiff's cervical and lumbar spine. Dr. Cabatu states that an EMG/NCV taken on May 26, 2017, reveals right L5 nerve root irritation and EMG/NCV taken on May 23, 2017, left C6 radiculopathy. Dr. Cabatu's review of the MRI of Plaintiff's cervical spine dated March 22, 2017, central disc herniation at C5/6 and a bulge at C6/7. Review of the MRI of Plaintiff's lumbar spine by Dr. Cabatu, reveals a disc herniation at L4/5, L5/S1. Dr. Cabatu states that he disagrees with the determination of Dr. Lerner as to causation and the degree of degeneration noted by Dr. Lerner's review.

It is settled law that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3112(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574(2d Dept 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1st Dept. 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998). Additionally the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811(4th Dept. 2000), *also see*, *Green v. Jones*, 133 A.D.3d 472 (1st Dept. 2015) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223(1978) Thus where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiff, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2nd Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2nd Dept. 1989)

Plaintiff's claim that she was unable to perform his usual and customary activities for 90 out of the 180 days immediately following the accident based upon a reading of Plaintiff's deposition transcript and those medical records provided do not support such position. *Pouchie v. Pichardo*, 173 A.D.3d 643 (1st Dept. 2019); *Hayes v. Gaceur*, 162 A.D.3d 437 (1st Dept 2018); *Holloman v. American United Transportation Inc.*, 162 A.D.3d 423 (1st Dept 2018). Likewise, Plaintiff has failed to establish based on the evidence presented that she suffered a permanent

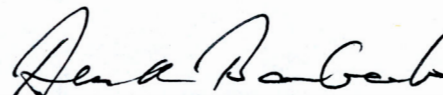
loss of use of a body organ, member, function or system. *Blake v. Cadet*, 175 A.D.3d 1199 (1st Dept. 2019)

Therefore it is

ORDERED, that the portion of Defendant, Trevor O. McIntosh's, motion seeking dismissal of Plaintiff's claim with respect to those injuries that prevented Plaintiff from performing substantially all of his usual and customary daily activities for 90/180 day immediately following the accident, the permanent loss of a body organ, member, function or system is **granted** and it is further

ORDERED, that the portion of Defendant, Trevor O. McIntosh's, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiff's Complaint for failure to meet the significant limitation of use and the permanent consequential use requirement of the Insurance law's serious injury threshold requirement mandated by Insurance Law § 5102(d) is **denied**

Dated: September 28, 2020



Hon. Ben R. Barbato, J.S.C.