

Williams v May Transp. Corp.
2021 NY Slip Op 30366(U)
February 8, 2021
Supreme Court, Kings County
Docket Number: 503579/2015
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

x

JOYCE MARIE WILLIAMS,

Plaintiff,

-against-

**MAY TRANSPORTATION CORP.
and KOK LUENG CHOW,**

Defendants.

DECISION / ORDER

**Index No. 503579/2015
Motion Seq. No. 1
Date Submitted: 12/3/20**

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>11-18</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>21-26</u>
Reply Affirmation.....	<u>27</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action which arises from a motor vehicle accident which took place on May 6, 2013 in Brooklyn, NY. Plaintiff was removed from the scene of the accident in an ambulance and was taken to Woodhull Hospital, where she testified they wrapped her right knee and put her right arm in a sling, then released her. At the time of the accident, plaintiff was approximately fifty-five years of age. In her Bill of Particulars, plaintiff claims that as a result of the accident, she sustained injuries to her cervical spine, lumbar spine, thoracic spine, right knee, right wrist, and both shoulders.

Defendants contend that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102(d). Defendants support their motion with an attorney's affirmation, the

pleadings, plaintiff's deposition transcript, an affirmed IME report from an orthopedist and an affirmation from an independent radiologist.

Dr. Dana Mannor, an orthopedist, examined plaintiff on June 12, 2019 on behalf of the defendants, and reports that plaintiff had normal ranges of motion in her cervical spine, thoracic spine, lumbar spine, shoulders, knees and wrists, with otherwise negative test results. He concludes that plaintiff's sprains and strains have all resolved. His opinion is "The examinee presents with a normal orthopedic examination on all objective testing, subjective complaints do not correlate with negative clinical tests results. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties." The court notes that this exam was six years after the accident.

Dr. Eric L. Cantos, a radiologist, reviewed the MRI films of plaintiff's cervical spine and her right knee. With regard to the cervical spine, he states "The imaging study was obtained 2 weeks after the accident. There are chronic appearing and generalized degenerative changes throughout the cervical and upper thoracic region which are indicative of a chronic and long-standing degenerative condition. While there is multilevel disc disease, this is felt to reflect a pre-existent and unrelated degenerative condition relative to the accident date. I do not see evidence of a fracture or cord injury that could be attributed to the accident." With regard to plaintiff's right knee, he states "The imaging study was obtained 2 weeks after the accident. The study depicts chronic arthritic and degenerative changes of the right knee. Given the short time frame involved, this is felt to reflect a much more long standing and pre-existent degenerative condition. Degeneration

is most prevalent within the medial compartment, as outlined above. When allowing for the spectrum of degenerative changes, I see no imaging evidence of an acute abnormality that could be attributed to the accident. A chronic joint effusion and synovial cyst is noted along with the bony degenerative changes.”

Defendants contend that their medical evidence, combined with plaintiff’s testimony at her EBT, eliminates all categories of injuries in the statute. Plaintiff testified at her EBT that she missed only a month from work after the accident [EBT Page 34-38], although she said she never returned to her full duties and changed her work assignment to a desk job. The defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of the orthopedist who examined plaintiff, indicate that she did not sustain a serious injury as a result of the subject accident. Further, plaintiff’s testimony that she missed only a month of work after the accident makes a *prima facie* showing on the 90/180-day category of injury (*see Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] [“Plaintiff’s testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked “light duty” is fatal to her 90/180–day claim”]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] [“The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis”]). The burden of proof then shifts to plaintiff.

Plaintiff contends that the medical evidence she has submitted overcomes the motion and raises a triable issue of fact as to whether she sustained a serious injury under

Insurance Law § 5102(d). Plaintiff opposes the motion with an attorney's affirmation, her own affidavit, affirmations from two treating doctors and an affirmed report from the radiologist who read her MRIs.

Dr. Charles A. Kaplan, plaintiff's treating doctor, provides an affirmation. He states that plaintiff first came to his office on May 8, 2013, a few days after the accident. She was referred to Dr. Thomas Pobre who placed her on a course of physical therapy three times per week. She went for about a year. He examined her on August 18, 2020. She was still complaining of "severe right knee aching pain and stiffness, daily neck pain and stiffness, and the right wrist is still very painful and stiff . . . She does have a slight antalgic gait, favoring the right leg." He describes the exam as demonstrating significant restrictions in the range of motion of plaintiff's spine, shoulders, right wrist and right knee. He concludes that "status post motor vehicle accident on May 6, 2013 with cervical strain, multilevel cervical disc derangement including bulges and herniations. Multilevel thoracic disc bulges. Lumbar strain. Bilateral shoulder strain. Right wrist sprain. Head contusion and post-traumatic-headache. Right knee sprain and meniscal tear. It is my opinion that all of the above said injuries are causally related to the motor vehicle accident on May 6, 2013. . . To a reasonable degree of medical certainty Ms. Williams's disability and limitations are partial, significant and permanent. . . It is my medical opinion that the cervical disc bulges and herniations were traumatically induced from this accident."

Plaintiff also provides affirmed reports prepared by Dr. Thomas Pobre, of Physical Medicine and Rehabilitation of New York which were prepared in connection with her office visits from May 17, 2013 to July 2014.

Lastly, plaintiff provides an affirmation from Dr. Jeffrey Chess, M.D., the radiologist who read her MRI films. The MRIs were done on May 21, 2013. With regard to her cervical spine MRI, he states “cervical spine revealed an anterior and posterior bulge of the C3/4 intervertebral disc impinging upon the thecal sac; anterior and posterior bulge of the C4/5 intervertebral disc with a superimposed right posterior herniation impinging upon the thecal sac and the right lateral recess and causing mild stenosis of the medial aspect of the right neural foramen; anterior and posterior bulge of the C5/6 intervertebral disc, with a superimposed right posterior herniation impinging upon the thecal sac and the right lateral recess and causing mild stenosis of the medial aspect of the right neural foramen; there is an anterior bulge and central posterior herniation of the C6/7 intervertebral disc impinging upon the thecal sac, causing mild stenosis of the spinal canal; there is an anterior and posterior bulge of the T2-3, T3-4 and T4-5 intervertebral discs impinging upon the thecal sac; there is mild stenosis of the spinal canal at the T3-4 and T4-5 levels; there is mild stenosis of the bilateral neural foramina at the T2-3 level, left greater than the right.” With regard to the right knee, he states “A review of the MRI of the Right Knee revealed that there is an oblique tear of the posterior horn of the medial meniscus contacting the inferior surface; There is a complex tear of the posterior horn of the medial meniscus; There is a full thickness tear of the proximal aspect of the anterior cruciate ligament where clinical correlation is recommended; There is a 6.0 cm long loculated popliteal cyst between the medial head of the gastrocnemius and the semimembranosus. There is mild chondromalacia patella of the lateral facet; There is also moderate joint effusion.”

Plaintiff testified at her EBT [Page 34] that “I was recommended for surgery [for her right knee] but then they found issues with my heart and said that it would cost me out of

pocket to pay for an anesthesiologist specialist, which I couldn't afford, so I never had the surgery.”

The court finds that plaintiff’s treating doctors’ affirmations are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Plaintiffs’ doctors provide affirmations indicating significant and quantified restrictions in their patient’s ranges of motion, both contemporaneously with the accident and recently, and opine that their patient’s injuries were caused by the subject accident. Thus, they each raise a “battle of the experts,” with defendants’ doctors, requiring a trial.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 8, 2021

ENTER :



Hon. Debra Silber, J.S.C.