

Roberts v Ahmed

2021 NY Slip Op 30867(U)

March 12, 2021

Supreme Court, Kings County

Docket Number: 500767/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 12th day of March, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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NOLA ROBERTS,

Plaintiff,

Index No.: 500767/2019

- against -

DECISION AND ORDER

SYED AHMED, ABID SYED and
TAZWAR HOSSAIN

Defendants.

Motion Sequence #1, #2

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	20-28, 29-34
Opposing Affidavits (Affirmations).....	44-50,
Reply Affidavits (Affirmations).....	56, 57

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on August 9, 2018. The Plaintiff, Nola Roberts (hereinafter the "Plaintiff"), was a passenger in a vehicle owned and operated by Defendant Tazwar Hossain (hereinafter "Defendant Hossain") when that vehicle was involved in a collision with a vehicle owned by Defendant Abid Syed and operated by Defendant Syed Ahmed (hereinafter "the Syed Defendants"). The Plaintiff alleges that the collision occurred at JFK International Airport, at or near exit T5 of the Van Wyck Expressway, in the County of Queens, New York. The Plaintiff claims in her Verified Bill of Particulars (See Syed Defendants' Motion Exhibit B, Paragraph 10), that she sustained a number of serious injuries, *inter alia*, injuries to her cervical spine, lumbar spine, and left knee. The Plaintiff also alleges (See Syed Defendant's Motion Exhibit B, Paragraph 20) that she sustained keloid scarring and

that she was prevented “from performing substantially all of the material acts which constitute her usual and customary daily activities for no less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

The Syed Defendants move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). In support of this application, the Syed Defendants rely on the deposition of the Plaintiff and the reports of Dr. Alan J. Zimmerman and Dr. Darren Fitzpatrick.¹

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the Defendants have failed to meet their *prima facie* evidentiary showing, and that even assuming that they had, there are sufficient issues of fact raised by the reports of the Plaintiff’s Doctors which serve to support the denial of summary judgment.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

¹ Defendant Hossain also cross-moves (motion sequence #2) for the same relief and for the sake of judicial economy adopts and incorporates the submissions made by the Syed Defendants.

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Insurance Law § 5102(d)

In support of their motion (motions sequence #1) the Syed Defendants proffer the affirmed medical report from Dr. Alan J. Zimmerman. Dr. Zimmerman conducted an orthopedic medical examination of Plaintiff on December 11, 2019, more than fifteen months after the collision at issue. In his report, Dr. Zimmerman detailed his findings based upon his review of Plaintiff’s medical records, his personal observations and objective testing. Dr. Zimmerman performed an orthopedic examination of the Plaintiffs cervical spine, lumbar spine, thoracic spine, and left knee, with the use of a hand held goniometer and found no limitation in the Plaintiff’s range of motion in relation to these areas. Dr. Zimmerman opined that “[t]here are no objective evidences that would preclude this claimant from pursuing gainful employment or activities of daily living without restriction.” Dr. Zimmerman also stated that “[t]he left knee surgery was carried out for degenerative, preexisting and not causally related conditions.” (See Syed Defendants’ Motion, Report of Dr. Zimmerman, Exhibit F).

Dr. Darren Fitzpatrick reviewed the MRI of the Plaintiff’s lumbar spine, cervical spine and left knee. The left knee MRI was performed on September 10, 2018, one month after the Plaintiff’s accident. Dr. Fitzpatrick states that “[d]egenerative tears of the meniscus results from normal, repetitive forces

acting upon a worn-down meniscus.” Regarding the left knee, Dr. Fitzpatrick also states that “[t]his process occurs over a protracted time course requiring months to years to develop, thus, this finding has no traumatic basis, and was not a result of the injury on the stated date of loss.” The cervical spine MRI was performed on September 24, 2018. Regarding, the cervical spine MRI, Dr. Fitzpatrick states that “[c]ervical intervertebral disc degeneration is an age-related, drying out and loss of the disc substance, desiccation, which occurs over a protracted time course of at least 6 month duration, resulting in loss of intervertebral disc signal and/or height, with no traumatic basis.” The lumbar spine MRI was performed on October 8, 2018. In relation to the lumbar spine Dr. Fitzpatrick stated that the Plaintiff suffered from “[m]ild to moderate multilevel lumbar degenerative disc disease.” Dr. Fitzpatrick concluded that “[t]hese MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic lumbar spine injury.” (See Syed Defendants’ Motion, Report of Dr. Fitzpatrick, Exhibit G).

Turning to the merits of the motion made by the Syed Defendants, the Court finds that the Syed Defendants have failed to meet their *prima facie* burden. This is because the Plaintiff was examined by the defendants' examining orthopedist Dr. Zimmerman, more than one year after the accident, and he failed to relate his findings to the 90/180 category of serious injury for the relevant period of time immediately following the accident. Dr. Fitzpatrick also failed to address this claim specifically. See *Owens-Stephens v. PTM Mgmt. Corp.*, 191 A.D.3d 691, 137 N.Y.S.3d 734 [2d Dept 2021]; *Rouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010]; *see also Epstein v. MTA Long Island Bus*, 161 AD3d 821, 823, 75 N.Y.S.3d 532, 534 [2d Dept 2018]; *Stead v. Serrano*, 156 AD3d 836, 837, 67 N.Y.S.3d 244 [2d Dept 2017]; *Nembhard v. Delatorre*, 16 AD3d 390, 791 N.Y.S.2d 144 [2d Dept 2005]; *Peplow v. Murat*, 304 AD2d 633, 758 N.Y.S.2d 160, 161 [2d Dept 2003]; *Frier v. Teague*, 288 AD2d 177, 732 N.Y.S.2d 428 [2d Dept 2001].

It is true that where a Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008].

However, in the instant proceeding, the Plaintiff sets forth in her verified Bill of Particulars that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The Plaintiff's Bill of Particulars also indicates that "Plaintiff was incapacitated from her employment from August 9, 2018 to February 4, 2019." (See Syed Defendant's Motion Exhibit B, Paragraph 13). While the Syed Defendants argue in their affirmation in support of their motion (Paragraph 11) that the Plaintiff's deposition testimony contradicts this claim since she returned to work approximately two weeks after the accident, it fails to note that the Plaintiff explained that she returned for one day, was in constant pain and could not continue. Thereafter when asked how much time she missed from work after that one day, she testified "[s]ix months or more, I think six and -six and over months." When asked if a Doctor made this recommendation for her, she testified "Dr. Bryk, Eli Bryk." (See Syed Defendant's Motion Exhibit E, Pages 33 through 42). As a result, the Syed Defendants have failed to meet their *prima facie* burden regarding this claim. *See Owens-Stephens v. PTM Mgmt. Corp.*, 137 N.Y.S.3d 734, 735 [2d Dept 2021]; *Hall v. Stargot*, 187 AD3d 996, 996, 131 N.Y.S.3d 250, 251 [2d Dept 2020]; *Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011].

"Since the moving defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable

issue of fact.” *Williams v. Maleachern*, 186 AD3d 1462, 1464, 128 N.Y.S.3d 851, 852 [2d Dept 2020];
see also *Rouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010].

Based on the foregoing, it is hereby ORDERED as follows:

The motions by the Defendants (motions sequence #1 and #2) for summary judgment are denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

FILED
MAR 17 2021
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