

Martinez v Komilov
2021 NY Slip Op 31286(U)
April 14, 2021
Supreme Court, Kings County
Docket Number: 508795/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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MARIBEL MARTINEZ,

Plaintiff,

DECISION / ORDER

-against-

Index No. 508795/2019

Motion Seq. No. 1

SHAKHROM KOMILOV,

Defendant.

Date Submitted: 2/11/21

_____X

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>16-23</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34-38</u>
Reply Affirmation.....	_____

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

This is a personal injury action arising out of a motor vehicle accident that took place on April 26, 2017 in Queens, NY. At the time of the accident, plaintiff was a passenger in her husband's car. Defendant was driving his car, and the defendant's vehicle rear-ended the plaintiff's vehicle while it was stopped for a red light on Cooper Avenue near the intersection with Wyckoff Avenue. Plaintiff was removed from the scene in an ambulance and taken to Wyckoff Heights Medical Center.

In her bill of particulars, plaintiff alleges that as a result of the accident, she sustained injuries to her right shoulder and to her cervical and lumbar spine. At the time of the accident, she was forty-eight years old. She claims (in her EBT testimony) she "honestly doesn't remember" how much time she missed from work after the accident [Page 14]. She is a kindergarten teacher for the NYC Department of Education.

Defendant moves for summary judgment dismissing the complaint and contends that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d).

In support of the motion, defendant submits the pleadings, an attorney’s affirmation, plaintiff’s EBT transcript and affirmed reports from an orthopedist, Pierce J. Ferriter, M.D., and a radiologist, Dr. Darren Fitzpatrick. Dr. Ferriter examined plaintiff on February 17, 2020 so had no ability to evaluate plaintiff’s condition in the six months after the accident. The radiologist did not examine plaintiff. He reviewed the cervical, lumbar, and right shoulder MRI films and concludes that all of the positive findings on the spine MRIs are degenerative, longstanding and not causally related to the date of the accident. He also states that the conditions indicated (bulges and herniations) could not have developed in the short time between the accident and the taking of the films. With regard to the plaintiff’s right shoulder, Dr. Fitzpatrick states it indicates “Rotator cuff tendinosis with findings of subacromial impingement.” He says this is not a traumatic injury, and that tendinosis” is a non-traumatic entity that is the result of chronic overuse” and subacromial impingement “is an acquired degenerative condition with no traumatic basis.”

Dr. Ferriter examined plaintiff and tested the range of motion in plaintiff’s cervical and lumbar spine and reports completely normal results. He tested the range of motion in plaintiff’s right shoulder, and indicates that five of the six tests produced normal results, but the test of her extension was 60 degrees when normal is 40 degrees. This must be a typo, as normal for shoulder extension is 60 degrees. He concludes that her sprains and strains have all resolved. He concludes that it was a “normal orthopedic examination on all objective testing.”

With regard to the 90/180-day category of injury, plaintiff's EBT provides little help on the subject. Plaintiff testified on multiple occasions at her EBT that she missed time from work but could not remember how much. On Page 73, she was asked if she returned to work before the school year ended and she said "yes," but she did not remember when. However, she has not had any surgeries and her verified (by her) bill of particulars states that she missed four days of work. This verified pleading is binding on plaintiff. This does not enable the court to conclude that she missed more than ninety days of work after the accident, or that she was unable to perform substantially all of her usual and customary daily activities.

The court notes that defendant's attorney contends at Paragraph 29 and 30 of her affirmation that "defendants' proof ruled out the 90/180-day category of the statute. Putting aside, for the moment, that this category requires proof that there was a causally related, medically determined injury, this category requires proof that plaintiff was medically prevented from performing "substantially all" of his [sic] usual and customary activities for the requisite period. . . . defendants submit that, based on the above, the *burden should shift to plaintiff* to come forward with an offer of competent proofs demonstrating real issues of fact as to the alleged injuries being both causally related to the accident, as well as showing impairments which could satisfying [sic] at least one definition in Ins. Law 5102(d) [emphasis added]." Counsel seems to misunderstand the law and rules for summary judgment. The court cannot take the "gestalt" approach suggested by counsel. A moving party must make a prima facie case for the relief requested in the motion before the burden shifts to the opposing party.

The court finds that defendant has made a *prima facie* showing of his entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of orthopedist Pierce Ferriter, M.D. (typos aside) and radiologist Dr. Fitzpatrick, who examined the MRIs taken, show that plaintiff did not sustain a serious injury as a result of the subject accident. Further, her verified bill of particulars states that she missed only four days of work as a kindergarten teacher. Thus, defendant 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 counters that the medical evidence she has submitted overcomes the motion and raises a triable issue of fact as to whether plaintiff sustained serious injuries under Insurance Law § 5102 (d).

Plaintiff provides an affirmation of counsel, an affidavit of plaintiff, affirmed reports of her cervical, lumbar and right shoulder MRIs, an affirmation from Dr. J. McGee, who was her treating doctor at the physical therapy facility named Yellowstone Medical Rehabilitation, P.C., and the records from the orthopedist she treated with, Alexios Apazidis, M.D., who plaintiff went to see twice in 2017, which were submitted in

admissible form, with an affirmation from the doctor to authenticate the records, which are themselves affirmed and electronically signed.

Dr. Apazidis saw plaintiff in June and August of 2017. At the first visit, he went over her MRIs and recommended arthroscopic surgery for her right shoulder. At the second visit, he reports that plaintiff had normal range of motion in her cervical and lumbar spine, but not in her right shoulder, which had significant restrictions in the range of motion and was painful. He said it seemed to him that she might have a rotator cuff tear. She declined arthroscopic surgery and told him she wanted to continue with physical therapy. The radiologist had concluded [Doc 38] that her MRI indicated “Evidence for impingement syndrome; Tear supraspinatus tendon with retraction and atrophy of the muscle; and Bursitis.”

Dr. McGee provides an affirmation which is titled “Final Narrative Report” and is 27 pages, single spaced, and in tiny type. Plaintiff first went to his facility on May 16, 2017, a few weeks after the accident. Her range of motion was significantly restricted. He set her up for physical therapy three times per week. He referred her to a chiropractor and an acupuncturist. He recommended chiropractic treatment three times a week. Plaintiff complained of pain being 6-9 on a scale of 1-10, that she couldn’t sleep and was miserable. Someone (Dr. McGee or a staff member) examined plaintiff and tested her range of motion again in June, July, August, September, October, November, and December of 2017, and she continued to have a significantly restricted range of motion in her cervical and lumbar spine and in her right shoulder. She apparently did not return to his office until a few weeks after defendant filed the instant motion and was re-examined on September 1, 2020. She still complained of pain in her

neck, back, and right shoulder. Dr. McGee tested the range of motion in plaintiff's cervical and lumbar spine and right shoulder. The results indicate significant restrictions in her range of motion on all of the tests.

Following the test results, Dr. McGee opines as follows:

"The type of accident that the patient has been in . . . and the mechanism of the injury are completely consistent with clinical presentation and his symptomatology. There has been severe trauma to the spine; this causes vertebrae to be misaligned, ligaments and muscles to be over stretched, nerves to be irritated, and various soft tissue to be inflamed. Injuries of this nature and body's response to them can go on for years. The ligament and capsular structures of the spinal joint possesses elasticity and tensile strength only to a limit. When they are subjected to a deforming force beyond the functional capacity, . . . [scar tissue results and may] reduce intersegmental motion. The muscles that reinforce the ligamentous and function to create movement are very susceptible to direct trauma. The short muscle and those with attachments to the bony process, which they span, are most vulnerable. Over stretching the muscles causes pain and spasm, which may be persistent. Here again, healing by scar tissue impairs normal function. Direct traumatic insult to a nerve result[s] in normal movement of the nerve root within the intervertebral foramen. The subsequent irritation of the involved neural structures can be responsible for future complications involving pain and paresthesia, which so often accompany this type of injury in the form of long-range sequel.

For the most part, this case has followed the usual pattern for this injury. When no spinal fracture or dislocation exists, but the supporting structures of the spine have been traumatized, the common syndrome of joint dysfunction, spasm, restriction, discomfort, and pain are usually encountered. Furthermore, the likelihood of future degenerative change in the involved joints is certainly is significant one.

The patient's Disability is partial, permanent and has a tendency to result in chronic localized pain with progressive downhill course of remission and exacerbation during cold weather and overexertion. Full recovery is guarded" (Doc 36, Page 26).

Dr. McGee concludes that "there is good reason to believe, with a reasonable degree of medical certainty, that the condition the patient has developed is solely related to and has a direct causal relationship to the accident of 4/26/2017."

The court finds that plaintiff has overcome the motion and raised an issue of fact as to whether she sustained a “serious” injury as a result of the subject accident, specifically, a “permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system” as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Dr. McGee’s affirmed report indicates significant and quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and recently, and he opines that her injuries were caused by the subject accident. He thus raises a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial.

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

This constitutes the decision and order of the court.

Dated: April 14, 2021

ENTER:



Hon. Debra Silber, J.S.C.