

Cohn v City of New York
2021 NY Slip Op 32267(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 450173/2019
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

ARIANA COHN,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, JUAN URGILESTORAL, MANIK HOSSAIN,
LUX CREDIT CONSULTING LLC

Defendants.

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INDEX NO. 450173/2019

MOTION DATE 05/12/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for

DISMISS

Defendants Manik Hossain (“Hossain”) and Lux Credit Consulting, LLC (“Lux”) move for summary judgment dismissing the complaint against them. In a separate motion, defendants The City of New York (“City”), New York City Police Department (“NYPD”) and Juan E. Urgilestoral (“Urgilestoral”) “cross- move” for summary judgment dismissing the complaint.

This is a personal injury action involving the No Fault regulations. Plaintiff commenced this action to recover damages for injuries sustained in an automobile collision that occurred on August 26, 2017 on the highway known as the “Manhattan Bridge” in Brooklyn, New York. Plaintiff was the passenger in the vehicle owned by Lux and operated by Hossain, which collided into a vehicle owned by NYPD and operated by Urgilestoral, a police officer. Plaintiff is suing all of the defendants for negligence and recklessness, which she alleges resulted in her physical injuries. In her verified Bill of Particulars, plaintiff alleges that she suffered head and neck injuries, upper back pain and discomfort, chest pain and trauma, and mental discomfort.

Hossain and Lux move for summary judgment dismissing the complaint against them on the ground that plaintiff's alleged injuries did not reach the threshold of "serious injury," as required by section 5102 of the Insurance Law.

As evidence, Hossain and Lux submit plaintiff's deposition testimony, wherein plaintiff testified that upon leaving the emergency ward at a hospital in Manhasset, shortly after the accident occurred, she was prescribed painkillers for her injuries. Plaintiff, who was a student at the time, missed a few classes, but was able to graduate on time and subsequently went on several vacation trips. Plaintiff stated that she underwent therapy but had eventually discontinued it. According to Hossain and Lux, the 90/180 days category provided by section 5102 (d) of the Insurance Law is not applicable here.

The moving defendants submit a report from Dr. Michael Carciente, a neurologist, who examined plaintiff on February 2, 2020. His affirmed report concludes that plaintiff does not show evidence of disability, permanence or serious limitation of movement, and that plaintiff is capable of seeking employment without restrictions. Defendants also submit a report from Dr. Jessica Berkowitz who conducted a radiological evaluation of two MRI films of plaintiff's cervical and lumbar spine on March 3, 2021. The MRI's were taken on September 21, 2017 at Kolb Radiology, almost a month after the accident. Dr. Berkowitz found no evidence of post-traumatic changes causally related to the accident.

Based on the evidence, Hossain and Lux contend that they have proven that plaintiff does not have the condition that would constitute a "serious injury" and that in the absence of such injury, the allegations against them must be dismissed.

The City, NYPD and Urgilestoral, (collectively the “City defendants”), move separately for the same relief. The City defendants acknowledge that Hossain and Lux have submitted the correct evidence and they join in the arguments asserted by Hossain and Lux.

Plaintiff opposes the motions on the ground that defendants have failed to make out a case for summary judgment. Plaintiff submits as evidence the aforesaid MRI records on her cervical and lumbar spine. Plaintiff also submits her counsel’s affirmation, which argues in detail plaintiff’s objections to the motions.

The affirmation contends that the City defendants’ cross-motion is not appropriate, as it does not oppose the motion made by Hossain and Lux. The affirmation further contends that the medical evidence submitted by defendants is insufficient to dismiss plaintiff’s claim of “serious injury,” because the medical examination by Dr. Carciente is conclusory, as there was no range of motion testing to provide an objective analysis of plaintiff’s limitation of movement. Furthermore, the affirmation alleges that Dr. Carciente’s conclusions did not address plaintiff’s current complaint of disc bulges and herniation. Furthermore, the affirmation contends that the delay in examining plaintiff undermines defendants’ assertion that plaintiff’s injuries would not qualify under the 90-180 day category of section 5102 (d).

The affirmation also dismisses Dr. Berkowitz’s report on the MRI films as conclusory, in that she failed to examine other medical reports related to plaintiff’s injuries. Plaintiff argues that she should have an opportunity to demonstrate her significant and permanent physical limitations to a trier of fact. She states that she did not submit other medical evidence in her opposition papers because defendants did not make out a case for summary judgment.

In reply, the City defendants argue that if filing a cross-motion was an error on their part, the court can make a correction pursuant to CPLR 2001. They contend that they made out a case for summary judgment and that plaintiff has failed to raise an issue of fact precluding a summary judgment order. The City defendants argue that the medical evidence submitted was adequate and objective and that plaintiff failed to submit more current medical evidence to rebut its conclusions. They also argue that plaintiff's deposition testimony was sufficient to disqualify her injuries as consistent with those under the 90-180 day category of section 5102 (d). Moreover, they contend that plaintiff's complaints of bulges and herniation are insufficient to constitute "serious injury."

"The proponent of a motion for summary judgment must determine that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waismann*, 39 AD3d 303, 3306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon the proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof inadmissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgement must be denied (see *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

As a preliminary matter, CPLR 2001 permits the court to correct or disregard a mistake, defect or irregularity as long as a substantial right of a party is not prejudiced. In the absence of any alleged prejudice herein, this court shall regard the City defendants' motion as one for summary judgment and not as a cross-motion.

Section 5102(d) of the Insurance Law defines “serious injury” as: “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Courts have continually held that the question of whether a plaintiff has established a *prima facie* case for a “serious injury,” as described in section 5102(d), remains an issue of law (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). Claims of “serious injury” are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Here, plaintiff submits her MRI records to demonstrate her injuries and seeks to have defendants’ motion for summary judgment denied, due to a failure to prove a lack of “serious injury.” Plaintiff contends that her injuries constitute a permanent or significant limitation of a body function, and/or are of a non-permanent nature under the 90-180 day category in the statute.

Ordinarily, an affirmation from an attorney with no personal knowledge of the facts is admissible when documentary or other supplemental evidence is submitted. Here, the documents accompanying the affirmation are plaintiff’s MRI records. However, these MRIs, which were conducted in September 2017 are dated. By comparison, Dr. Carciente’s examination of plaintiff was based on a February 2020 report, which revealed no evidence of atrophy and a 5/5 motor strength in all proximal and distal muscle groups in the upper and lower extremities. In addition,

Dr. Carciente's examination of plaintiff's cervical spine revealed no tenderness, spasm or scapular winging. His examination of her thoracic and lumbar spine revealed no tenderness, spasm or negative straight leg maneuver.

In opposition, plaintiff submitted no recent medical evidence with respect to her condition. Her complaints of bulges and other symptoms of discomfort are insufficient in contrast to Dr. Carciente's objective findings.

Defendants' reliance on plaintiff's deposition testimony is admissible in determining the seriousness of her injuries (*see Elias v Mahlah*, 58 AD3d 434, 436 [1st Dept 2009]). Plaintiff testified that she did not undergo surgery with respect to the injuries resulting from the accident. She stated that she went for physical therapy two to three times for six to seven weeks. She stated that she missed a few classes, graduated on time, and left New York State about ten times, mainly on vacation trips. There is no evidence that plaintiff's resultant injuries prevented her from performing usual and customary daily activities for a prescribed period.

Based on the evidence, defendants have made out a case for summary judgment and plaintiff has not made out a material issue of fact to preclude judgment. Thus, in the absence of a claim for "serious injury," pursuant to section 5102 (d) of the Insurance Law, defendants shall be dismissed from this action.

Accordingly, it is hereby

ORDERED that defendants Manik Hossain and Lux Credit Consulting, LLC's motion for summary judgment is granted; and it is further hereby

ORDERED that defendants The City of New York, New York City Police Department and Juan E. Urglietoral's motion for summary judgment is granted; and it is further hereby

ORDERED that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further hereby

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the Decision and Order of the court.

<u>11/12/2021</u>			
DATE		J. MACHEILLE SWEETING, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE