

Mack v Hambone Mgt. Corp.
2021 NY Slip Op 33043(U)
December 14, 2021
Supreme Court, Bronx County
Docket Number: Index No. 23286-2019E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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SATANYA MACK and CRYSTAL GONZALEZ,

Plaintiffs,

-against -

**Index No. 23286-2019E
DECISION/ORDER
Motion Seq. 1**

HAMBONE MANAGEMENT CORP. and EPITANIO VALLEHO,
Defendants.

-----X
VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in regard to defendants' motion [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiffs SATANYA MACK and CRYSTAL GONZALEZ (plaintiffs) have not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiffs allegedly sustained as a result of a motor vehicle accident that occurred on March 11, 2017 (the Accident).

In the bill of particulars and opposition papers, in relevant part, plaintiffs allege that, as the result of the Accident, plaintiffs suffered injuries and these injuries fall within the serious injury categories of: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiffs fail to address the ground of permanent loss of use on this motion, however, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640

[4th Dept 2018]). In any event, as plaintiffs do not allege a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

Defendants seek summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a “serious injury” under Insurance Law 5102(d). Defendants argue that plaintiffs’ claimed injuries are not “serious,” and that any injuries or conditions from which plaintiffs suffer are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiffs’ deposition transcripts, plaintiffs’ medical records and the expert affirmations of Dr. Ferriter (orthopedic) and Dr. Eisenstadt (radiologist).

Plaintiff Mack

Of note, plaintiffs’ counsel uploaded all of plaintiffs’ exhibits without any of the required identifying labels. This lack of care undermines the purposes of NYSCEF and muddles the record. The court is not obligated to search an inappropriately presented record in order to decipher plaintiffs’ arguments.

Plaintiff Mack suffered a traumatic brain injury in 1998 from a fall down the stairs prior to the Accident. Plaintiff Mack testified that immediately following the Accident, she was confined to bed and home for only a few weeks. Plaintiff Mack’s last treatment was in August 2017.

Dr. Ferriter (orthopedist) examined plaintiff Mack over three years post-Accident, on July 17, 2020. Plaintiff Mack reported a history of a prior accident in 1998. The doctor states that he reviewed the bill of particulars, and the police report. The expert finds no loss of range of motion in the cervical spine, with negative objective tests. In the impression section of the report, the expert concludes that the cervical spine is “strain, objectively resolved”. He finds no evidence of orthopedic limitations, and plaintiff is capable of functional use of the examined

body parts for normal activities of daily living as well as usual daily activities include work duties. There is no permanency or disability.

Dr. Eisenstadt submits his evaluation, dated November 10, 2019, of the cervical spine MRI that was performed on March 19, 2017, eight days after the Accident. The doctor finds disc desiccation and degeneration at several levels. There are bulging discs and herniations. He finds that the bulging discs, herniated discs and bony productive changes are the result of degenerative changes with no traumatic etiology or association with the Accident. He opines that the findings such as loss of disc height and signal, herniations and disc drying required between three to six months to develop. In conclusion, he finds that none of the changes have a traumatic origin and the findings are degenerative in nature.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff Mack did not suffer a serious injury to the relevant body parts under the permanent consequential limitation, significant limitation or 90/180 day categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff Mack opposes the motion, submitting an attorney affirmation, plaintiff's affidavit, plaintiff's medical records, and the affirmations and reports of Dr. Rehova (physical medicine), Dr. Katzman (radiologist), Dr. Johnston (pain management), and Dr. Kiernan (surgeon). All of the records/reports are from 2017. While the report of Dr. Rehova is dated May 10, 2021, plaintiff was last examined by said expert on September 7, 2017. From March 17, 2017 to September 7, 2017, Dr. Rehova found restrictions in the range of motion of the cervical spine.

In opposition, plaintiff Mack only argues that plaintiff "suffered significant non-permanent limitations" due to the injuries from the Accident that prevented her from performing substantially all of the material acts which constitute her customary daily activities for 90/180 days. [NYSCEF No. 51, p.17]. Plaintiff therefore acknowledges the lack of permanency. The

categories of permanent consequential limitation and significant limitation are dismissed without opposition. In terms of the 90/180 day category, plaintiff Mack submits an affidavit stating that she had difficulty normal house activities, cleaning, sit or stand for long period and was unable to exercise for months after the Accident.

In total, plaintiff' Mack's evidence fails to generate a triable issue of fact as to plaintiff's claim of "serious injury" as to the cervical spine under the 90/180 day category in light of her testimony (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions also fail to prove causation between the Accident and plaintiff's injury in light of the previous accident and evidence of degeneration. To the extent that plaintiff's opposition affidavit differs with her testimony regarding her alleged impairment during the 90/180 day period, the affidavit appears to have been tailored to avoid the consequence of the earlier testimony that she returned to work promptly after the Accident and plaintiff's inability to establish other serious injury categories and is insufficient to defeat summary judgment (*Nguyen v Abdel-Hamed*, 61 AD3d 429 [1st Dept 2009]).

Plaintiff Gonzalez

Plaintiff testified that after the Accident she was not confined to bed and traveled to Tennessee by car soon after the Accident. Plaintiff Gonzalez's last treatment was November 2017.

Dr. Ferriter (orthopedist) examined plaintiff Gonzalez over three years post-Accident, on July 17, 2020. The doctor states that he reviewed the bill of particulars, and the police report. The expert finds no loss of range of motion in the lumbar spine, with negative objective tests. In the impression section of the report, the expert concludes that the lumbar spine is "strain, objectively resolved". He finds no evidence of orthopedic limitations, and plaintiff is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities include work duties There is no permanency or disability.

Dr. Eisenstadt submits his evaluation, dated November 10, 2019, of the lumbar spine MRI that was performed on March 19, 2017, eight days after the Accident. The doctor finds disc desiccation and degeneration at several levels. There are no bulging or herniated discs. There is osteophyte formation and arthritic changes that are degenerative changes that required 3- 6 months to develop. No post-traumatic changes are seen.

Based on the submissions, defendants sets forth a *prima facie* showing that plaintiff Gonzalez did not suffer a serious injury to the relevant body part under the permanent consequential limitation, significant limitation or 90/180 day categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff Gonzalez opposes the motion, submitting an attorney affirmation, plaintiff's affidavit, plaintiff's medical records, and the affirmations and reports of Dr. Rehova (physical medicine), Dr. Katzman (radiologist), Dr. Johnston (pain management), Dr. Kierman, and Dr. Mann. All of the records/reports are from 2017. Plaintiff was last examined by an expert in November 2017. From March 17, 2017 to September 7, 2017, Dr. Rehova found restrictions in the range of motion of the lumbar spine.

In opposition, plaintiff Gonzalez only argues that plaintiff "suffered significant non-permanent limitations" under the 90/180 day category due to the injuries from the Accident that prevented her from sleeping, standing for long periods of time, walking long distances and housecleaning chores. [NYSCEF No. 59]. Plaintiff Gonzalez therefore acknowledges the lack of permanency. The categories of permanent limitation and significant limitation are dismissed without opposition.

In total, plaintiff' Gonzalez's evidence fails to generate a triable issue of fact as to plaintiff's claim of "serious injury" as to the lumbar spine under the 90/180 day as she returned to work within a week and travelled by car soon after the Accident. (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]; see *Bacon v Bostany*, 104 AD3d 625 [2d Dept 2013]). Plaintiff's submissions also fail to prove causation between the Accident and plaintiff's injury in light of the evidence of degeneration. To the extent that plaintiff's opposition affidavit differs with her testimony regarding her alleged impairment during the 90/180 period, the affidavit appears to have been tailored to avoid the consequence of the earlier testimony (*Nguyen v Abdel-Hamed*, 61 AD3d 429 [1st Dept 2009]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants HAMBONE MANAGEMENT CORP. and EPITANIO VALLEHO [Mot. Seq. 1] (defendants), made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiffs SATANYA MACK and CRYSTAL GONZALEZ (plaintiffs) have not sustained a "serious injury" as defined by Insurance Law 5102(d) is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants and dismissing the complaint in its entirety; and it is further

ORDERED that the Clerk shall mark the action disposed in all court records.

