

Mason v Tavera

2021 NY Slip Op 33045(U)

December 6, 2021

Supreme Court, Bronx County

Docket Number: Index No. 24275/2019E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

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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PAMELA MASON, ALICIA STEWART, and
ALEXIS STEWART,

Plaintiffs,

-against -

**Index No. 24275/2019E
DECISION/ORDER
Motion Seq. 1**

MANUEL H. TAVERA,
Defendant.

-----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 support of and in opposition to the motion of defendant MANUEL H. TAVERA (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiffs PAMELA MASON, ALICIA STEWART, and ALEXIS STEWART (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 February 23, 2017. At the time of the accident, plaintiff Mason was operating a motor vehicle with the other plaintiffs as passengers when it was rear-ended by defendant's vehicle at or near Marconi Street and Waters Place, Bronx, N.Y.

In the bill of particulars and opposition papers, in relevant part, plaintiffs allege that the injuries they sustained fall within the serious injury categories of: permanent loss, 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]).

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues 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, photographs, and the expert reports of Dr. Arnold T. Berman (orthopedic surgeon) who examined all three plaintiffs.

Plaintiff Mason

In terms of plaintiff Mason, Dr. Berman bases his opinion on the details of a physical examination of plaintiff Mason taken on August 13 ,2020 (approximately three years post-Accident), plaintiff’s bill of particulars, and plaintiff’s medical records.

Based on the examination, the expert finds that the cervical spine, thoracolumbar spine, the lumbar spine, the shoulders, and the knees have normal range of motion and the results of all of the objective tests were negative.

In the “impression section”, he opines that the cervical and lumbar spine are “strain/sprain resolved with no residuals and no aggravation to preexisting degenerative joint disease-osteoarthritis and bulging discs which is seen on the X-rays and MRIs of the cervical

and lumbar spine... There are no objective findings and no radiculopathy on exam. There is no clinical correlation between the normal exam and the MRI findings. MRI findings could not have been caused by this single motor vehicle accident”.

The right shoulder, right arm and right leg were normal on examination.

The expert opines that the injuries diagnosed are cervical and lumbar strains/sprains which are resolved. Plaintiff’s current complaints related to the cervical and lumbar sprain are solely related to the accident. There is no aggravation to plaintiff’s prior lumbar condition. Treatment to date has been reasonable and necessary but no further treatment is indicated. The mechanism of injury supports the back sprains as of February 23, 2017. The cervical and lumbar sprains that are casually related to the accident are resolved and there is no injury to the right shoulder, right arm, or right leg. Plaintiff’s history of lumbar pain was not aggravated by the accident.

Plaintiff Mason can participate in all activities of daily living. She was on disability at the time of the accident and did not sustain any permanent injury or disability from the accident.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff Mason did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation 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 Mason opposes the motion, submitting an attorney affirmation, the bill of particulars, plaintiff’s medical records, MRIs reports (performed March 27, 2017) of the lumbar and cervical spine, and the affirmation of Dr. Abramov (pain management). Of note, plaintiff testified that she was confined to bed for 3-4 months and to her home since the accident. She was on disability at the time of the accident.

In total, plaintiff Mason's evidence raises triable issues of fact as to her claims of "serious injury" as to the cervical spine and lumbar spine under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that she received medical treatment for the claimed injuries promptly after the Accident, and that she had substantial limitations in motion in the relevant body parts at the examinations immediately after the Accident, and more recently at the recent examination by plaintiff's expert in November 2020 (see *Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnosed plaintiff with injuries to the spine and plaintiff's testimony and expert report set forth proof of physical limitations resulting therefrom. Plaintiff's expert opines that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injury. Furthermore, the expert reviewed the records and opines that the injuries to the cervical spine and lumbar spine were caused by the Accident, and are permanent, causing a significant loss of use and function in those body parts (see *Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). The expert also finds that the injuries were not degenerative or pre-existing in nature. Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation with regards to the cervical spine and lumbar spine. Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day claim, defendant sets forth entitlement to summary judgment (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d 230 [1982]), and plaintiff's submissions in opposition generate a question of fact as to the issue (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]).

Plaintiff Alicia Stewart

In terms of plaintiff Alicia Stewart, defendant submits the report of Dr. Berman based on his evaluation of plaintiff done on August 13, 2020 (approximately three years post-Accident), plaintiff's bill of particulars, and plaintiff's medical records.

The expert finds that the cervical spine, thoracolumbar spine, the lumbar spine, and the shoulders have normal range of motion and the results of all of the objective tests were negative. In the "impression section", he opines that the cervical and lumbar spine are "strain/sprain resolved with no residuals" on examination. There is no clinical correlation between the MRI and EMG findings and the normal examination. The MRI L5-S1 herniated disc has no clinical correlation to the exam that has no radiculopathy and no objective findings. There is no permanency or disability, a good prognosis exists, and no treatment is needed.

The strain/sprain injuries are the result of the accident and are now resolved. There were no objective findings on examination. The documentation supports a causal relationship between reported injuries and the Accident. The mechanism of injury and impact supports the reported injuries. Plaintiffs complaints are solely related to the Accident and she has sustained cervical and lumbar strains/sprains as a result of the Accident. Plaintiff can participate in all activities of daily living and can work full time. She did not sustain any permanent injury or disability as the result of the Accident.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff Alicia Stewart did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation 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 Alicia Stewart opposes the motion, submitting an attorney affirmation, the bill of particulars, plaintiff's medical records, MRI reports (cervical spine and lumbar spine), and the affirmation of Dr. Abramov (pain management).

In total, plaintiff Alicia Stewart's evidence raises triable issues of fact as to her claims of "serious injury" as to the cervical spine and lumbar spine under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that she received medical treatment for the claimed injuries promptly after the Accident, and that she had substantial limitations in motion in the relevant body parts at the examinations immediately after the Accident, and more recently at the recent examination by plaintiff's expert in November 2020 (see *Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnosed plaintiff with injuries to the spine and plaintiff's testimony and expert report set forth proof of physical limitations resulting therefrom. Plaintiff's expert opines that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injury. Furthermore, the expert reviewed the records and opines that the injuries to the cervical spine and lumbar spine, including disc herniations, were caused by the Accident, and are permanent, causing a significant loss of use and function in those body parts (see *Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). The expert finds that the injuries are not degenerative or pre-existing in nature and to the extent that any injury was degenerative or pre-existing, they were activated or exacerbated by the accident. Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation with regards to the cervical spine and lumbar spine. Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day claim, defendant sets forth entitlement to summary judgment by plaintiff's testimony that she returned to school and work promptly after the accident (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d

230 [1982]), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]).

Plaintiff Alexis Stewart

In terms of plaintiff Alexis Stewart, defendant submits the report of Dr. Berman based on his evaluation of plaintiff done on August 13, 2020 (approximately three years post-Accident), plaintiff's bill of particulars, and plaintiff's medical records.

The expert finds that the cervical spine, thoracolumbar spine, the shoulders, and the knees have normal range of motion and the results of all of the objective tests were negative. In the "impression section", he opines that the cervical and lumbar spine are "strain/sprain resolved with no residuals" on examination. There is no clinical correlation between the MRI and X-ray findings and the normal examination. There was no objective findings and no radiculopathy and the MRI findings of herniated disc in the lumbar spine could not have been caused by the accident. Plaintiff can participate in all activities of daily living and can work full time without restrictions. There is no permanent injury and plaintiff is fully recovered from the mentioned injuries. Her prognosis is good for continued stable function

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff Alexis Stewart did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation 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 Alexis Stewart opposes the motion, submitting an attorney affirmation, the bill of particulars, plaintiff's medical records, MRI reports, and the affirmation of Dr. Abramov (pain management).

In total, plaintiff Alexis Stewart's evidence raises triable issues of fact as to her claims of "serious injury" as to the cervical spine and lumbar spine under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that she received medical treatment for the claimed injuries promptly after the Accident, and that she had substantial limitations in motion in the relevant body parts at the examinations immediately after the Accident, and more recently at the recent examination by plaintiff's expert in November 2020 (see *Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnosed plaintiff with injuries to the spine and plaintiff's testimony and expert report set forth proof of physical limitations resulting therefrom. Plaintiff's expert opines that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injury. Furthermore, the expert reviewed the MRI records and opines that the injuries to the cervical spine and lumbar spine were caused by the Accident, and are permanent, causing a significant loss of use and function in those body parts and are not degenerative (see *Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation with regards to the cervical spine and lumbar spine. Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day claim, defendant establishes entitlement to summary judgment (*Pakeman v Karekezia, supra*; see *Licari v Elliott, supra*), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine, supra*).

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 defendant MANUEL H. TAVERA (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiffs PAMELA MASON, ALICIA STEWART, and ALEXIS STEWART (plaintiffs) have not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: December 6, 2021

ENTER

s/Hon. Veronica G. Hummel/signed 12/06/2021

Hon. Veronica G. Hummel, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT