Washington v Mulligan
2021 NY Slip Op 33064(U)
November 4, 2021
Supreme Court, Bronx County
Docket Number: Index No. 33557-2018E
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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WILLIAM WASHINGTON and REGINA MCFFADDEN

Plaintiff,

-against-

BRIAN MULLIGAN,

Defendants.

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Index No. 33557-2018E
DECISION/ORDER
Motion Seq. 2

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 BRIAN MULLIGAN [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff REGINA MCFFADDEN has not sustained a “serious injury” as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a two-motor vehicle accident that occurred on September 5,2018 (the Accident). Plaintiff was a passenger in a vehicle driven by her husband plaintiff William Washington which collided with defendant Mulligan’s vehicle.

In the bill of particulars, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered various personal injuries as a result of the subject accident, including but not limited to injuries to the left shoulder, lumbar spine, cervical spine, left knee, left thigh, left hip, left arm, elbows and bilateral ankle pain. Plaintiff alleges that these injuries qualify as

serious injuries under the permanent consequential, significant limitation, permanent loss[1] and 90/180 day categories. Plaintiff was confined to home from the date of the accident and partially and continually thereafter. Plaintiff was involved in two slip and fall accidents and a prior car accident, all three of which resulted in lawsuits.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d). Defendant argues that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bills of particulars, plaintiff's deposition transcript, plaintiff's medical records, and the expert affirmations of Dr. Denton (orthopedic) and Dr. Katzman (radiologist).

Dr. Denton bases his opinion on the details of a physical examination conducted on September 23,2020, approximately two years post-Accident, and plaintiff's medical records. In the "impression section", the expert finds that the cervical spine, thoracic spine, lumbar spine, left shoulder, bilateral elbow, bilateral wrist, bilateral hip, bilateral knee and bilateral ankle/ foot injuries as "sprain/strain-resolved". Dr. Denton finds that there are no significant decrease in the range of motion in any of the tested body parts, and all objective tests are negative.

The expert finds that there is no evidence of orthopedic disability and plaintiff is capable of working without restrictions and can perform the activities of daily living as she was doing prior to the accident. The doctor notes that the "treatment of the approved accident injuries to date was causally related to the accident of record".

[1] It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 115 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Authority* 115 AD3d 507 [1st Dept 2014]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 1010 AD3d 452 [1st Dept 2021]).

In his report in support of defendant's motion, Dr. Katzman reviews the October 2018 MRIs of the left shoulder, cervical spine, and lumbar spine (one month post-Accident). As for the left shoulder, the doctor finds no evidence of a fracture or dislocation. There is trace of subdeltoid/subacromial bursitis, and chronic internal impingement of the rotator cuff. The rotator cuff reveals mild chronic degenerative tendinosis of the tendons with a small partial thickness undersurface tear of the distal supraspinatus tendon and mild degenerative undersurface fraying. He opines that there is no evidence of recent post-traumatic injury to the left shoulder joint, but rather degenerative changes and conditions exist. All the found internal derangement appear to be chronic, degenerative, and preexisting, and there is no evidence of recent post-traumatic injury.

The MRI of the plaintiff's s cervical similarly reveals only degenerative conditions. There is degenerative loss of disc height, and mild degenerative disc bulging at several discs. All of the conditions are chronic, pre-existing, and non-traumatic. The degenerative changes are unrelated to the Accident, and there is no recent-appearing traumatic disc herniation, extrusion or annular tear. There is no evidence of recent post-traumatic injury to the cervical spine.

In terms of the lumbar spine MRI, it reveals degenerative disc dehydration and degenerative disc bulging at several vertebrae. The MRI reveals minimal chronic multilevel degenerative disc disease without evidence of recent post-traumatic injury. The disc bulges are by definition degenerative and non-traumatic, and the changers are chronic, pre-existing and unrelated to the accident. There is no recent-appearing traumatic disc herniation, extrusion or annular tear, and no evidence of posttraumatic injury.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury 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 opposes the motion, submitting an attorney affirmation, supplemental bill of particulars, a certified police report, plaintiff's medical records, and the no-fault IME report of Dr. Miller.

In total, plaintiff's evidence raises triable issues of fact as to the left shoulder and lumbar spine only under the significant limitation threshold category (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). The records submitted concerning course of treatment indicate persistent significant limitations in the lumbar spine and left shoulder function, which the treating physicians casually related to the Accident and to objective MRI evidence, thus raising an issue of fact as to whether plaintiff sustained a significant limitation of the use of those body parts (*Licari v Elliott*, 57 NY2d 230 [1982]). Without a more recent finding, plaintiff fails to raise an issue as to a permanent consequential limitation of said body parts *(see Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]). As for the remainder of the alleged injuries, plaintiff's proof was insufficient to demonstration a limitation of such magnitude and duration as to be considered "serious" within the meaning of the statue (*see Dieujuste v Kiss Mgt, Corp*., 60 AD3d 514 [1st Dept 2009]; *Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]), and the last examination found close to normal ranges of motion. Nevertheless, if it is found by the trier of fact that plaintiff sustained any injury that constitutes a "serious injury", plaintiff is entitled to recovery damages for any other injury causally related to the Accident (*see Gordon v Hernandez*, 181 AD3d 424 [1st Dept 2020*]; Morales v Cabral*, *supra*).

As for plaintiff's 90/180-day claim, plaintiff's testimony and medical evidence showing that plaintiff did not return to work for months after the Accident generates a question of fact as to the issue (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; *see Licari v Elliott*, *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 BRIAN MULLIGAN [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff REGINA MCFFADDEN has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied.

The attorneys are reminded of the Chief Justice’s mandate and the companion court rules requiring that all attorneys make numerous good faith efforts (via letter, email and telephone) to resolve any discovery issue before seeking court intervention. The note of issue may not be filed until a stipulation signed by all parties stating that discovery is completed is uploaded to NYSCEF.

The foregoing constitutes the decision and order of the court.

Dated: November *4,* , 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 11/04/2021

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

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