

Moore v Bakhranov
2021 NY Slip Op 33066(U)
November 8, 2021
Supreme Court, Bronx County
Docket Number: Index No. 34233/2018E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

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SANCIOUS MOORE and AMARYLIS SAMUEL,

Index No. 34233/2018E

Plaintiffs,

-against-

DECISION AND ORDER

SHUKHRAT BAKHRANOV,

Hon. Bianka Perez

Defendant.

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The following papers numbered 1 to 6 were read on this motion (Seq. No. **001**)
for **SUMMARY JUDGMENT DEFENDANT** noticed on **October 14, 2020**.

Notice of Motion – Affirmation in Support - Exhibits Annexed	No.(s). 1-3
Affirmation in Opposition and Exhibits	No.(s). 4-5
Replying Affidavit and Exhibits	No.(s). 6

Plaintiffs brought this action seeking to recover for injuries allegedly sustained in an accident that occurred on May 22, 2018. Defendant Shukhrat Bakhranov now moves for summary judgment, pursuant to CPLR § 3212 contending that plaintiffs cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d). Plaintiffs oppose.

Standard of Review

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold. See, Linton v. Nawaz, 62 A.D.3d 434 (1st Dept 2009). It is well established that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries, and as such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002).

Insurance Law § 5102(d) defines the term “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.”

An affirmed report concerning the lack of evidence of disability establishes defendant's prima facie burden that plaintiff did not suffer a serious injury as defined by Insurance Law 5102(d), and shifts the burden to plaintiff to raise an issue of fact. See, Quinones v. Ksieniewicz, 80 A.D.3d 506 (1st Dept 2011).

To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. See, Id.

Procedural History

The Defendant now moves this Court for summary judgment alleging that the plaintiffs has failed to sustain serious injury within the meaning of the Insurance Law. Defendant argues that it is evident from a review of the affirmed medical reports of Dr. Steven A. Renzoni, Dr. Rene Elkin, and Dr. Jeffrey Salkin and the plaintiffs deposition transcripts that the plaintiffs did not sustain serious injuries and should not be allowed compensation outside of the No-Fault system.

Defendant's Motion

- Moore

In support of defendant's motion, they provided the report from Dr. Renzoni, (Exh. F) a Board-Certified orthopedic surgeon, stating there were no objective findings of disability or permanency. Further, he provided that the active range of motion as well as the neurological examination all came back perfect. Dr. Renzoni opined that plaintiff Moore is capable of working without restrictions and can perform her activities of daily living as she was doing prior to the accident.

Defendant further submits a report from Dr. Elkin who provided the neurological physical examination of plaintiff Moore. Dr. Elkin claimed there are no objective findings for any neurological injury resulting from this accident. (Exh. G). Further, the absence of any significant

finding on examination of the cervical or lumbar spines would mitigate strongly against any causal relationship between the radiological studies and the subject accident.

- **Samuel**

Defendant provided a medical assessment from Dr. Jeffrey Salkin, a Diplomate of the American Board of Orthopedic Surgery, finding that plaintiff Samuel is capable of performing all the tasks of daily living and maintaining full employment with no restrictions. (Exh. H). His examination of the cervical spine revealed no spasms. His examination of the lumbar spine also revealed no paraspinal spasms.

Another examination from Dr. Rene Elkin claims there are no objective findings on the neurological physical examination for any neurological injury incurred as a result of the accident. Dr. Elkin notes that the MRI studies of the cervical and lumbar spines report “non-specific disc bulging” that cannot be attributed to the accident with any medical certainty. (Exh. I). Furthermore, there are no objective findings for accident related neurological permanency and for any acute traumatic injury to the cervical or lumbar spines. Dr. Elkin believes that Samuel should be able to function just as she did prior to the accident.

Defendant also argues that speculative and conclusory opinions of Dr. Abramov and Dr. Goldenberg are not sufficient to rebut defendant’s prima facie showing of “lack of serious injury”. Further, defendant points to the plaintiff’s self-serving affidavit and transcript along with plaintiff’s counsel’s affidavit should not be entitled to any probative weight on the issue of “serious injury”.

Plaintiffs’ Opposition

Plaintiffs’ opposition argues that defendant failed to meet their burden of establishing a prima facie entitlement to summary judgment, and further contend that plaintiffs have sustained a “serious injury” within the meaning of § 5102 of the Insurance Law of the state of New York.

- **Moore**

First, plaintiffs submitted affirmed medical records from Dr. Vadim Abramov who last examined plaintiff Moore on October 21st, 2020. He performed range of motion testing with the use of a goniometer (Exh. A) and the following findings were present. The plaintiff exhibited a loss of range of motion in her lumbar spine. Specifically, flexion was 70/90, which represents a 23% loss of motion; extension was 25/30, which represents a 17% loss of motion and right and

left rotation were 35/45, which represents a 23% loss of motion. With respect to her cervical spine, the plaintiff exhibited a loss of range of motion in that area. Specifically, flexion was 45/50, which represents a 10% loss of motion, extension was 40/50, which represents a 20% loss of motion, right sided rotation and left sided rotation was 70/80, which represents a 34% loss of motion. Dr. Abramov placed the plaintiff on a treatment plan that consisted of physical therapy including modalities and therapeutic exercises. This plan continued 2-3 times per week for approximately 6 months. Per Dr. Abramov, plaintiff then went to receive MRI scans of her cervical and lumbar spine. The cessation of treatment was due to Dr. Abramov's opinion that there was no further benefit with continuing the treatment.

Plaintiff then submits the affirmation of Dr. Marc Katzman, MD., specializing in radiology who interpreted the plaintiffs MRI examinations that took place on June 27, 2018 (Exh. B). Dr. Katzman states plaintiff suffered from disc hydration loss noted throughout the cervical spine with diminished disc space height at C4/5 and CS/6. He further notes the remaining lumbar vertebral bodies and intervertebral discs to be unremarkable in height, alignment and signal the conus medullaris is unremarkable in signal, morphology and position.

- Samuel

In opposition, plaintiff Samuel submits affirmed medical records from Dr. Joyce Goldenberg who last saw the plaintiff on February 27, 2020. (Exh. E). She performed range of motion testing on the plaintiff with the use of a goniometer and the following findings were present. The plaintiff exhibited a loss of range of motion in her lumbar spine. Specifically, flexion was 65/85, which represents a 24% loss of motion; extension was 15/25, which represents a 40% loss of motion and right and left rotation were 35/45, which represents a 23% loss of motion. With respect to her cervical spine, the plaintiff exhibited a loss of range of motion in that area. Specifically, flexion was 35/45, which represents a 23% loss of motion, extension was 30/45, which represents a 34% loss of motion, right sided rotation and left sided rotation was 45/60, which represents a 25% loss of motion. Dr. Goldenberg placed the plaintiff on a treatment plan that consisted of physical therapy including modalities, soft tissues mobilization, active range of motion and strengthening exercises. This plan continued 2-3 times per week for approximately 8 months. Per Dr. Goldenberg, plaintiff then went to receive MRI scans of her neck and back. The plaintiff did return after the eight month period just less frequently. Dr. Goldenberg opines, with a

reasonable degree of medical certainty, that the subject accident was the “primary competent producing cause of the injuries” plaintiff Samuel now suffers. That plaintiff Samuel has suffered consequential limitation, as well as significant limitation, of both her cervical and lumbar spine.

Further, plaintiff submits affirmed medical records from Dr. Thomas M. Klob, a medical doctor specializing in the field of radiology. According to Dr. Klob, plaintiff suffered a disc herniation at C4-5 impinging upon the thecal sac, disc bulges at C5-6 and C6-7, and straightening of the normal cervical lordosis. Moreover, there is a shallow posterior disc herniation at L4-5 impinging upon the thecal sac and narrowing the inferior aspects of the neural foramina bilaterally and disc bulge at L3-4. (Exh. F).

Discussion

As to Sancious Moores’ alleged lumbar and cervical spine injuries, the Court finds that defendants carried their initial prima facie burden of demonstrating that plaintiff Sancious Moore did not sustain a serious injury resulting in either a “permanent consequential” or “significant” limitation through the affirmed reports of Dr. Renzoni, Dr. Elkin, and Dr. Salkin, which state there is no evidence of orthopedic disability, no permanency or residuals and that Sancious Moore is able to work. See, Kester v Sendoya, 123 A.D.3d 418 (1st Dept 2014). See also, Rodriguez v Abdallah, 51 A.D.3d 590 (1st Dept 2008). Similarly, as to plaintiff Amarylis Samuels’ alleged lumbar spine and cervical spine injuries, the Court finds that defendants met its initial prima facie burden of demonstrating that plaintiff Amarylis Samuel did not sustain a serious injury.

With the burden shifting onto plaintiffs, the Court next finds that plaintiffs met their burden of proof and raised a material issue of fact as to whether she sustained a “permanent consequential” or “significant” limitation. Dr. Abramov and Dr. Villafuerte affirmations for each plaintiff state that the injuries are both significant in nature and are causally related to the accident with sufficient objective findings and qualitative assessment. See, Linton v. Nawaz, 62 A.D.3d 434 at 439 (holding that plaintiff raised an issue of fact regarding causation as the doctor concluded that plaintiff’s symptoms were related to the accident based on a full physical examination of plaintiff). See also Ramkumar v. Grand Style Trans. Enter., 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013). Furthermore, Dr. Abramov and Dr. Villafuerte’s report established that any further treatment would be palliative in nature, thereby explaining any cessation in treatment. See, Pommells v. Perez, 4 N.Y.3d 566 (2005).

As to defendants' branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendants established its entitlement to summary judgment as the proof clearly shows plaintiffs did not miss work for 90 days out of the first 180 days immediately after the accident or that they were totally confined to bed or home. Plaintiffs' bill of particulars states that plaintiffs were confined to bed and home for approximately five days following the occurrence and remain partially disabled to date. Defendant established its prima facie burden through the affirmed reports of Dr. Renzoni and Dr. Salkin, who concluded that both plaintiffs could return to work and continue with their daily activities as they did prior to the accident. See, Gordon v. Hernandez, 18 A.D. 3d 424 (1st Dept 2020).

Further, plaintiffs' deposition transcripts illustrate that Sancious Moore testified that after the accident, she took trips to Disney World and Cancun which she flew to. Also, she claimed she now suffers from on and off pain when walking, climbing stairs, going to the gym, and anything involving her 6-year-old child (bathing, bending over). Amarylis Samuel testified during her deposition that after the accident, she can perform the same daily activities as she did prior to the accident just less frequently. This includes activities such as Zumba, running, the gym, and general exercise. Further, she has taken trips to Barbados and Jamaica following the accident. The effect of these admissions in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof. See Sanchez v. Oxcin, 157 A.D.3d 561, 69 N.Y.S.3d 623 (1st Dept 2018).

Conclusion

Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted only to the extent of dismissing the "90/180 day" claim and the permanent loss of use claim, and it is further

ORDERED, that the remaining branches of Defendant's motion are denied.

This constitutes the decision and order of the Court.

Dated: November 8, 2021

Hon. _____


BIANKA PEREZ, 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