

Wickman v Kastavis

2021 NY Slip Op 33936(U)

April 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 707387/2017

Judge: Chereé A. Buggs

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Short Form Order

FILED

NEW YORK SUPREME COURT-QUEENS COUNTY

**4/30/2021
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Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

**COUNTY CLERK
QUEENS COUNTY**

PENNY WICKMAN,

Index No. 707387/2017

Plaintiff,

Motion

Date: April 28, 2021

-against-

Motion Cal. No.: 25

PENELOPE G. KASTAVIS,

Motion Sequence No.: 3

Defendant.

The following e-file papers numbered EF 40-68 submitted and considered on this motion by defendant PENELOPE G. KASTAVIS (hereinafter referred to as "Defendant") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 granting summary judgment finding the plaintiff PENNY WICKMAN (hereinafter referred to as "Plaintiff") failed to meet the serious injury threshold pursuant to NY Insurance Law §§ 5102 (d) and 5104 (a) and for such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation- Exhibits.....	EF 40-53
Stipulations.....	EF 54-55
Aff. in Opp.- Exhibits.....	EF 56-62
Reply- Exhibits.....	EF 63-68

This is a negligence action arising out of a vehicle collision that occurred in the parking lot of North Shore Farms located at 770 Port Washington Boulevard, Town of Port Washington, County of Nassau, State of New York on June 17, 2013. Plaintiff alleges she was seated in her vehicle and legally parked when her vehicle was struck in the rear by Defendant. Plaintiff alleges injuries to her right shoulder, neck, arms, cervical and lumbar spine. Notably, Plaintiff was involved in two subsequent accidents. On October 7, 2013 Plaintiff was involved in a collision, she alleges injuries to her head, thoracic and lumbar spine. On June 10, 2015 Plaintiff was involved in a collision, she alleges injury to her lower back and left knee.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Serious Injury

Defendant, asserts that Plaintiff did not incur a "serious injury" as defined under NY Insurance Law §5102 (d) which reads as follows:

" 'Serious injury' means 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."

In support of her motion, Defendant submits independent medical examination reports from Dr. Jean-Robert Desrouleaux, M.D., a neurologist, (“Dr. Desrouleaux”) and Dr. Jay Eneman, M.D., an orthopedic surgeon, (“Dr. Eneman”).

Dr. Desrouleaux performed an independent neurologic examination of Plaintiff on June 25, 2018. Dr. Desrouleaux stated Plaintiff’s chief complaints were pain in the neck, mid/lower back and right shoulder. Plaintiff also complained of headaches. Plaintiff rated her pain as 8 out of 10. Plaintiff reported to Dr. Desrouleaux that her pain is sharp, achy and tingling in nature. That, she experiences radiating pain in her left arm and right leg and her right shoulder pain can be nagging sometimes.

Dr. Desrouleaux performed a range of motion test on Plaintiff using a hand-held goniometer. The values are in accordance with AMA Guidelines, Dr. Desrouleaux does not specify which edition he used. Dr. Desrouleaux recorded the following decreases in Plaintiff’s range of motion:

Lumbar Spine

Flexion: 50 degrees, 60 degrees normal

Rt. Lateral Bending: 20 degrees, 25 degrees normal.

Neurologic examination of the upper extremities revealed muscle testing to be 4/5 in Plaintiff’s right deltoid due to right shoulder pain. Dr. Desrouleaux opined exacerbation of the cervical spine degenerative disease, thoracic spine myofascitis and exacerbation of the lumbar spine degenerative disease are all resolved. According to Dr. Desrouleaux, there are no objective findings or permanency, Plaintiff is able to work without restriction and perform all her activities of daily living.

Dr. Eneman performed an independent orthopedic examination of Plaintiff on July 26, 2018. Plaintiff reported pain in her neck, mid/lower back and right shoulder. Dr. Eneman performed a range of motion test on Plaintiff using a hand-held goniometer in accordance with NYS WC and A.M.A. Guidelines, Dr. Eneman did not specify which edition he used.

Dr. Eneman recorded the following decreases in Plaintiff’s range of motion:

Cervical spine

Extension: 50 degrees, 60 degrees normal

Rt. Lateral Flexion: 40 degrees, 45 degrees normal

Lt. Lateral Flexion: 40 degrees, 45 degrees normal

Thoracic Spine

Flexion: 35 degrees, 45 degrees normal

Rt. Lateral Bending: 40 degrees, 45 degrees normal

Lft. Lateral Bending: 40 degrees, 45 degrees normal

Dr. Eneman noted minimal trapezii tenderness to light touch on the right. There was minimal paraspinal tenderness upon palpation of the lumbar spine. Dr. Eneman further noted, tenderness to palpation at the AC joint of the right shoulder.

According to Dr. Eneman, the sprains/strains of Plaintiff's cervical, thoracic, lumbar and right shoulder are resolved. Dr. Eneman opined there are no objective findings of permanency or disability, Plaintiff is capable of performing her daily activities and work without restriction.

Defendant points to *Cassandra Montgomery v Miguel Pena* (19 AD3d 288, 289 [1st Dept 2005]) where the defendants moved for summary judgment arguing plaintiff did not satisfy the serious injury threshold. The defendants presented evidence from independent medical examiners who found that plaintiff did not suffer from a orthopedic or neurologic disability. Additionally, defendants offered the reports of two radiologists one opined that the MRI of the plaintiff made within two months of the accident indicated that plaintiff suffered from preexisting degenerative conditions, the other stated an x-ray of plaintiff's right knee indicated an early stage of osteoarthritis with no evidence of fracture or gross destructive lesion (*id*). Furthermore, defendants presented the transcript of plaintiff where she testified that she injured her right knee in a fall nine years before the accident and injured her back in a car accident four months prior to the accident (*id*). The court found defendants established prima facie entitlement to judgment as a matter of law. In opposition, the court held plaintiff failed to present objective proof which would create a triable issue of fact (*id*). Plaintiff's treating physician failed to present an objective basis for the finding that plaintiff's alleged limitations were due to the subject accident rather than the prior traumatic events that plaintiff testified about (*id* at 290).

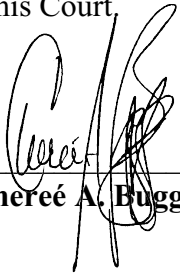
Defendant argues Plaintiff's conditions are pre-existing. Defendant points to Plaintiff's pre-accident medical records from Dr. Mitchell Weinstein, M.D. ("Dr. Weinstein"). On September 22, 2010, Plaintiff allegedly checked off that she has a history of back pain, headaches and loss of sleep. Within, Dr. Weinstein's records were the November 21, 2011 records from Dr. Sanford A. Ratzan ("Dr. Ratzan") where it was noted that Plaintiff had a history of scoliosis, arthritis and multiple degenerative disc disease. Dr. Ratzan stated that Plaintiff has marked dorsolumbar scoliosis with minimal restricted flexion beyond 90 degrees. Plaintiff was noted to have good hyperextension, rotation and lateral bend. On January 16, 2013 Plaintiff presented to South Shore Neurologic Associates, P.C. with pain in both feet, her legs, arms, face, and torso.

Defendant has established prima facie entitlement to judgment as a matter of law as to Plaintiff's lumbar spine and shoulder. However, Defendant does not establish prima facie entitlement to judgment as a matter of law as to Plaintiff's cervical spine. The records presented fail to establish that Plaintiff had a pre-existing condition as it relates to her cervical spine and Defendant's expert Dr. Eneman fails to address the decreases in the range of motion of Plaintiff's cervical spine that he recorded. Thus, despite its unreasonable lateness, this Court need not address the opposition papers as Defendant has not fulfilled her burden. Therefore it is,

ORDERED, that the motion is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: April 30, 2021



Hon. Chereé A. Buggs, JSC

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**COUNTY CLERK
QUEENS COUNTY**