

Morel v Carreras

2021 NY Slip Op 34106(U)

October 21, 2021

Supreme Court, Bronx County

Docket Number: Index No. 26315/2017E

Judge: Bianca Perez

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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MIGUEL A. MOREL, YASMIN A. GOMEZ and
GERMANIA MOREL MARTIN,

Index No. 26315/2017E

DECISION AND ORDER

Plaintiffs,

Hon. BIANKA PEREZ
Justice Supreme Court

-against-

RAMON A. CARRERAS, JACK CAR SERVICE CORP.,
JHOMATTAN CABRASSA and RICHARD LOPEZ FRIAS,
Defendants.

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The following papers numbered 1-6 were read on this motion (Seq. No. #002) for **SUMMARY JUDGMENT DEFENDANT** noticed on **March 30, 2021**.

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

Upon the foregoing papers, defendants move for summary judgment, dismissing the complaint of the plaintiff, GERMANIA MOREL MARTIN (hereinafter MARTIN) for her alleged failure to satisfy the “serious injury” threshold as defined by New York Insurance Law §5102(d). Plaintiff opposes the motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011])[internal quotations omitted]. A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendants established that Plaintiff, Martin’s alleged injuries to her left shoulder, cervical spine and lumbar spine, left hip and left ankle were not permanent or significant in nature. Defendants accomplished this by submitting a sworn report from Orthopedist, Dr. John H. Buckner, who found that all diagnostic testing was either normal or negative (*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]). While Dr. Buckner did not compare plaintiff’s range of motion values to normal values, he nevertheless examined plaintiff’s cervical spine and lumbar spine, and opined that there was no objective evidence of injury after administering diagnostic tests resulting in negative findings, and states the plaintiff, Martin can perform all of her daily activities, (*Rodriguez v. Konate*, 161 A.D.3d 565, 566 [1st Dept 2018]). Defendants also submit the sworn report from Dr. Eric Postal, a Board Certified Radiologist, who found that there was no evidence of recent traumatic injury to the left shoulder and opined that all findings show signs of aging and degeneration not causally related to the accident. In addition, defendants submit several reports of Dr. Audrey Eisenstadt, a Board Certified Radiologist, who found no evidence of recent traumatic injury to the left ankle, cervical spine and lumbar spine, who opined that all findings were degenerative in nature existing prior to the accident and also found no abnormalities on the left hip MRI. (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]).

In opposition to the motion, Plaintiff, Martin, raised a triable issue of fact as to whether she sustained a “permanent consequential” or “significant” limitation to her left shoulder, left hip, left ankle, cervical and lumbar spine. Plaintiff submitted the affirmation of Dr. Douglas A. Schwartz, who opined that plaintiff’s injuries are both permanent in nature and causally related to the accident (*see Linton v. Nawaz*, 62 A.D.3d 434 at 439). Plaintiff also addressed the issue of degeneration through Dr. Schwartz’s report stating he disagrees that the pain and reduction of motion experienced by the plaintiff were due to “degeneration” or “chronic” issues as suggested by Dr. Buckner in his report and he especially refutes the findings in the exam and finds that the injuries alleged are all causally related to the accident herein. At a recent examination, Dr. Schwartz continued to find significant range-of-motion limitations in plaintiff’s left shoulder, left ankle, left hip and cervical and lumbar spine. He opines that Plaintiff was not able to perform her usual daily and customary activities the first 90 out of 100 days after the accident.

The above submissions are sufficient to raise fact issues as to whether Plaintiff sustained a “permanent consequential” or “significant” limitation of use of her left shoulder, left hip, left ankle and cervical and lumbar spine as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]).

Defendants established that plaintiff did not sustain a serious injury under the 90/180-day category by relying on plaintiff’s testimony at her deposition where she testified she was confined to bed for just three days and home for just two weeks immediately following the accident (*see Fuentes v Sanchez*, 91 AD3d 418, 420 [1st Dept 2012]). However, in opposition, plaintiff raised an issue of fact by submitting an affirmation of her physician opining that plaintiff was totally disabled and unable to perform all of her daily and customary activities for more than 90 days following the accident, which corroborated her testimony that she was unable to perform her daily activities for over 8 months following the accident see *Kaakyire v. Soto*, 197 A.D.3d 1040 [1st Dept 2021]; *Lazzari v Qualcon Constr., LLC*, 162 AD3d 440, 441-442 [1st Dept 2018]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]). If plaintiff prevails on her 90/180-day or other serious injury claims, she will be entitled to recover damages to compensate her for all injuries caused by the accident, whether or not they meet the meet the serious injury threshold (*see Vishevnik v Bouna*, 147 AD3d 657, 658 [1st Dept 2017]; *Martinez*, 95 AD3d at 683).

Finally, the there is no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]), death, dismemberment, or fracture.

Conclusion

Accordingly, it is hereby

ORDERED, that Defendants’ motion for summary judgment is granted to the extent of dismissing Plaintiff, GERMANIA MOREL MARTIN’s claims that she sustained a “permanent loss of use” claim, and it is further,

ORDERED, that Defendants’ motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: October 21, 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