

Innocent v Golden Touch Transp. of NY, Inc.

2021 NY Slip Op 34172(U)

February 26, 2021

Supreme Court, Queens County

Docket Number: Index No. 709998/2018

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
CASSANDRE INNOCENT,

Plaintiff,

-against-

GOLDEN TOUCH TRANSPORTATION OF NY, INC.
and "JOHN DOE" (The Name being fictitious and Intended
to Designate the Driver of the Bus)

Defendant(s)
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Present: **HONORABLE ULYSSES B. LEVERETT:**

Index No.:709998/2018

Motion Seq. No.002

Decision and Order



Notice of Motion-Affirmation-Exhibits.....	<u>EF-28-30</u>
Affirmation in Opposition-Exhibits	<u>EF-31-32</u>
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Upon the foregoing papers, it is ordered that defendants' motion for an order restoring the "marked off" summary judgment motion pursuant to CLPR § 3212 is granted. Defendant's motion for an order granting summary judgment and dismissing plaintiff's complaint on the grounds that plaintiff's injuries are not causally related to the subject accident and that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is denied.

Defendants assert that its default in answering the February 5, 2019 motion calendar is excusable because counsel had checked in and it was the intention of both sides to adjourn the matter for plaintiff to serve opposition papers. Defendants allege that counsel went to another part to answer the calendar for another matter and upon returning to the Part was told that the calendar call was missed. Defendants also allege that they have a meritorious defense in that the plaintiff cannot show that she has sustained an injury that would pierce the serious injury requirement mandated by the New York Insurance Law.

Plaintiff Cassandre Innocent seeks to recover for personal injuries allegedly sustained as a result of a one vehicle accident which occurred on February 4, 2018 at or near the JFK airport employee parking lot, County of Queens, State of New York.

Plaintiff Cassandre Innocent asserts that on February 4, 2018, she was a passenger in the motor omnibus owned by defendant Golden Touch Transportation of NY, and operated by defendant John Doe within the scope of his employment. Plaintiff alleges that she was severely injured when the bus stopped abruptly, suddenly, violently and without warning while she was standing and that she fell to the floor of the bus. Plaintiff alleges that as a result of defendants' negligence, she sustained severe and permanent injuries to her neck, mid back, lower back and left wrist and that she missed six months of work.

Insurance Law § 5102(d) defines a "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 permanent nature which prevents the injured from performing substantially all of the material acts, which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendant alleges that plaintiff has not suffered a serious injury within the meaning of the No fault Law. In support of the claim, defendants submitted an orthopedic evaluation of plaintiff dated July 30, 2019 by Dr. Eial Faierman, a Board Certified Orthopedist, who examined plaintiff using a goniometer and reviewed plaintiff's medical records. Dr. Faierman reports that the examination of plaintiff's cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees (normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). Dr. Faierman found normal deep tendon reflexes in the biceps, triceps and brachioradialis tendons.

Plaintiff's lumbar spine range of motion examination found flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left rotation to 30 degrees (normal 30 degrees), lateral flexion bilaterally 25 degrees (normal 25 degrees). Full range of motion of both hips, flexion to 100 degrees (normal 100 degrees), extension 30 degrees (normal 30 degrees), external rotation 50 degrees (normal 50 degrees), abduction 40 degrees (normal 40 degrees), and good dorsalis pedis pulses bilaterally.

Plaintiff's wrist/hands examination found full range of motion of all the hand joints. Finger motion is MP 0-100 degrees (normal 0-100 degrees), PIP 0-120 (normal 0-120 degrees), Full range of motion of the wrist joint in extension to 60 degrees (normal 60 degrees), flexion 60 degree (normal 60 degrees), supination 80 degrees (normal 80 degrees), pronation 80 degree (normal 80 degrees). Both upper extremities are neurovascularly intact distally.

Dr. Faierman reviewed medical records from the Fort and Ankle Center of Fort Lee and asserts that plaintiff stated that she has a past medical history of three previous motor vehicle accidents and that plaintiff reinjured her neck and lower back and sustained injuries to her left wrist in the instant accident. Dr. Faierman states that there have been multiple injuries to the cervical spine with likely preexisting degenerative changes throughout the cervical spine and in his medical opinion, does not believe there is any objective findings of traumatic pathology in the cervical spine or in the 6/4/2018 lumbar spine MRI report related to the subject accident. The 6/13/2018 left wrist MRI report found no ligamentous tears, fractures, dislocations or subluxations. Dr. Faierman opines that there is no residual pathology in the left wrist related to the subject accident. Dr. Faierman found that plaintiff's examination of the shoulder and hip/leg and ankle were normal and that plaintiff has full range of motion and no objective evidence of impingement or internal derangement. In summary, Dr. Faierman states that there are no objective findings of any permanency or residual traumatic pathology on examinations of the cervical and lumbar spine, bilateral shoulders, or bilateral wrist/hands related to the subject accident. Dr. Faierman states that plaintiff is capable of performing her normal activities of daily living without restrictions.

Defendants submitted a sworn report dated July 9, 2019 by Dr. Adam Mednick, a board certified neurologist who performed a neurological exam of the plaintiff and reviewed plaintiff's medical records. Dr. Mednick found plaintiff's cervical and lumbar spine was normal with full range of motion in all planes. Plaintiff has full muscle strength and was neurologically intact in

both the upper and lower extremities. There was no objective evidence of cervical or lumbar radiculopathy. Dr. Mednick asserts that plaintiff has a significant history of neck and back injuries along with treatment and that based on the examination findings and available medical records there is no disability or permanency relating to the subject accident. Plaintiff can perform her regular activities of daily living and continue to work without restrictions or limitations.

Plaintiff in opposition to defendants motion to restore this action to the calendar and for summary judgment asserts that defendant failed to provide a reasonable excuse for their failure to appear at the previous calendar call and has not shown a meritorious defense to this action and that plaintiff has sustained a serious injury as defined under Insurance Law 5102.

Plaintiff submitted a 3/2/2020 sworn affidavit by Dr. Simon Ryoo, a board certified radiologist who reviewed the 6/4/2018 MRI films of plaintiff's lumbar spine and stated that the MRI revealed (1) L5-S1, 2mm broad based central disc herniation impresses of the thecal sac and (2) straightening of the lumbar lordosis. Plaintiff's 6/4/2018 MRI of the cervical spine revealed (1) C2-C3 annular disc bulge impresses on the thecal sac, (2) C6-C7 2mm central disc herniation impresses on the thecal and (3) straightening of the cervical lordosis.

Plaintiff submitted a sworn report dated March 16, 2020 from Dr. Scott Leist, a chiropractor who last examined plaintiff on 3/9/2020 and reviewed Dr. Simon Ryoo's review of plaintiff's lumbar and cervical spine MRI's and certified medical records from Larry Cinicola, DPT. Plaintiff's examination of her cervical spine with the assistance of a goniometer revealed a 40% restriction of flexion, 50% restriction of extension, 50% restriction of right lateral flexion, 40% restriction of left lateral, 60% restriction of right rotation and 47% restriction of left rotation.

Plaintiff's lumbar spine exam revealed 50% restriction of flexion, 29% restriction of extension, 29% restriction of right lateral flexion, 14% restriction of left lateral flexion, and 14% restriction of right/left rotation. Dr. Leist states that based on the abnormal MRI of the lumbar and cervical spine and his objective range of motion testing, he can state within a reasonable degree of chiropractic certainty that the subject accident caused, precipitated, aggravated and/or exacerbated plaintiff's injuries that are permanent in nature, non degenerative, and has prevented and/or impaired plaintiff from engaging in her normal activities. Dr. Leist states that he has found plaintiff to be 100% impaired due to the injuries sustained in the subject accident.

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use and a "permanent consequential limitation of use of a body organ or member requires an even greater degree of proof that a significant limitation. See *Licari v Elliot*, 57 NY2d 230 (1982)

It is well established that the proponent of 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 issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

The Court finds that there are issues of fact as to whether plaintiff sustained a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system. The medical evidence submitted by plaintiff establishes significant loss

of range of motion of the cervical and lumbar spine. Dr. Leist has continually found significant restrictions in all aspects of plaintiff's lumbar and cervical spine for over 24 months following the subject accident. The affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Accordingly, defendant's motion for an order restoring the "marked off" summary judgment motion pursuant to CLPR § 3212 is granted. Defendant's motion for an order granting summary judgment and dismissing plaintiff's complaint on the grounds that plaintiff's injuries are not causally related to the subject accident and that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is denied.

This is the decision and order of this Court.

Dated: February 26, 2021


Ulysses B. Leverett, JSC

