

Marshall v Suzuki

2021 NY Slip Op 34177(U)

June 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 708882/2018

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
SHANNON T. MARSHALL,

Plaintiff,

-against-

LONNIE SUZUKI, DANGELO CORP.,
LUIS D. ABUD CASTILLO,

Defendants.
-----X

Index No.:708882/2018

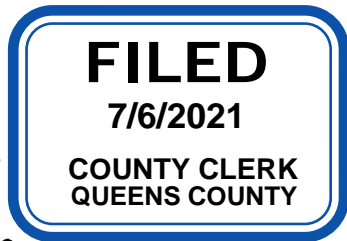
Motion Seq. No. 004

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERETT:**

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Upon the foregoing papers, it is ordered that defendant s Dangelo Corp., and Luis D. Abud Castillo’s motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiff Shannon T. Marshall on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law § 5102 (d) is denied. Defendant Lonnie Suzuki’s cross motion on the issue of liability and for failure to meet the serious injury threshold requirement as mandated by Insurance Law § 5102 (d) is denied. Plaintiff’s cross motion for an order pursuant to CPLR § 3212 granting plaintiff summary judgment on the issue of serious injury pursuant to Insurance Law § 5102 (d) is denied. Plaintiff’s cross motion regarding liability and striking defendants’ affirmative defense of comparative negligence is granted. Defendants Dangelo Corp., and Luis D. Abud Castillo’s cross motion for an order pursuant to CPLR § 3212 dismissing the complaint and granting summary judgment in favor of defendants Dangelo Corp., and Luis D. Abud Castillo on the issue of liability is granted.

Plaintiff Shannon T. Marshall seeks to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on February 14, 2018 Eastbound on the Grand Central Parkway near 33rd Street at or near the intersection of 30th Avenue and 70th Street, County of Queens, State of New York.

Plaintiff Shannon T. Marshall asserts that on February 14, 2018, she was a back seat passenger in defendant Luis D. Abud Castillo's Uber vehicle when a vehicle owned by defendant Dangelo Corp. and operated by defendant Lonnie Suzuki struck the passenger side of the Castillo vehicle. Plaintiff states that as a result of the collision, she sustained injuries to her neck, lower back, right shoulder and left knee.

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 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendants Dangelo Corp., and Luis D. Abud Castillo's move for an order granting summary judgment and dismissing the complaint. In support of the motion, defendants assert that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d). Defendant submitted a sworn report dated June 19, 2018 by Dr. Eric S. Roth, a board certified acupuncturist who states that he performed a physical medicine and rehabilitation examination on plaintiff on 6/19/2018 with the use of handheld goniometer or an inclinometer and reviewed plaintiff's medical records. Dr. Roth 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), bilateral lateral bending 45 degrees (normal 45 degrees, bilateral rotation 80 degrees (normal 80 degrees). There was no evidence of paracervical muscle spasm or atrophy.

Plaintiff's lumbar spine range of motion examination found flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), bilateral bending to 25 degrees (normal 25 degrees). There was no paralumbar muscle spasm and no loss of the normal lumbar lordosis. Straight leg raising was bilaterally full and pain free at 70 degrees (normal 70-90 degrees).

Examination of the thoracic spine revealed flexion 45 degrees (normal 45 degrees), extension to 0 degrees (normal 0 degrees), right/left rotation to 30 degrees (normal 30 degrees), right/left lateral bending to 45 degrees (normal 45 degrees).

Plaintiff's right shoulder range of motion examination revealed abduction to 180 degrees (normal 180 degrees), flexion to 180 degrees (normal 180 degrees), extension to 40 degrees (normal 40 degrees), adduction to 30 degrees (normal 30 degrees), internal rotation to 80 degrees (80 degrees normal), external rotation 90 degrees (normal 90 degrees). There was no erythema, ecchymosis, swelling or tenderness. There was no weakness of the shoulder girdle muscles or instability of the right shoulder.

Plaintiff's left shoulder range of motion examination revealed abduction to 180 degrees (normal 180 degrees), flexion to 180 degrees (normal 180 degrees), extension to 40 degrees (normal 40 degrees), adduction to 30 degrees (normal 30 degrees), internal rotation to 80 degrees (80 degrees normal), external rotation 90 degrees (normal 90 degrees). There was no erythema, ecchymosis, swelling or tenderness. There was no weakness of the shoulder girdle muscles or instability of the left shoulder.

Examination of the left/right knee range of motion revealed extension of 0 degrees (normal 0 degrees), flexion to 150 degrees (normal 150 degrees). There was no erytherma, ecchymosis, swelling or tenderness. There was no effusion or ligamentous laxity in the knee.

Dr. Roth's diagnosis was cervical and lumbosacral sprain/strain, resolved; right shoulder sprain, s/p arthroscopic surgery, resolved; left knee tendinitis, resolved; Qi and Blood Stagnation, resolved. Dr. Roth concludes that there is no disability and that plaintiff may perform her usual occupational duties as a tower operator and participate in household activities and activities of daily living without restrictions.

Defendant submitted a sworn report dated September 15, 2020 by Dr. Thomas P. Nipper, a board certified orthopedic surgeon who reviewed plaintiff's medical records and performed an independent orthopedic examination of plaintiff's injuries. Dr. Nipper stated that ranges of motion were measured with the use of a goniometer. Plaintiff's cervical spine range of motion testing revealed flexion to 50 degrees (50 degrees normal), extension to 50 degrees (50 degrees normal), right/left lateral bend 35 degrees (45 degrees normal), right/left rotation to 70 degrees (80 degrees normal). Palpation of the paraspinal muscles and trapezius was negative for tenderness or spasm. A normal cervical lordosis was observed.

Plaintiff's lumbar spine range of motion examination found forward flexion 50 degrees (normal 50 degrees), extension to 25 degrees (normal 25 degrees), right/left lateral bending to 25 degrees (normal 25 degrees), straight leg raising testing was performed and was negative to 90 degrees bilaterally. Palpation of the paralumbar muscles and negative for tenderness or spasm.

Right Shoulder range of motion examination revealed abduction to 180 degrees (normal 180 degrees), flexion to 180 degrees (normal 180 degrees), extension to 50 degrees (normal 40 degrees), adduction to 30 degrees (normal 30 degrees), internal rotation was normal to the L1 level, external rotation 90 degrees (normal 90 degrees). Impingement testing was negative bilaterally. No crepitus was found on range of motion.

Examination of the left knee range of motion revealed extension of 0 degrees bilaterally (normal 0 degrees), flexion of 130 degrees bilaterally (normal 130 degrees). There was no erytherma, ecchymosis, swelling or tenderness. There was no tenderness to palpation over the medial or lateral joint lines. No swelling or effusion was present.

Dr. Nippers review of plaintiff's lumbar spine, left knee and cervical spine MRI all revealed that there was no evidence of an acute traumatic injury and that the findings are all consistent with degenerative changes.

Dr. Nipper's diagnosis was cervical and lumbosacral sprains, resolved; right shoulder sprain, resolved, left knee sprain, resolved. Dr. Nipper concludes that plaintiff is able to perform her usual activities of daily living without restrictions.

Defendant submitted a sworn report dated June 19, 2018 by Dr. George J. Cavaliere, a board certified radiologist who reviewed plaintiff's 3/4/2018 left knee MRI. Dr. Cavaliere's findings revealed no evidence of post traumatic change, no meniscal or ligamentous tear and a small joint effusion. Plaintiff's 3/4/2018 right shoulder MRI review revealed hypertrophic change of the acromioclavicular joint that is degenerative in nature. There is no evidence of post traumatic

change.

Once the proponent of a motion for summary judgment has set forth a prima facie case that an injury is not serious, under no-fault statute, the burden then shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was serious. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

Plaintiff in opposition to the motion states that defendant has not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) and that plaintiff has raised triable issues of fact that she did indeed sustain a serious injury. Plaintiff submitted a physician affirmation dated March 13,, 2018 by Dr. Bradley R. Wasserman, who performed an orthopedic evaluation of plaintiff's right shoulder and left knee with a hand held goniometer. The examination of plaintiff's right shoulder range of motion revealed forward flexion to 180 degrees, abduction 180 degrees, external rotation 90 degrees, internal rotation 80 degrees, motor strength: 5/5 of the supraspinatus and external rotators. Left shoulder range of motion revealed forward flexion to 180 degrees, abduction 180 degrees, external rotation 90 degrees, internal rotation 80 degrees, motor strength: 5/5 of the supraspinatus and external rotators. Dr. Wasserman performed arthroscopic surgery on plaintiff on April 30, 2018.

Left knee evaluation revealed healed scars consistent with prior surgery. Small effusion, no erythema or warmth. Range of motion 0-115 degrees and tenderness to palpation over the lateral and medial joint lines and pain with patellar compression. Right knee revealed no effusion, erythema, or warmth. Range of motion 0-130 degrees. Non tender to palpation.

Dr. Wasserman's assessment revealed right shoulder rotator cuff tear, subacromial impingement, biceps tendinitis, left knee pilca syndrome. Dr. Wasserman states that with a reasonable degree of medical certainty, the subject accident is causally related to plaintiff's right shoulder and left knee injuries.

Plaintiff submitted a physician affirmation dated April 9, 2018 by Dr. Thomas S. Mathew who last evaluated plaintiff on 4//9/2018. Range of motion testing of cervical spine revealed Plaintiff's cervical spine range of motion testing revealed flexion to 45 degrees (normal 50 degrees), extension to 45 degrees (normal 60 degrees), right/left lateral bend 35 degrees (45 degrees normal), right/left rotation to 75 degrees (80 degrees normal). Plaintiff did have some tenderness to palpation in the cervical paraspinal musculature and trapezius musculature with muscle spasming.

Plaintiff's lumbar spine range of motion testing revealed flexion to 70 degrees (90 degrees normal), extension to 25 degrees (30 degrees normal), right/left lateral bend 30 degrees (40 degrees normal), right/left rotation to 70 degrees (80 degrees normal). Plaintiff had negative straight leg raise bilaterally.

Right Shoulder range of motion examination revealed abduction to 90 degrees (normal 180 degrees), flexion to 130 degrees (normal 180 degrees). Plaintiff has significant tenderness to palpation in the anterior aspect of the shoulder. Left knee evaluation range of motion revealed extension and flexion was 0-120 degrees (normal 0-130 degrees). Plaintiff has some slight tenderness to palpation in the medial aspect of the knee.

Dr. Mathew's assessment is C3-C3 and C5-C6 disc hernialtion; C6-C7 posterior disc bulge,

L4-L5 herniation with canal stenosis and foraminal stenosis, L3-L4 posterior disc bulge, right shoulder internal derangement including full thickness tear of the supraspinatus tendon; left knee pain; medial patellar plica and lateral subluxation and tilt; intermittent right upper extremity paresthesias; possible right cervical radiculitis versus entrapment neuropathy (such as median neuropathy).

Plaintiff submitted a physician affirmation dated November 20, 2020 by Dr. Leon Reyfman, a board certified anesthesiologist and pain management physician who reviewed plaintiff's medical records and examined plaintiff on 8/1/2018. Dr. Reyfman performed a C5-6 cervical percutaneous discectomy. Dr. Reyfman found limited range of motion involving rotation, lateral bending, flexion as well as multiple trigger points including supra and infraspinatus. Dr. Reyfman disagrees with defendants' Dr. Nipper that plaintiff's herniated discs, tears, and resulting symptoms were all pre-existing and degenerative. Dr. Reyfman states that upon his most recent examination of plaintiff, he found objective evidence of injury. He objectively measured the range of motion of plaintiff's cervical, lumbar spine and right shoulder, finding 10% to 25 % limitations of motion of virtually all planes when compared to normal ranges of motion.

Dr. Reyfman states that with a reasonable degree of medical certainty, plaintiff was disabled from her employment and unable to perform substantially all of her usual daily activities for more than 90 of the 180 days immediately following the 2/14/2018 accident.

Plaintiff cross moves for an order granting her motion for summary judgment on the issue of no-fault threshold. Defendant Lonnie Suzuki also cross moves for an order granting him summary judgment on the no-fault threshold and opposes plaintiff's motion for summary judgment on the issue of no-fault threshold. Plaintiff opposes defendant Lonnie Suzuki's cross motion adopting the arguments of co-defendants contending that plaintiff who as a result of the subject accident failed to sustain serious injuries as a result of the subject accident.

Defendants Dangelo Corp. and Luis D. Abud Castillo in opposition and reply to plaintiff's summary judgment motion on the issue of threshold assert that they have met their prima facie showing that plaintiff did not sustain a serious injury.

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 movant has the initial burden of proving entitlement to summary judgment, and failure to make such a showing by evidence in admissible form requires a denial of the motion, regardless of the sufficiency of the opposing papers. See *Alvarez v Prospect Heights*, 68 NY 2d 320 (1986).

The Court finds that the medical evidence submitted by plaintiff in support of the motion for summary judgment raised genuine issue of material facts as to whether plaintiff suffered a serious injury within the meaning of No fault Law precluding summary judgment. When there are contradictory reports between the parties' physicians, there is an issue of fact and credibility that must be left for a jury to determine. The conflicting findings of the doctors are alone sufficient to create a triable issue of medical fact. See *Pagano v Kingsbury*, 182 AD 2d 268 (1992).

Accordingly, defendants Dangelo Corp., and Luis D. Abud Castillo's motion and ,

defendant Lonnie Suzuki's cross motion for an order pursuant to CPLR § 3212 granting summary judgment in favor of defendants and dismissing the complaint on the grounds that there are no triable issues of fact, in that plaintiff Shannon T. Marshall cannot meet the serious injury threshold requirement as mandated by New York Insurance Law § § 5102 (d) and 5104 (a) is denied. Plaintiff's cross motion for summary judgment on the issue of serious injury is denied.

Plaintiff Shannon T. Marshall cross moves for summary judgment on the issue of liability and comparative negligence. Plaintiff asserts that at the time of the accident, she was a passenger in the Uber vehicle owned by defendant Dangelo Corp. and operated by defendant Luis D. Abud Castillo and states that as a passenger, she has no culpable conduct in this matter. Plaintiff states that defendant Lonnie Suzuki's vehicle attempted to change lanes from the right lane to the middle lane in order to pass a slow moving vehicle and sideswiped the Uber vehicle in which plaintiff was a passenger.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case. See *Rodriguez v City of New York*, 31 NY 3d 312 (2018). The Court finds that plaintiff is an innocent passenger and finds no liability attributable to plaintiff Marshall.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability against defendants Lonnie Suzuki and Dangelo Corp. and Luis D. Abud Castillo with no comparative negligence by plaintiff is granted.

Defendants Dangelo Corp. and Luis D. Abud Castillo cross move pursuant to CPLR § 3212 dismissing the complaint and granting summary judgment to defendants Dangelo Corp and Luis D. Abud inasmuch as plaintiff has failed to establish liability on the part of the defendants Dangelo Corp and Luis D. Abud.. Defendant Castillo asserts that he was traveling in the middle lane when he was sideswiped by co-defendant Lonnie Suzuki's vehicle while the Suzuki vehicle was attempting an unsafe lane change into Castillo's lane of travel. Moving defendants state that defendant Suzuki admits that he did not see the Dangelo vehicle when changing lanes and that there was nothing defendant/driver Castillo could do to avoid the accident.

Plaintiff in opposition to Dangelo Corp. and Luis D. Abud Castillo's motion for summary judgment on the issue of liability asserts that defendant Luis D. Abud Castillo conclusory affidavit is insufficient to demonstrate a prima facie entitlement to summary judgment as it fails to demonstrate that he kept a proper look out, or that his alleged negligence, if any, did not contribute to the accident. Plaintiff states that defendant Castillo failed to see the Suzuki vehicle as it changed lanes prior to the impact.

Defendant Lonnie Suzuki in opposition to defendants Dangelo Corp. and Luis D. Abud Castillo motion for summary judgment on the issue of liability asserts that there are issues of fact as to the proximate cause of the subject accident and as to whether Dangelo Corp. and Luis D. Abud Castillo were negligent in the happening of the accident and that the motion is premature because discovery is not complete.

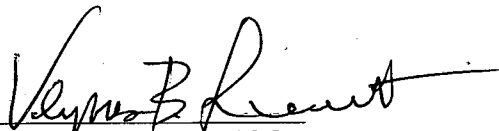
Here, defendant Lonnie Suzuki states that he did not see the Dangelo vehicle nor did he see

any headlights in the left lane before entering the left lane. Vehicle and Traffic Law Section 1129 (a) states that “an unsafe lane change is when a driver moves from his/her exiting lane on a roadway into another lane without signaling and/or checking to ensure that it is safe to do so”. It is well settled law that a driver is bound to see what is there to be seen and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield. See *Laino v Lucchese*, 35 AD 3d 672 (2006). The Court finds that defendants Dangelo Corp. and Luis D. Abud Castillo motion is not premature. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion as being premature. See *Torres v Beth Israel Medical Center*, 134 AD 3d 1097 (2015).

Accordingly, Defendants Dangelo Corp. and Luis D. Abud Castillo cross motion pursuant to CPLR § 3212 dismissing the complaint and granting summary judgment to defendants Dangelo Corp and Luis D. Abud on the issue of liability is granted.

This is the decision and order of this Court.

Dated: June 30, 2021


Ulysses B. Leverett, JSC

