

Wiggins v McLeish
2022 NY Slip Op 30008(U)
January 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 507489/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

ALEXIS WIGGINS,

Plaintiff,

DECISION/ORDER

-against-

**Index No. 507489/2017
Motion Seq. No. 6 & 7**

**ANTHONY McLEISH, individually and
d/b/a A & G TRUCKING, and SAMUEL SEJOUR,**

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Sejour's motion for summary judgment and defendant McLeish's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>71-91</u>
Notice of Cross Motion, Affirmations, Affidavits, and Exhibits Annexed...	<u>94-95</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>96-102,103-109</u>
Reply Affirmation.....	<u>110, 111</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In this personal injury action arising from a motor vehicle accident, defendant Samuel Sejour moves, and co-defendant Anthony McLeish (sued "individually and d/b/a A & G Trucking") cross-moves, for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, based upon their contention that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d).

The accident in question occurred on April 11, 2016 at the intersection of Meeker Avenue and Union Avenue in Brooklyn, New York. At the time of the accident, the plaintiff was a passenger, seated in the rear seat of a taxi, owned and operated by defendant Samuel Sejour. Co-defendant was driving a truck. The vehicles collided in the intersection. Plaintiff claims (in her Bill of Particulars) that she sustained injuries to her

cervical and lumbar spine, and to her right shoulder. She was removed from the scene of the accident in an ambulance and was taken to Woodhull Hospital Emergency Room. At the time of the accident, plaintiff was twenty-two years old. Defendant Sejour also brought suit against co-defendant McLeish, Ind. 504165/2018. The two actions were joined for trial pursuant to an order dated August 16, 2018.

The defendants' motion and cross motion rely upon the same proof and arguments. In support of the motions, the defendants offer plaintiff's EBT, affirmed reports from three doctors, Dr. Michael Russ, a physical medicine and rehabilitation doctor; Dr. Kevin Portnoy, a chiropractor; and Dr. Gregory Chiaramonte, an orthopedist. At the outset, the court notes that it did not consider the report from Dr. Portnoy, a chiropractor, as his report was not presented in the form of an affidavit. It is in the form of an affirmation, notarized at the end. This is insufficient (See, CPLR 2106; *Doumanis v Conzo*, 265 AD2d 296 (2d Dept 1999)).

The branch of the motions for leave to make late motions, due to the Pandemic and late completion of discovery, is granted with respect to both motions.

During the independent medical exams that they conducted of the plaintiff's cervical spine and upper extremities, both Dr. Russ and Dr. Chiaramonte noted that there was no muscle spasm upon palpation of the paracervical muscles, that the plaintiff's cervical ranges of motion were normal, that the muscle strength in her upper extremities was 5/5, that no atrophy was noted, and that deep tendon reflexes were 2+. In their exams of the plaintiff's lumbar spine and lower extremities, both Dr. Russ and Dr. Chiaramonte noted that there was no muscle spasm upon palpation of the paralumbar muscles, that the plaintiff's lumbar ranges of motion were normal, that muscle strength in the lower extremities was 5/5, there was no atrophy, and her reflexes were 2+. Upon examination of

the plaintiff's right shoulder, Drs. Russ and Chiaramonte found that the plaintiff had full range of motion and that there was no sign of crepitus.

Both doctors conclude that the plaintiff sustained sprains and strains to her cervical spine, lumbar spine, and right shoulder, all of which have resolved. Dr. Russ opines that "[t]here is no objective evidence of a disability. The claimant is capable of performing her activities of daily living and full-time employment without any restrictions or limitations." Dr. Chiaramonte similarly opines that "[t]here is no evidence of orthopedic disability, permanency or residuals" and that the plaintiff "is capable of working without restrictions" and "can perform her activities of daily living as she was doing prior to the accident."

Plaintiff testified at her EBT that she missed one month from work, [Doc 81, Page 80] so, with regard to the "90/180" category of injury, defendants have established that plaintiff did not have an injury that meets the requirements.

The Court finds that the defendants have made a *prima facie* showing of their entitlement to summary judgment and have shifted the burden of proof to the plaintiff.

In opposition to the motion, the plaintiff offers an affidavit and certified records from her treating chiropractor, Dr. David Burg. Dr. Burg reports that he examined the plaintiff for the first time on April 12, 2016 and began treating her on April 14, 2016. At her first visit, Dr. Burg noted that the plaintiff had reduced ranges of motion in her cervical and lumbar spine when measured with a digital dual inclinometer. Dr. Burg noted that the plaintiff also complained of pain in her cervical and lumbar spine when moving, and that palpation of the both the cervical spine and the lumbar spine revealed tenderness and muscle spasm of the paravertebral musculature bilaterally. Plaintiff also complained of radiating pain in both shoulders, with numbness and tingling in the right arm. The chiropractor did not test

the range of motion in her shoulder, presumably because he considered the problem as related to her cervical spine.

During the more than five-month long period that the plaintiff treated with Dr. Burg, he referred her for neurological testing as well as MRIs of her cervical and lumbar spine. The neurological records, although annexed, are not in admissible form and, as such, were neither reviewed nor considered by the court in determining this motion. The plaintiff also submits an affirmation from the radiologist who interpreted her MRI films, Dr. Ajit Belliappa, as well as copies of the MRI reports that he generated after reading the plaintiff's films. In his affirmation, Dr. Belliappa states that the MRI of the cervical spine revealed disc herniations with impingement on the thecal sac at both the C5-6 and C6-7 levels, and that the MRI of the lumbar spine revealed a herniated disc impinging on the thecal sac at the L5/S1 level. In his affidavit, Dr. Burg causally relates the plaintiff's herniated discs and loss of range of motion to the accident of April 11, 2016. Dr. Burg also points out that the plaintiff was only 22 years old on the date of the accident, with no history of any prior accidents or injuries.

In January of 2021, Dr. Burg re-examined the plaintiff and measured her range of motion, utilizing a digital dual inclinometer. Dr. Burg reports that, at the exam in January of 2021, the plaintiff still had reduced ranges of motion across all ranges of movement, in both her cervical and lumbar spine. He also noted that the plaintiff is still experiencing pain during movement of both her cervical and lumbar spine. Dr. Burg concludes his report by opining that the plaintiff's injuries "resulted in limitations and restrictions that are significant", and further opines that the injuries are "extremely serious considering the severe limitations" in movement that he noted in his exams. Finally, Dr. Burg states that

the plaintiff's injuries are "causally related to the accident" and are "permanent and progressive in nature."

Based upon the foregoing, the court finds that the plaintiff has sufficiently raised triable issues of fact regarding her claims of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system", so as to warrant denial of the defendants' motions for summary judgment.

In conclusion, plaintiff's treating doctors' affirmed reports are sufficient to overcome the motions and raise an issue of fact as to whether plaintiff sustained a "serious" injury" as a result of the subject accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). These reports indicate significant, quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and more recently, and these doctors opine that plaintiff's injuries were caused by the subject accident. Thus, they raise a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial and the denial of both motions.

Accordingly, it is **ORDERED** that defendants' motions for summary judgment are both denied.

This constitutes the decision and order of the court.

Dated: January 3, 2022

ENTER :



Hon. Debra Silber, J.S.C.