

Coleman v Dyskolo, Inc
2022 NY Slip Op 30010(U)
January 4, 2022
Supreme Court, New York County
Docket Number: Index No. 156170/2018
Judge: Lisa Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22

Justice

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VERONICA COLEMAN,
Plaintiff,

- v -

DYSKOLO, INC, JOHN DOE
Defendant.

INDEX NO. 156170/2018
MOTION DATE 10/14/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS

Upon the foregoing documents, it is hereby ORDERED that defendant Dyskolo Inc.'s (hereinafter "defendant") motion for summary judgment dismissing the complaint on the ground that the plaintiff, Veronica Coleman's (hereinafter, "plaintiff"), claimed injuries do not satisfy the "serious injury" threshold under New York Insurance Law §§ 5102(d) is denied. Plaintiff filed opposition papers.

Plaintiff commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on April 13, 2017. Plaintiff alleges that the car in which she was a passenger was traveling on East 35th Street at or near the intersection of Park Avenue in New York, New York when the vehicle owned and operated by defendant struck the plaintiff's vehicle. As a result, plaintiff alleges that she sustained serious injuries as defined under New York Insurance Law § 5102(d), including injuries to her cervical spine, left knee, left wrist/hand, and head.

In support of the motion, defendant submits the objective findings of expert independent medical examiners orthopedic surgeon Dr. Pierce J. Ferriter and radiologist Dr. Mark J. Decker, a statement of material facts, and plaintiff's sworn deposition testimony.

Dr. Ferriter's exam found, inter alia, cervical spine sprain/strain, left wrist/hand sprain/strain, and left knee sprain/strain resolved. Dr. Ferriter found normal range of motion in the cervical spine, left wrist, left hand, right knee, and left knee. Dr. Ferriter found a normal orthopedic examination on all objective testing, and no findings which would result in orthopedic limitations in use of the body parts examined. Dr. Ferriter further opined that plaintiff is capable of functional use of the examined body parts for normal activities of daily living, and neither disability nor permanency.

Dr. Mark J. Decker's radiology review of plaintiff's left knee CT found, inter alia, "non-

acute 5-mm avulsion fracture of tip of the fibula,” and degenerative change with small joint effusion. Dr. Decker opined that these findings were longstanding, and not causally related to the subject accident, with no evidence to suggest that an acute traumatic injury was sustained. Dr. Decker’s review of plaintiff’s cervical spine CT found reversal of lordosis with diffuse degenerative disc disease, and multilevel disc herniations. Dr. Decker opined that these findings were all degenerative, longstanding, and not causally related to the subject accident, with no evidence to suggest that an acute traumatic injury was sustained. Dr. Decker’s review of plaintiff’s left-hand CT also found no acute fracture and no evidence to suggest that a traumatic injury was sustained.

Defendant also asserts that plaintiff’s course of treatment does not justify a claim of serious injury. Defendant contends that plaintiff’s cessation of treatment was neither due to a suspension of treatment benefits, nor a lack of an applicable secondary medical insurance coverage. Defendant further indicates that plaintiff testified that she was only confined to her bed and home for one month as a result of her alleged injuries. In addition, defendant asserts that plaintiff was involved in a prior motor vehicle accident in the 1990s, and a slip and fall accident in 2018. In sum, defendant argues that plaintiff does not meet the serious injury threshold based on defendant’s independent medical examinations and plaintiff’s testimony.

In opposition, plaintiff submits records from primary care physician Dr. Olusegun Ogunfowora, medical affirmation and reports from Dr. Gautam Khakhar of Physical Medicine & Rehabilitation of NY, PC., medical affirmation and reports from Dr. Narayan B. Paruchuri, Radiologist, and an affidavit of merit.

Plaintiff contends that she initially sought treatment at Winthrop Hospital the day after the accident, with complaints of pain in her left hand, right knee, head, neck and back. Plaintiff presented the same complaints at Mount Sinai Hospital two days after the accident. On May 2, 2017, plaintiff visited her primary care physician, Dr. Olusegun Ogunfowora, with neck pain radiating into her shoulder. Dr. Ogunfowora recommended follow up with a pain management doctor and physical therapy. Plaintiff followed up with Dr. Ogunfowora approximately two more times before beginning treatment at Physical Medicine & Rehabilitation of NY. Plaintiff received acupuncture and received physical therapy to her neck, back and knee three times per week for approximately six months.

Dr. Narayan B. Paruchuri’s review of plaintiff’s injuries, including the CT scan of the left hand found, *inter alia*, osteoarthritis of the first metacarpal joint. Dr. Paruchuri’s review of left wrist CT Scan found, *inter alia*, revealed a “ganglion cyst.” In addition, Dr. Paruchuri performed a CT scan of plaintiff’s cervical spine, which revealed, in part, “at C5-C6, there is a broad-based central herniation with severe thecal sac impingement[.]”

Dr. Gautam Khakhar opined that plaintiff sustained injuries, including but not limited to her cervical spine, left knee, and left wrist/hand with left knee sprain, left wrist/hand sprain, cervical disc herniations with headaches, lightheadedness, dizziness and loss of memory, all of which were causally related to the subject accident. Dr. Khakhar found that plaintiff sustained serious injuries to her neck, left knee and left hand/wrist in light of her subjective complaints of

pain and objective findings. Dr. Khakhar found significant limitations of use of plaintiff's neck, left knee and left wrist/hand based on range of motion testing. Dr. Khakhar opined that these injuries are not degenerative or preexisting in nature. Dr. Khakhar also opined that as a result of the accident, plaintiff sustained partial permanent disabilities and significant limitations to her cervical spine, left knee and left hand/wrist, which are traumatic in nature.

Throughout plaintiff's treatment with Dr. Khakhar, plaintiff reported significant difficulties with substantially all daily activities due to pain in her cervical spine, left knee and left hand/wrist, including motion, activity, turning, lifting, reaching, ambulating, weight bearing, mobility, transportation, shopping, walking, cooking, cleaning, going up and down stairs, reaching overhead, sleeping, showering, heavy lifting, writing, typing, walking long distances, standing too long, and bending.

Plaintiff alleges that she ended treatment with Dr. Khakhar and she was discharged from supervised physical therapy because she had reached the maximum medical level of improvement, despite residual complaints of pain in her neck, left knee and left hand/wrist and positive/objective findings.

Additionally, plaintiff contends that Dr. Ferriter's report is based on one examination approximately three years and eight months following the accident. Plaintiff contends that there is no basis for Dr. Ferriter's opinions as he did not review any of plaintiff's medical records. Even though plaintiff presented with complaints of pain in her neck, left knee and left hand/wrist, Dr. Ferriter does not explain these complaints, and opined that plaintiff's injuries are resolved and gave no opinion on the state of plaintiff's injuries at the time of the accident and at the time of the examination, three years after the accident. Further, plaintiff contends that Dr. Decker failed to review any medical records pertaining to her treatment, assessment, diagnosis, and impression aside from CT reports. Plaintiff contends that Dr. Decker does not address the fact that plaintiff has not sustained prior injuries to her cervical spine, left knee or left hand/wrist, and was not experiencing pain in any of the claimed body parts prior to the accident. In sum, plaintiff argues defendant's motion should be denied based on proffered evidence of serious injury causally related to the subject accident.

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), citing, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-76 (1979).

Here, upon examination of the papers submitted to this Court, defendant Dyskolo Inc.'s motion is denied because there are issues of fact precluding summary judgment, such as conflicting medical reports pertaining to the causation of plaintiff's injuries, and whether the injuries, including injuries to her cervical spine, left knee, left wrist/hand and head are permanent in nature and whether the plaintiff is currently without limitation. Specifically, defendant's doctor, Dr. Ferriter opined that plaintiff had normal range of motion in the cervical spine, left

wrist, left hand, right knee, and left knee, whereas plaintiff’s doctor, Dr. Khakhar, found significant limitations. Defendant’s doctor, Dr. Ferriter opined that plaintiff is capable of functional use of the examined body parts for normal activities of daily living, and that there is no disability or permanency, whereas plaintiff’s doctor, Dr. Khakhar found that plaintiff has sustained partial permanent disabilities and significant limitations to her cervical spine, left knee and left hand/wrist, which are traumatic in nature and causally related to the accident. As such, defendant Dyskolo Inc.’s motion for summary judgment on the issue of whether the plaintiff sustained a serious injury must be denied as issues of fact exist.

Accordingly, it is

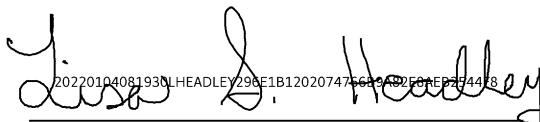
ORDERED that defendant Dyskolo Inc.’s, motion for summary judgment dismissing the complaint on the ground that the plaintiff’s claimed injuries do not satisfy the “serious injury” threshold under *New York Insurance Law* §§ 5102(d) is **DENIED**; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

1/4/2022
DATE


LISA HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE