

Smith v Lewis

2022 NY Slip Op 30012(U)

January 3, 2022

Supreme Court, Kings County

Docket Number: 515753/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

NADIA SMITH,

Plaintiff,

-against-

**MEKHELLA LEWIS, VENTURE LEASING LLC.,
and TYISHA K. PAYNE,**

Defendants.

DECISION / ORDER

**Index No. 515753/2019
Motion Seq. No. 1, 2
Date Submitted:9/23/21**

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>22-33</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>38-40</u>
Answering Affirmations	<u>44-54, 55-66</u>
Reply Affirmation.....	<u>67-68, 71</u>

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

This is a personal injury action arising out of a motor vehicle accident. Plaintiff was a passenger in a car owned and driven by defendant Payne which was allegedly rear-ended at a red light by a vehicle owned and driven by defendants Lewis and Venture Leasing LLC. The accident took place on July 11, 2018, on Saratoga Avenue near the intersection with Herkimer Street, in Brooklyn, NY. Plaintiff testified that they left the scene in a taxi, after the police responded and Payne's car was towed away. At the time of the accident, plaintiff was thirty-nine years old. In her bill of particulars, plaintiff claims she sustained injuries to her cervical and lumbar spine as a result of the

accident, as well as sprains and strains to her shoulders, her left hip, left ankle, and left foot. She underwent a lumbar discectomy on September 20, 2018, shortly after the accident.

Defendants Lewis and Venture Leasing LLC move, and defendant Payne cross-moves for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d).

Defendants, in support of their motion, provide affirmed medical reports from an orthopedist and a radiologist, plaintiff's EBT, plaintiff's bill of particulars, the pleadings, a statement of material facts, and an affirmation of counsel. No additional evidence is provided in the cross motion, which is a "me too" motion.

Jeffrey Guttman, M.D., an orthopedist, examined plaintiff on July 16, 2020, two years after the accident. Plaintiff told him she had a lumbar discectomy in September 2018, but her condition "is not improving." Dr. Guttman says she "is complaining of intermittent lower back and neck pain as well as radiating pain into the left leg and foot." He examined her lumbar, thoracic, and cervical spine, as well as her left hip, both shoulders, and her left ankle/foot, and he reports a completely normal examination. He concludes that any sprain/strain injuries that plaintiff sustained in the accident have resolved. He tested plaintiff's range of motion in all of these body parts with a goniometer and reports all tests to be completely normal. His conclusion is "Based on today's examination, the objective findings do not correlate with the subjective findings. Today's examination indicates that the injured body parts (alleged in the Bill of Particulars) have fully resolved. Ms. Smith did not sustain any significant or permanent

injury as a result of the motor vehicle accident dated 7/11/18. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL [activities of daily living], and usual activities including work, school, and hobbies.”

Dr. Jessica F. Berkowitz, a radiologist, only reviewed the MRI films of plaintiff’s cervical spine performed on August 27, 2018. This is confirmed in Dr. Guttman’s report, where he lists the records he reviewed. Dr. Berkowitz was not asked to review the MRI of plaintiff’s lumbar spine. Plaintiff had surgery to her lumbar spine, not her cervical spine. Plaintiff testified that she had a prior accident in 2013, which caused injuries to her neck, and resulted in a lawsuit which was settled. She testified at her EBT that she had completely recovered and was asymptomatic on the date of the 2018 accident. Dr. Berkowitz’ conclusion that the abnormalities in the MRI of plaintiff’s cervical spine are degenerative and pre-existing is thus not probative or useful.

Plaintiff testified at her EBT that she missed one month from work at one job [Doc 28, Page 47] and two months from her other job [Doc 28, Page 47], then, when she went back to her cleaning job, “it was too hard” so she quit after two days, had the back surgery (September 2018), and has not worked since [Page 49]. The back surgery was not successful, and she testified that she had a second surgery, performed by the same doctor on November 12, 2018 [Page 40]. However, she had trigger point injections, not surgery, on November 12, 2018. She testified that her back still hurts “a couple times a week” [Page 56]. She was not asked about a claim for lost wages at her EBT. In her bill of particulars (dated October 9, 2019), it states that she makes a claim for twelve weeks of lost wages, as she was confined to her bed for one week after the accident [¶12], then confined to her home for one month [¶13], “incapacitated from

employment for a period of one month after the accident”, and three weeks after (the first) surgery [¶13]. The court must conclude, on this somewhat fuzzy record, that the lumbar spine surgery, on September 20, 2018, was nine weeks after the accident of July 11, 2018, and her recovery period was three weeks. Therefore, plaintiff claims she missed twelve weeks of work after the accident, which is 90 days. So, with regard to the “90/180” category of injury, defendants have not established that plaintiff did not have an injury that meets the requirements of this statute.

The court finds that the defendants have not made out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

When a defendant has failed to make a prima facie case with regard to all of the plaintiff’s claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Since the movants have not sustained their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact (*Hodge v St, Eloi*, 168 AD3d 690, 691 [2d Dept 2019]).

Even if defendants had established a prima facie case for summary judgment, plaintiff's submissions are sufficient to overcome the motion and raise a triable issue of fact. While the operative report of Herschel Kotkes, M.D., the MRI reports, and other records were not submitted in admissible form, Dr. Howard Baum provides an affirmation dated April 21, 2021 [Doc 52] which describes plaintiff's treatment and complaints over the period of her treatment until she was "cut off by no-fault." He states that he personally reviewed the MRI films and other records. At first, she was treated by Ananthakumar Thillainathan, M.D. with physical therapy. Then he referred her to Dr. Kotkes. He performed the surgery. In addition to the back surgery, "a lumbar percutaneous discectomy", she had trigger point injections five times, and epidural steroid injections twice. The epidural steroid injections were administered by a different doctor, as she went in 2019 to a different doctor, Arisdov Medical, P.C., because the prior treatment had not stopped her pain. Dr. Baum examined plaintiff on April 21, 2021 and reports that despite all the described treatment, she "experiences constant and persistent neck pain and stiffness which is dull and aching in nature and exacerbated by rotation and extension and radiates to the lower extremities. She also complained of pain in her lower back which she states is stiff and worse by the end of the day with activities of daily living such as bending. She states that she has difficulty bending, reaching, lifting, and carrying items over 15 lbs. She also reports pains and restrictions with several activities of daily living." He tested plaintiff's range of motion in her cervical and lumbar spine and reports significant restrictions, with tenderness and pain. He states he reviewed the IME report of Dr. Guttman and disagrees with it. "I strongly disagree with Dr. Guttman's opinion that the patient 'did not sustain any significant or permanent injury as a result of the motor vehicle accident of 7/11/18". He also says, "I

also strongly disagree with his findings of full range of motion in the affected areas.” Dr. Baum also disagrees with Dr. Berkowitz’ radiology review of plaintiff’s cervical spine “I have personally reviewed the patient’s MRI studies and have found the injuries therein not only to be causally related to the accident and not the result of any degenerative condition, but I have also found the injuries to be permanent based on my objective testing and the continued limitations exhibited as a result.” He concludes that “As the result of my examination of this patient, a review of the patient’s records and my personal review of the MRI studies, I have determined that the motor vehicle collision which occurred on July 11, 2018 was the direct cause of the injuries discussed above and not the result of any "degenerative" or "pre-existing" condition and .that the resulting disability and limitations of these Injuries are permanent In nature and have resulted in a permanent partial disability to the patient which will continue to worsen over time.”

Dr. Baum, who disagrees with defendants’ doctors, creates 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 the defendants’ motion and cross motion are both denied.

This constitutes the decision and order of the court.

Dated: January 3, 2022

ENTER :



Hon. Debra Silber, J.S.C.