

<b>Millar-Williams v Balal</b>
2022 NY Slip Op 30014(U)
January 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 517262/2016
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**MARVA MILLAR-WILIAMS,**

**Plaintiff,**

**DECISION / ORDER**

**-against-**

**Index No. 517262/2016  
Motion Seq. No. 001, 002  
Date Sub: 10/14/21**

**SHAHID BALAL,**

**Defendant.**

X

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmations, Affidavits and Exhibits.....	<u>12-15</u>
Notice of Cross Motion, Affirmations, Affidavits and Exhibits .....	<u>21-37</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>38, 42-48</u>
Reply .....	<u>49</u>

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

This is an action for personal injuries arising from a motor vehicle accident that occurred on June 24, 2016 on West 6<sup>th</sup> Street near the intersection with Avenue P in Brooklyn, New York. Plaintiff was the owner and driver of a car, which was stopped for a red light, and defendant was the owner and driver of a car which allegedly rear-ended plaintiff's car when the light turned green, but plaintiff had not yet moved. Plaintiff was removed from the scene in an ambulance and taken to Coney Island Hospital. She then sought medical care after the accident. At the time of the accident, plaintiff was fifty years old.

In Motion Seq. 1, plaintiff moves for summary judgment on the issue of liability against defendant on the grounds that she bears no fault for the happening of the accident.

In Motion Seq. 2, defendant cross-moves for summary judgment and an order dismissing the complaint on the basis that she cannot establish a serious injury under Insurance Law § 5102 (d).

Plaintiff's motion is supported by a certified police report, an affirmation of counsel, and plaintiff's EBT transcript. All of these items support plaintiff's claim that she was rear-ended while she was not moving. Defendant does not oppose plaintiff's motion, but provides an affirmation solely addressed to the issue of interest accruing during the Covid-19 Pandemic, which counsel "opposes". Therefore, in the absence of a non-negligent explanation for rear-ending the plaintiff's vehicle, plaintiff is granted summary judgment on the issue of liability, and any affirmative defenses of comparative fault or contributory negligence are stricken. The issue of interest accruing from the date of the determination of liability is statutory, and thus is not a justiciable matter.

Defendant moves, pursuant to CPLR 3212, for summary judgment and an order dismissing the complaint for plaintiff's alleged failure to meet the threshold requirements necessary to recover under Insurance Law § 5102 (d). In her Bill of Particulars, plaintiff claims she sustained injuries to her cervical, thoracic, and lumbar spine, as well as to her right shoulder, as a result of the accident.

Defendant provides, in support of his motion, plaintiff's EBT, plaintiff's bill of particulars, the pleadings, an affirmation of counsel, the ambulance records, the emergency room records, the transcript of an EBT of Dr. Richard Apple, M.D., one of plaintiff's doctors, a radiologist's review of plaintiff's MRI films following studies of her cervical, thoracic and lumbar spine, and of her right shoulder, the MRI report for plaintiff's lumbar spine MRI taken in 2015 (before the accident), records from an emergency room visit at SUNY Downstate Hospital on October 25, 2016, an affirmation (with a notary

stamp) from Jane Kei-Yun Yiu, an acupuncturist who is not a physician, who states she conducted an “Independent Acupuncture exam” of plaintiff, an IME report of Dr. Miron Fayngersh, which states that he was asked to conduct a “pain management evaluation”, and a copy of a summons and complaint from a 1996 lawsuit, in which plaintiff was also a plaintiff claiming injuries from a car accident that took place in 1995.

The court notes that this accident took place in 2016, and the action was commenced in 2016, but the RJI was filed in 2020. No explanation is provided. Defendant’s counsel states that defendant interposed an answer dated March 21, 2018. The case is now on the trial calendar.

The first document provided (chronologically) is a lumbar spine MRI taken on November 16, 2015. It states that she was referred for the test because she was experiencing low back pain radiating to her legs, with difficulty walking. The findings are: “L4/5 and L5/S1 disc herniations deforming the thecal sac, abutting the proximal S1 nerve roots bilaterally, right greater than left, at the L5/S1 level, and abutting the proximal L5 nerve roots bilaterally with mild central spinal stenosis in conjunction with posterior hypertrophic changes at the L4/5 level. L3/4 disc bulge.”

Next, is the FDNY ambulance report [Doc 31]. It says her lower back was “tight.”

Next, are plaintiff’s emergency room records from Coney Island Hospital [Doc 32]. These are plaintiff’s medical records, and do not need to be certified. An x-ray of her cervical spine concluded that she should have a CT scan. The report notes moderate multilevel degenerative disc disease. The report says she was discharged with prescriptions for Robaxin (a pain killer) and Tylenol, and her diagnosis is spasm of muscles in cervical spine and neck sprain. This exhibit does not appear to be the complete emergency room record.

Four months later, on October 25, 2016, plaintiff went to the emergency room at SUNY Downstate, and some of those records are Doc. 34. She reported that she was, that day, rear-ended in a motor vehicle accident. At her EBT, she explained that this was a different rear-end accident [Page 95]. She was taken to this hospital by ambulance. She testified that this accident did not make her back better or worse, [Page 97] and that she was taken to the ER because her blood pressure was very high [Page 96].

Dr. Miron Fayngersh examined plaintiff on May 22, 2017 for defendant's IME exam. His report is hard to read. A clearer copy should have been provided. He tested some of the planes of plaintiff's range of motion in her cervical spine but did not do all of the usual testing. He does say he used the "AMA Guidelines 6<sup>th</sup> edition for "normals," and he used a goniometer. The court has not seen any doctor use the 6<sup>th</sup> edition. He tested flexion and extension in her lumbar spine, but not left or right lateral bending. He tested flexion and extension and rotation in her cervical spine, but not left or right lateral flexion or rotation. He says 30 out of 30 degrees is normal for cervical extension, but the AMA Guidelines 5<sup>th</sup> edition states that 60 degrees is normal.<sup>1</sup> Dr. Fayngersh says that plaintiff's lumbar flexion was normal at 90/90 but normal is 60 degrees in the 5<sup>th</sup> edition. He says that plaintiff's lumbar extension as normal at 30/30, but normal is 25 degrees<sup>2</sup> It is not possible that the 6<sup>th</sup> edition has such significantly different "normals." He states that plaintiff walked with an "antalgic gait." He states that she reported "pain on palpation" of both the cervical and lumbar spine. He did not examine her right shoulder. He concludes that plaintiff's sprains and strains have "clinically resolved" and the spondylosis is a pre-existing

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<sup>1</sup> The AMA Guidelines, 5th Edition states that normal cervical forward flexion (tilting the head forward) is 50 degrees, normal extension (tilting the head back) is 60 degrees, normal lateral flexion (tilting the head left and right) is 45 degrees and normal lateral rotation (turning the head left and right) is 80 degrees.

<sup>2</sup> For the lumbar spine, the AMA Guidelines, 5th Edition states that the normal lumbar extension is 25 degrees, forward flexion is 60 degrees, and left and right lateral bending is 25 degrees.

condition. He also states that she was magnifying her symptoms, and her “subjective complaints of tightness in the neck and pain in the lower mid back are due to her pre-existing spondylosis and arthrosis of spine.” He says she can continue to work and to perform her regular activities of daily living “as tolerated.”

The “IME” from the acupuncturist is not in admissible form and was not considered.

The radiologist’s affirmed reports were prepared for defendant by Dr. Robert F. Traflet, a doctor licensed in New York as stated in his affirmation, with an address which is a post office box in New Jersey. He reviewed the MRI films taken on July 18, 2016 of plaintiff’s cervical spine and says, “chronic degenerative changes were present.” He elaborates with specificity, not necessary to repeat here. He concludes that “each of the (six) disc herniations were directly adjacent to, and associated with, adjacent degenerative changes including degenerative ridging (chronic disc-ridge complex). No adjacent epidural hemorrhage or edema was seen. The combination of MRI findings was typical of disc herniations of long-standing duration.”

Dr. Traflet also reviewed the MRI films of plaintiff’s lumbar spine, which were taken (if not a typo) on May 29, 2019. He says he compared these films to the lumbar MRI exams taken on November 16, 2015 and July 22, 2016. His findings are: “At L3-4, there was annular bulging near midline and a small left posterior disc herniation. At L4-5 and L5-S1, again noted were old disc herniations appearing unchanged, along with chronic degenerative changes, including chronic disc desiccation and facet arthropathy. At L5- S1, the disc herniation was again somewhat more to the right; minimal prominence since the prior exams is most likely technical; the associated annulus tear is noted. (Previously in the 7/22/16 exam, the appearance was stable since the 11/16/15 exam.) There is chronic central canal narrowing and foraminal narrowing. No adjacent epidural hemorrhage or

edema was seen. It should be noted that chronic degenerative changes with disc herniations are often seen in individual patients without a history of prior trauma. Furthermore, in the prior 11/16/15 examination, chronic disc pathology was documented to precede the traumatic event of 6/24/16, and there were no new findings in the 7/22/16 exam. Partly visualized in the lower thoracic spine at T11-12 was old disc herniation and degenerative changes.” He states that all of the findings were present in the 2015 MRI films, so “therefore, there are no lumbar MRI findings causally related to the traumatic event of 6/24/16, given a reasonable degree of medical probability.”

Defendant next provides an EBT transcript for Dr. Apple, who was one of plaintiff’s doctors and was apparently subpoenaed to testify by defendant. The EBT was held virtually on August 3, 2020. He had his records on his laptop. He was asked about the history provided by plaintiff and stated that she did not tell him about the 1996 accident and lawsuit or the October 2016 accident. He treated plaintiff for pain and administered epidural injections.

Defendant next provides plaintiff’s EBT transcript [Doc 27]. She testified on January 10, 2020. She said she missed two or three days from work after the accident [Page 15]. She is employed as a registered nurse at the VA Hospital in Brooklyn, NY. She testified that surgery had been recommended for her lumbar spine, but she did not want to have it. She does home exercises every day, which helps to control the pain, but she still gets pain in her lower back, which radiates down her legs [Page 101], and intermittently in her neck [Page 102]. Asked about her right shoulder, she said it no longer bothered her [Page 103].

The court finds that defendant has not made a prima facie case for summary judgment dismissing the complaint. Dr. Fayngersh’s IME report is inadequate to make a prima facie case for summary judgment (see *Sanon v Moskowitz*, 44 AD3d 926 [2d Dept

2007)). Dr. Traflet avers that the lumbar spine injuries he sees on the MRI are pre-existing, as are the cervical spine injuries. Defendant does not provide the MRI reports which were sent to plaintiff's doctors so the court could compare them to Dr. Traflet's report. Further, an affirmed report of a radiologist cannot, on its own, make a prima facie case for dismissal, as a radiologist does not perform an exam. Further, the New York Court of Appeals has held that a defendant's allegations of a pre-existing condition based solely upon the defendant's radiologist's "conclusory notation" of a degenerative condition following review of an MRI and nothing more is "itself insufficient to establish that plaintiff's pain might be . . . unrelated to the accident" (see *Pommells v Perez*, 4 NY3d 566, 577-579 [2005]; see also *De La Cruz v Hernandez*, 84 AD3d 652 [1st Dept 2011]).

Since defendant has failed to meet his burden of proof as to all of plaintiff's claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), the motion must be denied. 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]).

Even if defendant 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, by providing medical evidence which contradicts defendant's evidence. For example, in Document 49, Dr. Hedayatnia states " It is also my opinion to a reasonable degree of

medical certainty that the Plaintiff has a permanent consequential limitation of her back that are caused by the June 24, 2016, accident and not related to any degenerative condition.”

Conclusion

Accordingly, it is **ORDERED** that defendant’s motion (Seq. #2) for summary judgment dismissing the complaint is denied, and it is further

**ORDERED** that plaintiffs’ motion (Seq. #1) for summary judgment on the issue of liability is granted. This case shall proceed to trial on the issue of damages only. Defendant’s affirmative defenses of comparative fault and assumption of the risk are hereby stricken.

This constitutes the decision and order of the court.

Dated: January 3, 2022

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Hon. Debra Silber, J.S.C.