Sheehan v Biderman
2022 NY Slip Op 31028(U)
March 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 508622/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of March 2022.

PRESENT:
CARL J. LANDICINO, J.S.C.

--X

MARGARET M. SHEEHAN,

Plaintiff,

-against-

SARAH BIDERMAN,

Defendant,

--X

Index No.: 508622/2019

DECISION AND ORDER

Motion Sequence # 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..........	25-35,
Opposing Affidavits (Affirmations)..........	40-45,
Reply Affidavits (Affirmations)..........	46

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Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that purportedly occurred on April 10, 2018. On that day, Plaintiff, Margaret M. Sheehan, (hereinafter referred to as the "Plaintiff") was allegedly involved in a motor vehicle collision with a vehicle owned and operated by Defendant Sarah Biderman (hereinafter the "Defendant"). The Plaintiff alleges that the collision occurred while she was travelling east on the Prospect Expressway at or near the Church Avenue exit in Brooklyn, New York. The Plaintiff claims, in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to her left shoulder, thoracic spine, and

cervical spine. The Plaintiff also alleges that she was prevented from performing "substantially all of the material acts which constitute plaintiffs usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence." ("90/180 claim").

The Defendant now moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of Plaintiff and the reports of Doctors Anthony Spataro and Steven M. Peyser. The Defendant also argues that the Plaintiff experienced a significant "gap" in treatment that places into question the seriousness of the injuries allegedly suffered by the Plaintiff.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that there are issues of material fact raised by the evidence proffered by the Plaintiff as to whether the Plaintiff has suffered either a permanent partial disability of her cervical spine and her left shoulder or a significant limitation of use of those parts of her body. Plaintiff contends that this supports denial of the summary judgment motion.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect*

Hospital, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of his motion, the Defendant proffers the affirmed medical reports of Dr. Anthony Spataro, a board certified orthopedic surgeon. Dr. Spataro examined the Plaintiff on June 29, 2020, more than two years and two months after the date of the accident. Dr. Spataro conducted range of motion testing of the Plaintiff's cervical spine, and the left and right shoulder, using a handheld goniometer. Dr. Spataro found no limitation in the Plaintiff's range of motion in relation to those areas. Dr. Spataro opined that the cervical spine sprain/strain had resolved and her left shoulder sprain/strain had resolved. Dr. Spataro opined that "[t]here is no evidence of an orthopedic disability." (See Defendant's Motion, Report of Dr. Spataro, Exhibit E).

Dr. Steven M. Peyser did not examine the Plaintiff but reviewed the MRI of the Plaintiff's lumbar spine, cervical spine and left shoulder. The cervical spine MRI was performed on May 23, 2018, one month after the Plaintiff's accident. Dr. Peyser states that "[r]eview of MRI of the cervical spine reveals diffuse spondylitic change with disc desiccation and diffuse osseous ridging and bulging C5-6 with impingement and bilateral foraminal stenosis. These findings appear most consistent with pre-existing degenerative disc disease." Regarding the cervical spine, Dr. Peyser

also stated that "[n]o post traumatic-type etiology related to the accident date of April 10, 2018 can be determined." The thoracic spine MRI was performed on May 12, 2018, less than a month after the accident. Regarding the thoracic spine MRI, Dr. Peyser states that "[t]here are no disc herniations or stenosis demonstrated." Dr. Peyser opined that "[n]o post traumatic-type etiology related to the accident date of April 10, 2018 can be determined." The left shoulder MRI was also performed on May 12, 2018. Regarding the left shoulder, Dr. Peyser stated that "[r]eview of MRI of the left shoulder reveals mild hypertrophic change of the acromioclavicular joint. This finding is most consistent with pre-existing degenerative joint disease." He concluded that "[n]o post traumatic-type etiology related to the accident date of April 10, 2018 can be determined." (See Defendant's Motion, Report of Dr. Peyser, Exhibit F).

When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion for summary judgment. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars state (paragraph 7) that the Plaintiff "was not confined to (a) hospital, was not confined to (b) bed and (c) was not confined to home." Moreover, in her deposition, when asked if there were activities she could no longer perform she stated "I don't go on roller coasters anymore. I don't lift heavy objects." However, there was no discussion of limitations specific to that initial 180 day period. (See Defendant's Motion, Exhibit D, Page 39). Accordingly, the Plaintiff does not state a 90/180 claim.

The Defendant has made a *prima facie* showing that the Plaintiff has not sustained a serious injury as defined by the statute. It therefore becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of her action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

Some of the records that the Plaintiff relied upon, such as the records purportedly related to treatment from Dr. John J. McGee (See Plaintiff's Affirmation in Opposition, Exhibit "D") were not signed or affirmed. As a result these records are inadmissible and are therefore without probative value. See CPLR 2106 and *Parente v. Kang,* 37 A.D.3d 687, 831 N.Y.S.2d 430 [2nd Dept, 2007]; *See Mora v. Riddick*, 69 A.D.3d 591, 591, 893 N.Y.S.2d 149, 150 [2nd Dept, 2010]; *Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 [2nd Dept, 2008]. *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693 [2nd Dept, 2006], *Joseph v. A&H Livery*, 58 A.D.3d 688, 871 N.Y.S.2d 663 [2nd Dept, 2009]. Although these reports may have been mentioned by Dr. Spataro he did not comment on them and the reports were not provided in the Defendant's moving papers. *See Ayzen v. Melendez*, 299 AD2d 381, 749 N.Y.S.2d 445 [2d Dept 2002]; *Kearse v. New York City Transit Auth.*, 16 A.D.3d 45, 49, 789 N.Y.S.2d 281 [2d Dept 2005].

In addition, the MRI reports of the Plaintiff's thoracic spine, left shoulder and lumbar spine, conducted by Diagnostic Imaging of Rockville Center (Dr. Schlussberg and Dr. Waxman) are not affirmed (Plaintiff' Affirmation in Opposition, Exhibits "E"). However, even assuming their

admissibility, based upon Dr. Spataro's minimally detailed reference to Dr. Schlussberg's report, the Court finds that these reports are not sufficient to create a material issue of fact as they merely serve to present the existence of injuries at or around the time of the motor vehicle collision, do not reference the accident, do not speak to causation or degeneration, and do not represent "objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration." *Cornelius v. Cintas Corp.*, 50 AD3d 1085, 1087, 857 N.Y.S.2d 637, 640 [2d Dept 2008]; *see also Lozusko v. Miller*, 72 AD3d 908, 899 N.Y.S.2d 358 [2d Dept 2010]; *Washington v. Mendoza*, 57 AD3d 972, 973, 871 N.Y.S.2d 336, 337 [2d Dept 2008]. Finally, the Plaintiff fails to address her cessation or gap in treatment (*see Neugebauer v. Gill*, 19 AD3d 567, 568, 797 N.Y.S.2d 541, 542 [2 Dept 2005]; *Sibrizzi v. Davis*, 7 AD3d 691, 692, 776 N.Y.S.2d 843 [2d Dept 2004]).

Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment by the Defendant (motions sequence #2) as against the Plaintiff is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

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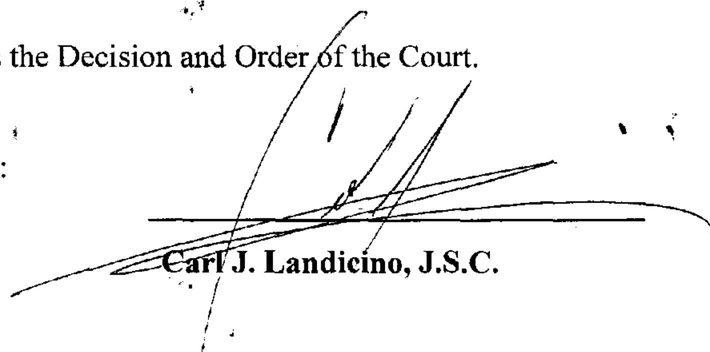

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