Lall v Flooring Wholesale Resources
2022 NY Slip Op 31065(U)
March 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 517837/2018
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
____X

SASEWATTIE LALL,
Plaintiff,
-against-

FLOORING WHOLESALE RESOURCES d/b/a FERMA WOOD FLOORING and BRYAN S. ANGELES,

Defendants.
____X

DECISION/ORDER

Index No. 517837/2018
Motion Seq. No. 1
Date Submitted: 12/09/2021

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed..........	35-46
Affirmation in Opposition and Exhibits Annexed....................................	48-52
Reply Affirmation..	53

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In this personal injury action arising from a motor vehicle accident, the defendants move 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 June 28, 2018, on Avenue J at its intersection with Ocean Parkway in Brooklyn, New York. At the time of the accident, both the plaintiff and the defendant driver were driving their vehicles eastbound on Avenue J, when the sides of their vehicles allegedly came into contact with each other. At the time of the accident, the plaintiff was the owner and operator of her vehicle and defendant Bryan Angeles was the operator of the co-defendant's vehicle.

In support of their motion, the defendants offer a narrative report from Dr. Andrew Bazos, an orthopedic surgeon. In his report, Dr. Bazos states that he reviewed, and also refers to, various records including the FDNY prehospital care report summary dated June 28, 2018, records from Maimonides Medical Center dated June 28, 2018, records from Action Sports Medicine and Rehabilitation dated July 6, 2018, to January 9, 2020, and physical therapy notes from Action Sports Medicine dated July 11, 2018, to January 6, 2020, none of which are annexed. As such, the court did not consider any of the portions of Dr. Bazos' report that describes the information that is claimed to be contained in those records.

Following the IME exam that he conducted of the plaintiff's cervical spine, Dr. Bazos noted that the plaintiff's cervical ranges of motion were normal, and that there was no midline bony tenderness or trapezial tenderness but found that there was paraspinal tenderness on the right and left, which Dr. Bazos opined was "out of proportion to the depth of palpation." In his exam of the plaintiff's thoracolumbar spine, Dr. Bazos found that the plaintiff's range of motion upon extension was normal but found that plaintiff's range of motion upon flexion was "inconsistent, ranging from 10 degrees under direct observation in the exam room and 80 degrees in the waiting room." Dr. Bazos also found tenderness to palpation in the lumbar spine, which he, once again, opined was "out of proportion to the depth of palpation in her lumbar spine." He further reported that the plaintiff's lumbar spine demonstrated normal alignment, that there was no midline bony tenderness, that the plaintiff was able to heel and toe walk and perform a mini squat without difficulty, and that the straight leg raise test was negative on both sides at 90 degrees.

In his exam of the plaintiff's shoulders, Dr. Bazos found forward elevation to be inconsistent in both shoulders, ranging from 90 to 180 degrees in the right shoulder and

from 80 to 130 degrees in the left shoulder. Although he found that the plaintiff's range of motion upon abduction was normal at 180 degrees in the right shoulder, he found the range of motion upon abduction in the left shoulder "to be inconsistent, ranging from 70 to 120 degrees." He further reported that internal rotation was normal bilaterally at 50 degrees and external rotation was normal bilaterally at 45 degrees. There was no apprehension or impingement noted in either shoulder. There was no discrete acromioclavicular tenderness or bicipital groove tenderness, and O'Brien's test was negative bilaterally. Dr. Bazos states that "the claimant got confused about which shoulder was bad and at times moved her allegedly bad shoulder fully" and notes that "she moaned inconsistently throughout the examination of the shoulder."

Dr. Bazos reports that his exam of the plaintiff's range of motion in her elbows, wrists and hands were all normal, with no swelling or tenderness noted. He also found that motor strength was 5/5 in all muscle groups, that reflexes were 2+ and symmetric in the upper and lower extremities, and that sensory testing was normal, "except she had no sensation bilaterally in her lower extremities."

Dr. Bazos concludes that the plaintiff sustained "minor, self-limited, soft tissue strain injuries to the cervical and lumbar spine and left shoulder" which he states resolved within just a few weeks with conservative management. He opines that the plaintiff "has made a complete recovery from her accident-related injuries and requires no additional medical treatment. She is left with no accident-related disability or limitations in performing her normal daily activities." However, the court notes that Dr. Bazos also stated that "there was no explanation for her being insensate over both legs nor the inconsistent range of motion she demonstrated." Dr. Bazos says "this calls into question the claimant's effort and sincerity."

With regard to the "90/180" category of injury, the defendants submit copies of the plaintiff's two deposition transcripts. Defendants' counsel states, at paragraph 24 of her affirmation in support that "[a]t the time of the accident, the plaintiff was employed by Human Care as a rehabilitation worker helping kids at a facility for children with disabilities. After the accident she returned to her position and continued to work for human care until August 2020." Other than this sentence, defendants make no argument in support of a claim that the plaintiff fails to satisfy the 90/180 category. Even if the defendants had made such an argument, it would fail, because the plaintiff clearly testified at her deposition that, in addition to working at Human Care, she also worked for a company called Mishkon, providing "day-hab" services to children. The plaintiff testified that, as a result of her injuries, she stopped working at Mishkon immediately after the accident occurred, and she has still not returned to work there. As previously noted, the movants make no argument in support of any contention that the plaintiff fails to satisfy the 90/180 category.

Based upon the foregoing, the court finds that the defendants have failed to make a prima facie showing of entitlement to summary judgment as a matter of law with regard to the categories "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system," or "a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts that constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident."

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 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 the defendants had made a prima facie showing, plaintiff's papers in opposition are sufficient to raise an issue of fact as to these categories of injury.

The plaintiff's treating doctor's affirmed report [Doc 50, Dr. Sunil H. Butani] is sufficient to overcome the motion 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]). The plaintiff's doctor reports significant, quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and more recently, and the doctor opines that plaintiff's injuries were caused by the subject accident. Thus, his report raises a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: March 31, 2022

ENTER:

Hon. Debra Silber, J.S.C.