

<b>Smith v Land Rover Mt. Kisco</b>
2022 NY Slip Op 31195(U)
April 11, 2022
Supreme Court, New York County
Docket Number: Index No. 152439/2018
Judge: Lisa S. Headley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LISA S. HEADLEY **PART** IAS MOTION 22

*Justice*

-----X

NYTRICHA SMITH,

Plaintiff,

- v -

LAND ROVER MT. KISCO, HVA REALTY, LLC, JILL OKUN

Defendant.

-----X

**INDEX NO.** 152439/2018

**MOTION DATE** N/A

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is hereby ORDERED that defendants’ motion for summary judgment to dismiss the complaint on the ground that plaintiff’s alleged injuries from the accident were not “serious” pursuant to *Insurance Law §5102(d)* is denied. Defendants argue that plaintiff does not have a significant or permanent injury as a result of the subject accident. They also argue that the accident did not aggravate the previous injuries that plaintiff had suffered.

The complaint alleges that on August 7, 2017, at approximately 4:00 p.m., plaintiff’s vehicle was rear-ended by defendants’ vehicle, owned by defendant Land Rover Mt. Kisco and operated by defendant Jill W. Okun, on the Henry Hudson Parkway in New York, New York. Defendants Land Rover Mt. Kisco and Jill W. Okun have been found liable for the accident.

In support of their motion, defendants rely upon plaintiff’s deposition testimony, and the report of Dr. Pierce Ferriter, who performed an Independent Medical Examination (“IME”) of plaintiff Smith. Defendants allege that during her testimony, plaintiff discussed her accident, as well as her subsequent medical treatment. Defendants contend that plaintiff’s testimony has been inconsistent. For example, defendants contend plaintiff alleged that she received no treatment from June 2018 to April 2019. When plaintiff was treated by Dr. Berg, a pain management specialist, she forgot whether he examined her or whether she informed him of her previous injuries. Plaintiff testified that she was not employed at the time of the subject accident, but in May 2018, she worked regularly as a cashier for Home Depot in Nanuet but was fired in August 2018. In her testimony, plaintiff stated that she was currently taking over-the-counter medications for pain relief. She also stated that she was able to perform regular household chores like cooking, laundry work, shopping, as well as driving and walking her dog.

Defendants submit an affirmation from Dr. Pierce Ferriter, who examined plaintiff’s range of motion on her cervical spine, her thoracic spine, her lumbar spine and her left shoulder on January 13, 2020. Dr. Ferriter concluded that upon examining the cervical spine, he found no

spasm and no complaint of tenderness upon palpation of paracervical muscles. His orthopedic tests of upper extremities were negative, with no atrophy and no loss of muscle strength. The lumbar spine examination found no swelling, no discoloration or deformity. The left shoulder examination also showed no swelling, and the rotator cuff muscle strength was normal. Furthermore, Dr. Ferriter reported that plaintiff's condition was normal, that her injuries from the subject accident were not permanent, and that there was no evidence of aggravated pain from prior injuries. Thus, the defendants argue that based on the evidence submitted, there is no proof of a serious injury related to the subject accident as claimed by plaintiff, and their motion for summary judgment should be granted.

Plaintiff opposes the motion, and argues, *inter alia*, that defendants have failed to make out a case for summary judgment, and there are issues of fact precluding the granting of this motion. Plaintiff submits her deposition testimony, as well as her medical records from City Med, the medical opinion of Dr. Marc Berezin, an orthopedic surgeon, Dr. Annarose Polifrone, who performed her MRI, and Dr. Mark Leichter, a chiropractor.

Plaintiff claimed to have immediate pain from the accident to her head, neck, back and left shoulder, although she did not go immediately to a hospital. Plaintiff also claimed that she had previous accidents in 2010 and 2014, and the subject accident aggravated her prior injuries, and her pain from the subject accident was sharper.

Plaintiff went to City Med in Nanuet, New York, and her examination revealed paresthesia of the left shoulder, cervical tenderness, and sharp pain in the left trapezius. The plaintiff was prescribed a muscle relaxant and pain reliever medication. Subsequently, plaintiff visited the Northeast Orthopedics Center in Orangeburg, New York, and was treated by Dr. Marc Berezin, an orthopedic surgeon, and underwent a left shoulder examination, including a range of motion examination. She was prescribed pain medication and signed up for physical therapy. Plaintiff later went to the Good Samaritan Hospital in Suffern, New York for physical therapy.

Plaintiff saw Dr. Annarose Polifrone and complained of neck pain, left shoulder pain, difficulty in walking, standing and lifting objects. Dr. Polifrone conducted a neck examination and found a decrease in normal cervical curvature and spasms and tenderness on palpation with bilateral movement. Dr. Polifrone conducted a left shoulder examination and found pain on palpation at the AC tip and posterior capsule. Dr. Polifrone also conducted a lower back examination and found spasms and tenderness on palpation of the paraspinal bilaterally with decreased movement. Dr. Polifrone concluded that plaintiff suffered a herniated cervical disc with radiculopathy, a herniated disc of the lumbar spine, and internal derangement of the left shoulder. The lumbar spine MRI performed on plaintiff revealed disc bulging with superimposed left foraminal disc herniation at L 4-5 contacting the L 4 nerve root as well as disc bulges at L 2-3 and L 3-4. The left shoulder MRI revealed a possible tear of subscapularis tendon and a possible labral tear.

Plaintiff also saw Dr. Mark Leichter, and upon examining plaintiff, Dr. Leichter found significant limitations in range of motion regarding the cervical and lumbar spines. Plaintiff was subsequently subject to chiropractic treatment and exercise on a regular basis until June 2018.

Plaintiff contends that her injuries rendered her unable to perform her work at Home Depot in 2018. In addition, plaintiff contends that she has difficulty lifting heavy objects, using stairs and walking long distances.

Further, defendants argue that some of plaintiff's evidence is not admissible because it was not affirmed. Plaintiff's physician, Dr. Berezin, submitted copies of reports from the

Northeast Orthopedic Center which were notarized in New Jersey. Defendants state that a certificate of competence is missing from the copies, which is a violation of *CPLR* §2309 (c). Thus, defendants claim that the records cannot be considered as admissible evidence.

### DISCUSSION

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues.” *Birnbaum v. Hyman*, 43 A.D.3d 374, 375 (1st Dep’t 2007). “The substantive law governing a case dictates what facts are material, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment’.” *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep’t 2008) [citation omitted]. “To prevail on a summary judgment motion, the moving party must provide evidentiary proof, in admissible form sufficient to warrant the direction of summary judgment in his or her favor.” *Kershaw v. Hospital of Special Surgery*, 114 A.D.3d 75, 81 (1st Dep’t 2013). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial.” *Id.* at 82.

Under *Insurance Law* § 5102(d), a serious injury consists of:

“... a personal injury which results in death; dismemberment; disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all the material acts which constitutes such person’s usual and customary daily activities for not less than ninety days during the one-hundred-eighty days immediately following the occurrence of the injury or impairment.”

*CPLR* §2309(c) provides that: “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state to if such deed had been acknowledged before the officer who administered the oath or affirmation.”

However, *CPLR* §2001, which provides that the court may permit a mistake, omission, defect or irregularity if a substantive right of a party is not prejudiced.

In their motion papers, defendants submitted the report of their physician, Dr. Ferriter, who examined plaintiff. In his report, Dr. Ferriter attested that he read and reviewed various medical reports and records related to plaintiff’s treatment, including the Northeast Orthopedic Center reports and the MRI reports, the documents alleged to be inadmissible by defendants. Dr. Ferriter claimed to have knowledge of this information before disclosing the results of his examinations. Thus, the court shall admit the aforesaid evidence despite a lack of an affirmation, since defendants would not be prejudiced in this case. Moreover, the unaffirmed MRI reports reviewed by Dr. Ferriter were proper evidence as they were not the sole basis for his findings. *See, Cruz v. Rivera*, 94 A.D.3d 576, 577 (1st Dep’t 2012).

Dr. Ferriter examined plaintiff after reviewing the medical documents. These included medical reports related to her earlier 2010 accident, which was work-related rather than vehicle-related, and effected the same body parts as the subject accident. He provided the results of his various objective tests, including the range of motion exams on her lumbar, thoracic and cervical spine and left shoulder. Dr. Ferriter compared her present condition to normal standards. He concluded that plaintiff’s injuries were no longer serious and that any further treatment was unnecessary, that pre-existing conditions and degeneration was noticeable and

that plaintiff's continuing complaints of pain were not related to the subject accident.

Dr. Berezin reviewed various medical reports as well as examined plaintiff's neck, upper extremity, left shoulder, right shoulder, left elbow, right elbow, left wrist, right wrist and back. Dr. Berezin concluded, *inter alia*, that plaintiff continued to suffer constant pain in her neck, back and left shoulder and would need continued treatment or therapy. Dr. Berezin opined that plaintiff suffered from a moderate but permanent disability in her back and left shoulder, and that these injuries could be related to the subject accident.

Based upon medical reports of plaintiff's and defendants' doctors, this court determines that there exists issue of fact, *inter alia*, specifically as it pertains to plaintiff's range of motion, the permanency of plaintiff's injuries and the causal relationship of the injuries to the present accident. Plaintiff's physician, Dr. Berezin opined that plaintiff suffered from a moderate but permanent disability in her back and left shoulder that could be related to the subject accident. In contrast, defendant's independent medical examiner, Dr. Ferriter reported that plaintiff's condition was normal, that her injuries from the subject accident were not permanent, and that there was no evidence of aggravated pain from prior injuries. The contrasting conclusions of the physicians are drastic, and thus there are issues of fact precluding summary judgment.

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment is DENIED and it is further

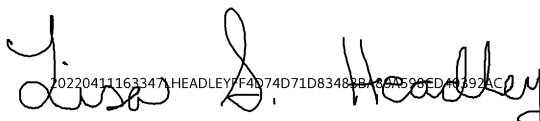
**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered;

**ORDERED** that within 30 days of entry, defendants to serve plaintiff with a copy of this order/decision with notice of entry.

This constitutes the Decision/Order of the Court.

4/11/2022

DATE

  
20220411163347 HEADLEY/F4874D71D83483B/CASE OPENED AT 192AC

LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE