

McAlpine v Theophile
2022 NY Slip Op 32011(U)
June 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 504066/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : PART 9**

IYANA MCALPINE,

Plaintiff,

-against-

**LINOEL THEOPHILE, JEAN PIERRE-LYS,
 “JOHN DOE”, defendant’s real name unknown,
 DEVIN JARRARO and UBER TECHNOLOGIES,**

Defendants.

DECISION / ORDER

**Index No. 504066/2019
 Motion Seq. No. 3, 4
 Date Submitted:4/7/22**

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>60-71</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>72-77</u>
Answering Affirmations	<u>82-93, 106, 107; 94-109</u>
Reply Affirmations.....	<u>114; 110, 111-113</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 which occurred on February 4, 2017 at around 5:00 a.m. on an unidentified street entering the Brooklyn Queens Expressway in Brooklyn, NY. Plaintiff was a rear seat passenger in a taxi summoned via Uber, driven by defendant Theophile and owned by defendant Pierre-Lys, which was allegedly rear-ended by a vehicle owned by defendant Jarraro and driven by defendant “John Doe.” Plaintiff could not describe the details of the accident, and testified that she was “looking at her phone” at the time [EBT P 30].

Defendants Theophile and Pierre-Lys move (MS #3) and defendant Jarraro

cross-move (MS #4) 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).

Plaintiff's bill of particulars alleges that she sustained injuries to her cervical and lumbar spine as well as injuries to her ankles, shoulders, and knees as a result of the accident. At the time of the accident, plaintiff was twenty years old. She was not taken to an emergency room after the accident [EBT at Doc 70, P 47-48].

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

Salvatore Corso, M.D., an orthopedist, examined plaintiff on February 9, 2021, four years after the accident. He states that he was not given any of plaintiff's medical records to review. He examined her lumbar and cervical spine, both knees, both ankles and both shoulders. He reports a completely normal examination, with normal range of motion on all tests. Dr. Corso concludes that any "alleged" injuries that plaintiff sustained in the accident have resolved. He states "Based on today's examination, there is no objective evidence of a disability or permanent injury. The claimant can perform activities of daily living and work duties without restrictions. All orthopedic testing was negative, there were no muscle spasms or trigger points and reflexes, muscle strength, sensation and muscle tone were all normal. There is no need for any further diagnostic testing or orthopedic or physical therapy treatment."

Jessica F. Berkowitz, M.D., a radiologist, states that she performed an independent evaluation of the MRI images of plaintiff's cervical spine and lumbar spine.

In viewing those MRIs, she found, with regard to the cervical spine, no herniated or bulging discs, and notes a cyst is possible in the plaintiff's neck, which "would be unrelated to an acute traumatic injury." She concludes that "there is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma." With regard to the lumbar spine MRI, Dr. Berkowitz states "Unremarkable MRI of the lumbar spine. No disc bulges or herniations are present. There is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma."

The court finds that movants make out a prima facie case for summary judgment with regard to the categories of injury "a permanent consequential limitation of use of a body organ or member" as well as "a significant limitation of use of a body function or system."

Turning to the 90/180 day category of injury, the only submission to support movants' motion is the plaintiff's EBT transcript. The deposition was conducted on January 28, 2021, four years after the accident. The questions were not asked in chronological order, requiring the court to piece her testimony together. Plaintiff testified that at the time of the accident she was a full time student at Borough of Manhattan Community College. She intended to transfer the following fall (2017) to Hunter College, to continue towards a bachelors' degree. But because of her physical therapy schedule, she "took a year off" and apparently withdrew from the spring 2017 semester [P 14]. The accident was at the very beginning of the semester. She started at Hunter College in 2019 [Page 14]. The court notes that this seems to be a two-year gap. She testified that she did not obtain an associate degree from BMCC and she did not finish

her degree at Hunter College.

She testified [Page 113] that at the time of the accident, she had just stopped working at Beacon, a job she had from May 2016 to January 2017, where she was a “direct care worker” for mentally disabled adults.” She was still on the roster for the temp agency that had placed her there, “but I wasn't necessarily employed at that time [P 114]. She testified that she did not work after the accident until she started at Proctor and Gamble in August 2017, and then left that job when she was hired by Americore in November 2017 [Page 113 of her EBT]. She testified [Page 84] that she took the job in August of 2017 to November of 2017 via the temp agency, as a “call center representative” for Proctor and Gamble. She was then employed via the Americore program starting in November of 2017 [Page 112] at the U.S. Department of Housing and Urban Development (“HUD”) until November of 2018. In November 2020, she started working for Hunger Free America, also through Americore. By then, the Covid-19 Pandemic had started and she was working for them from home part of the time and at a homeless shelter part of the time. Plaintiff testified that when she stopped working at HUD in November of 2018, she went back to school full-time [Page 112].

To sum up the testimony, plaintiff testified that she did not work or go to school from the date of the accident until August of 2017, so she could get regular physical therapy. Movant’s attorney avers that “this category requires proof that the alleged injury was medically determined and causally related to the underlying accident, this category also requires proof that Plaintiff was medically prevented from performing “substantially all” of her usual and customary activities for the requisite period. Furthermore, the courts have consistently held that any confinement must be medically directed. . . . Plaintiff has failed to present such proofs, thus, her claim does not meet

the 90/180 requirements under Insurance Law § 5102(d).” This is a misstatement of the law. The movant has the burden of proof. This EBT transcript does not make a prima facie case for summary judgment. It is possible that it would have if counsel had asked more questions. A party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

The court finds that the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury and that the motions must be denied. Accordingly, 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]).

Accordingly, it is **ORDERED** that the defendants’ motion and cross motion are both denied.

This constitutes the decision and order of the court.

Dated: June 27, 2022

ENTER:



Hon. Debra Silber, J.S.C.