Louis v Ali
2022 NY Slip Op 32394(U)
January 7, 2022
Supreme Court, Queens County
Docket Number: Index No. 704715/2020
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

ERIKA LOUIS,

Plaintiff,

-against-

BIBI F. ALI AND ASIF ALI,

Defendants.

Index No. 704715/2020

Motion
Date: January 5, 2022

Motion Cal. No.: 8

Motion Sequence No.: 1

The following e-file papers numbered EF 16-36 submitted and considered on this motion by defendants BIBI F. ALI and ASIF ALI (hereinafter referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 granting summary judgment finding the plaintiff ERIKA LOUIS(hereinafter referred to as "Plaintiff") failed to meet the serious injury threshold pursuant to NY Insurance Law §§ 5102 (d) and 5104 (a) and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits.....	EF 16-25
Stipulations.....	EF 26-27
Aff. in Opp.- Exhibits.....	EF 28-33
Reply- Exhibits.....	EF 34-36

This is a negligence action arising out of a vehicle collision that occurred on Merrick Boulevard at or near its intersection with 126th Avenue in the County of Queens and State of New York on December 4, 2019. Plaintiff alleges she was stuck on the front driver's side by Defendants after they failed to yield the right of way and made a left turn into Plaintiff. Plaintiff alleges injuries to her right ankle, right foot, bilateral shoulders, thoracic, cervical and lumbar spine. Plaintiff received a interlaminar lumbar epidural steroid injection to L5-S1 on March 3, 2020.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the

procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Serious Injury

Defendants assert that Plaintiff did not incur a "serious injury" as defined under NY Insurance Law §5102 (d) which reads as follows:

> " 'Serious injury' means a personal injury which results in death; dismemberment; significant 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 of the material acts which constitute 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."

Plaintiff claims permanent loss of use of a body organ, member, function or system; and/or permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the

material acts which constitute 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.

Plaintiff cannot establish she suffered "a death; dismemberment; significant disfigurement; a fracture; [or] loss of a fetus;" which would be attributable to the subject accident, thus the Court will not consider the same.

"In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." (*Ahmed D. Toure v Avis Rent A Car Systems, Inc. et al.,* 98 NY2d 345 [2002]).

Permanent Consequential/ Significant limitation

In support of the motion, Defendants submit an independent medical examination report from Dr. Regina Hillsman, M.D., P.C. an orthopedic surgeon, ("Dr. Hillsman"). Dr. Hillsman performed an independent orthopedic examination of Plaintiff on April l2, 2021. Plaintiff reported pain in her neck and back. Dr. Hillsman performed a range of motion test on Plaintiff using a goniometer in accordance with A.M.A. Guidelines fifth edition and ASSH Guidelines.

Dr. Hillsman did not find a decrease in range of motion of any of the body parts tested including Plaintiff's cervical, thoracic and lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, bilateral hips, bilateral knees, bilateral feet and bilateral ankles.

Dr. Hillsman opined there is a causal relationship between the medical records and the subject accident. However, according to Dr. Hillsman, the sprains/strains of Plaintiff's cervical, thoracic, lumbar spine, bilateral shoulders, bilateral feet and ankles are resolved. Dr. Hillsman opined there are no objective findings of disability, Plaintiff is capable of performing her daily activities and work without restriction.

Gap In Treatment

Defendants argue Plaintiff has a gap in treatment because Plaintiff testified that she had no future appointments for physical therapy and she had ceased treatment at the physical therapy facility prior to the examination before trial. However, Plaintiff testified that she still uses bands and performs at home treatments. Thus, it has not been established that there has been a complete cessation of treatment. Plaintiff testified as follows:

Q: During your treatment and currently, do you use any at-home devices or equipment to assist with alleviating your neck or back pain?

A: Yes.
Q: What do you use at home to help?
A: I use bands to try to help stretch and exercise.
Q: Anything else?
A: No.
Q: And the bands, which part of your body are you using them to assist with?
A: For my, my, I guess my neck area, my shoulder.
Q: Are you still using them now, and if so, how often, about, would you use the neck band, or rather the band to assist with your neck pain?
A: I would say at least twice a week.
(Pages 26-27 lines 16-25 and 2-9)

90/180

Plaintiff alleges she was confined to bed for four days and Plaintiff was confined to home for four days. Plaintiff claims, she was incapacitated from work for two days. Plaintiff claims she is limited with respect to the amount of household chores she can do. That, she is limited at work and limited while driving with respect to checking her blind spots. Plaintiff testified as follows:

Q: During that first ninety days while in therapy at New York Physical Therapy of South Central, did they restrict specifically any activities that you were doing just prior to the accident on some regularity?
A: No.
(Page 28 lines 11-16)

Q: During your initial therapy, or treatment or visits at Orlin and Cohen within those first ninety days, did anyone at Orlin and Cohen, a doctor or health care provider, restrict any of your activities during those first ninety days that you regularly had done just prior to this accident?
A:No.
(Page 29-30 lines 21-25 and 2-4)

Defendants have established prima facie entitlement to judgment as a matter of law. The burden now shifts to Plaintiff to raise a triable issue of fact.

In support of the opposition, Plaintiff submits the independent medical examination reports from Dr. Andrew Tarleton M.D., a medical doctor, ("Dr. Tarleton") and Dr. Steve Sharon, M.D., a radiologist ("Dr. Sharon").

According to Dr. Tarleton, Plaintiff first presented for treatment on December 5, 2019, approximately one day after the subject accident. Plaintiff presented with pain in her back, neck and shoulders. According to Dr. Tarleton, range of motion testing was performed on Plaintiff on her initial visit based upon AMA Guidelines fifth edition. Dr. Tarleton recorded deficits in the range of motion of Plaintiff's cervical and lumbar spine. In his initial examination of Plaintiff, Dr. Tarleton

observed weakness in Plaintiff's left deltoid, biceps, quadriceps and hamstrings during a motor examination. Additionally, during sensory examination of Plaintiff, Dr. Tarleton observed hypoestesia in the left C5, C6 and left L4, L5 and S1dermatomes. Plaintiff treated with Dr. Tarleton for over one year. According to Dr. Tarleton, Plaintiff was instructed to limit certain activities that involved prolonged periods of "sitting, standing, walking, climbing stairs, lifting, carrying and overhead activities". Dr. Tarleton opined that the injuries diagnosed were causally related to the subject accident. Furthermore, Dr. Tarleton opined that the disc pathology diagnosed via Plaintiff's MRI images were permanent in nature. That, the limitations of Plaintiff's motion would affect Plaintiff's ability to carry out her normal activities of daily living and Plaintiff's prognosis was guarded. According to Dr. Tarleton, Plaintiff is totally disabled. On October 25, 2021, Dr. Tarleton performed range of motion testing on Plaintiff using a goniometer based upon AMA Guidelines fifth edition. Dr. Tarleton recorded the following values for Plaintiff's lumbar spine:

Lumbar Spine
Flexion: 60 degrees, 90 degrees normal
Extension: 10 degrees, 30 degrees normal
Lft. lateral: 10 degrees, 25 degrees normal
Rt. Lateral: 10 degrees, 25 degrees normal

Based upon his most recent examination of Plaintiff, Dr. Tarleton opined that Plaintiff's prognosis was guarded. That, Plaintiff has a permanent disability.

Dr. Sharon examined the MRI's of Plaintiff's lumbar and cervical spine taken on December 7, 2019. Dr. Sharon's findings were as follows:

Lumbar Spine
Right paracentral herniation resulting in impingement and posterior displacement of the right S1 nerve root with posterior displacement of the S1 nerve root at L5-S1. Slight anterolisthesis at L5-S1 and slight exaggerated lumbar lordosis with facet arthrosis at L5-S1.

Cervical Spine
Straightening of the lordosis and multilevel disc desiccation with mild diffuse disc bulging at C4-C5, C5-C6 and C6-C7.

In reply, Defendants argue Dr. Tarleton relied upon unsworn medical records and the findings of other doctors, thus his report is inadmissible. Defendants argument is unpersuasive. Dr. Tarleton provided a narrative report containing his impression and expert opinion based upon his physical examinations of Plaintiff. This Court has considered Dr. Tarleton's report to the extent that it is based upon his physical examinations of Plaintiff.

Plaintiff has raised a triable issue of fact. In *Carmelo Noble v. Calvin Ackerman* (252 A.D.2d 392 [1st Dept 1998]) plaintiff alleged he sustained serious injuries after an accident with defendant pursuant to Insurance Law §5102 (d) defendant's motion for summary judgment was

denied by the lower court. On appeal, defendant moved once again for summary judgment on the issue of whether plaintiff sustained a serious injury (*id*). Both sides presented medical expert opinions. Plaintiff's expert found correlation between the alleged injuries and the accident (*id* at 393). Defendant's experts attributed plaintiff's injuries to, among other things, the normal aging process (*id* at 394). The court held "[w]here conflicting medical evidence is offered on the issue of whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn therefrom, the question is one for the jury" (*id* at 395). Therefore it is,

ORDERED, that the motion is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: January 7, 2022

Hon. Chereé A. Buggs, JSC