

DeJorge v Metropolitan Foods Inc.
2022 NY Slip Op 32432(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 160772/2015
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 22M

Justice

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DIGNA ACEVEDO DEJORGE,

Plaintiff,

- v -

METROPOLITAN FOODS INC. d/b/a/ DRISCOLL FOODS;
SALEM TRUCK LEASING, INC. JOHN DOE 1; SIFFRIDO
R. JORGE, JOHN DOES 2-5; and ABC CORPORATIONS 1-
5,

Defendants.

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INDEX NO. 160772/2015

MOTION DATE 08/31/2021

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 154, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 206, 207, 208, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

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

This action arises as a result of a motor vehicle accident that occurred on April 8, 2014. Plaintiff, Digna Acevedo DeJorge, who was 54 years old at the time, was a passenger in a taxi operated by former defendant Sigfrido R. Jorge, who is also her husband,¹ when the taxi collided with another vehicle operated by John Doe 1, and owned by defendant, Metropolitan Foods, Inc. d/b/a Driscoll Foods (NYSCEF Doc. No. 185, ¶10). In the motion before this court, the movant-defendants, Metropolitan Foods, Inc. d/b/a Driscoll Foods and Salem Truck Leasing, Inc. (defendants) move for an order of summary judgment to dismiss all claims and cross-claims against them on the ground that plaintiff did not suffer a serious injury as a result of the accident. For the reasons below, the court denies the defendants' motion.

Procedural History

Previously, this court granted co-defendant Jorge's motion to dismiss all claims and cross claims against him, and granted plaintiff's cross-motion for summary judgment on the issue of liability against defendant, Metropolitan Foods. *See, Dejorge v Metropolitan Foods, Inc.*, 2019 WL 5810321, 2019 NY Slip Op 33327 [U] [Sup Ct, NY County 2019], *aff'd* 191 A.D.3d 500 (1st Dep't 2021) (NYSCEF Doc. No. 154).² The First Department subsequently affirmed the trial court order. *See, Dejorge v. Metropolitan Foods, Inc.*, 191 A.D.3d 500 (1st Dep't 2021); (NYSCEF Doc. No. 220).

¹ *See generally*, NYSCEF Doc. No. 191 (Plaintiff's EBT [refers to defendant Jorge as plaintiff's husband and mentions the taxi]).

² In the decision, the court directed that the caption be amended to reflect the dismissal of co-defendant Jorge from the action, however the parties have not used the amended caption here, while the appeal was pending, and the change is not reflected in NYSCEF or SCROLL. Therefore, the court will provide the new caption at the end of this order.

Plaintiff's Relevant Medical History

Plaintiff was deposed on May 23, 2018 (NYSCEF Doc. No. 191). Plaintiff worked as a home health aide starting around December 2008, and she stopped working after her February 25, 2016 surgery (*id.*, p 23 lines 10-18).³ Plaintiff stated that before the subject accident that occurred on April 8, 2014, she had not been in any car accidents or any other accidents in which she required medical assistance, and she had not been a plaintiff in any personal injury lawsuit (*id.*, p 24 line 17 – p 25 line 2). Plaintiff also asserted that before the accident in question, she had not suffered pain or discomfort in her head, neck, back, left wrist and hand, right wrist and elbow, or right hip – the allegedly injured parts of her body (*id.*, p 30 lines 7-18).

Plaintiff alleged that during the accident, her body jerked back and forth, and her back struck the seat. At the time of the impact, plaintiff alleges that she experienced severe pain in her back going up to her head, as well as to her back, hands, arms, and neck (*id.*, p 59 line 14 – p 60 line 21). (*id.*, p 48 line 14 – p 49 line 15).

In regard to plaintiff's medical treatment, plaintiff alleges that immediately after the accident, the plaintiff attempted to treat herself with over-the-counter medication and cold compresses, but when the pain did not subside after six days, she sought medical attention (*id.*, p 68 line 1 – p 69 line 5). Dr. Emil Stracar opined that the plaintiff suffered damage to her hand and arm, and there was a lesion in her back (*id.*, p 71 lines 21-24). Dr. Stracar prescribed the plaintiff with pain medications and referred her to physical therapy (*id.*, p 73 lines 3-5). Plaintiff also treated with a chiropractor, acupuncturist, and massage therapist for a total of three times a week for over a year, and she was given wrist and neck braces. (*see id.*, p 77, line 14 – p 80 line 24). Plaintiff alleges that the physical therapy was not very helpful (*see id.*, p 98 line 8), and the injections she received did not substantially reduce her pain (*see id.*, p 98 line 16 – p 99 line 10).

Dr. Gabriel L. Dassa, the orthopedist who had been treating plaintiff's left-hand problems, told her that her ligaments were damaged and performed the surgery. (*see id.*, p 92 line 16 – p 96 line 8). Dr. Karen Abanesov, the orthopedic surgeon, treated plaintiff for her back and neck problems. The plaintiff underwent cervical spinal surgery in February 2016. At the time of her deposition in 2018, she was scheduled to undergo back surgery (*see id.*, p 100 line 18 – p 106 line 18).

Defendants' Motion to Dismiss

In support of their motion, defendants submit two reports by Dr. Yong H. Kim, M.D. Dr. Kim performed an orthopedic spine examination on plaintiff on April 8, 2019, five years after the accident. In the first report (NYSCEF Doc. No. 192), Dr. Kim noted that plaintiff did not seek medical treatment until six days after the accident. He opined that if plaintiff's injuries had been significant, she would have needed immediate and urgent medical attention. Dr. Kim also noted that plaintiff denied having any preexisting spinal injuries or spinal problems. Dr. Kim concluded, with a reasonable degree of medical certainty, that plaintiff's alleged injuries were a result of "preexisting degenerative conditions in the cervical spine," as well as preexisting carpal tunnel syndrome (*id.*, *9). Further, Dr. Kim opined that plaintiff's anterior cervical discectomy and fusion surgery on February 25, 2016 treated the preexisting problems rather than the alleged accident-related injuries, and that there was no "ongoing causally-related issues in her cervical spine." (*Id.*)

Dr. Kim prepared a supplemental report after he received additional medical records He determined, *inter alia*, that there were no traumatic injuries to plaintiff's cervical spine, (NYSCEF

³ Plaintiff testified that she stopped work the day before the surgery (NYSCEF Doc. No. 191, p 24 line 11).

Doc. No. 202). Dr. Kim concluded that these problems were age-related and he reaffirmed his opinion that plaintiff's medical problems were the result of preexisting, degenerative conditions and preexisting carpal tunnel syndrome.

The defendants also submit the medical opinion of Dr. Sheldon P. Feit, who performed a radiology review of the plaintiff. (NYSCEF Doc. No. 200). Dr. Feit examined an MRI of plaintiff's left wrist from August 13, 2014, four months after the car accident. Dr. Feit concluded, *inter alia*, that the MRI did not reveal any fractures, dislocations, bone contusions, and stress fractures. Dr. Feit also concluded that plaintiff did not sustain any posttraumatic injuries.

Lastly, the defendants urge the court to accept the reports of Dr. Kim and Dr. Feit as conclusive. They suggest that, as the reports indicate, plaintiff's complaints are the results of preexisting injuries and age-related degenerative changes. Only plaintiff's sprains and strains are the direct result of the accident, defendants state, and these are not serious injuries under the statute. *See, Ampofo v. Key*, 168 A.D.3d 601, 601-602 (1st Dep't 2019). Defendants argue that plaintiff has shown no "more than a mild, minor, or slight limitation of use," which is insufficient. *See, Murphy v. Arrington*, 295 A.D.2d 865, 866-867 (3d Dep't 2002) [internal quotation marks and citations omitted].

In opposition, plaintiff has submitted plaintiff's medical file, including the medical records of Dr. Robert Schepp, Dr. Dassa, Dr. Avanesov, and Dr. Stracar, all of whom treated plaintiff (NYSCEF Doc. No. 214). Dr. Schepp, Dr. Dassa, Gina Sciotto – the medical records coordinator for Dr. Avanesov, and Dr. Stracar certified to the accuracy and comprehensiveness of the records (*id.*, *1, *22, *36, and *123, respectively).

Plaintiff also submits Dr. Dassa's June 19, 2020 medical report. (NYSCEF Doc. No. 215). Dr. Dassa first treated on August 7, 2014, and examined plaintiff's May 2014 MRI reports. Dr. Dassa opined that the MRI reports revealed disc herniation at C4-C5 and bulging discs at C3-C4, C5-C6, and C6-C7, and performed an MRI on August 13, 2014. Dr. Dassa noted that plaintiff underwent left wrist arthroscopic surgery on December 22, 2014 and that even after the surgery plaintiff's recovery was "complicated by continued numbness and tingling that shoots down both arms and both legs" (*id.*) Dr. Dassa also noted that plaintiff still complained of neck and back pain along with "some pain in the left wrist with extremes of range of motion, forceful gripping, and any lifting more than 10 pounds." (*id.*) After another examination of plaintiff in June 2020, Dr. Darra found that there was cervical and lumbar nerve root compression and traumatic arthritis in the left wrist, and no evidence of carpal tunnel syndrome. Dr. Darra concluded, with a reasonable degree of medical certainty, that plaintiff had sustained persistent orthopedic impairment in her neck, back, and left wrist, and that the accident was a competent cause of her ongoing problems. Dr. Dassa opined that plaintiff's injuries were significant and permanent, and that she likely would need future spinal and wrist surgeries.

In addition, plaintiff submits the July 11, 2020 medical report of Dr. Avanesov, who first treated plaintiff on March 11, 2015, almost a year the subject accident. Plaintiff underwent new imaging on March 22, 2015, and the new MRI revealed C2-C3 posterior central disc bulge, C3-C4 posterior central disc herniation, C4-C5 posterior disc herniation, and C6-C7 posterior disc herniation. Dr. Avanesov determined that plaintiff's past medical, social and family histories did not cause plaintiff's current medical problems. In addition, Dr. Avanesov found probable congenital/developmental problems with the C5-C6 disc.

Further, the plaintiff had surgery on February 26, 2016. Dr. Avanesov treated plaintiff several times between April 6, 2016 and August 8, 2018, and ordered further MRIs since plaintiff

still complained of pain in her neck and back. Dr. Avanesov's tests revealed disc bulges, increased and/or continued disc herniation, and mild central stenosis.

Dr. Avanesov relied upon her own records, all MRI results, and Dr. Kim's reports in reaching her medical conclusions. Dr. Avanesov concluded, *inter alia*, that, "[w]ithin a reasonable degree of medical certainty, [plaintiff's] injuries and the need for the C4-C5 anterior cervical discectomy and fusion are directly and causally related to accident on April 8, 2014." Dr. Avanesov also concluded that plaintiff's surgery was necessary because plaintiff "continues to suffer from the sequela from the residual of her injuries," and that plaintiff's injuries are both permanent and progressive, and they will require further MRIs, CT-scans, and surgery.

Plaintiff contends that the reports of her experts raise triable factual issues and, therefore, summary judgment is not appropriate. *Swift v. New York Tr. Auth.*, 115 A.D.3d 507 (1st Dep't 2014). In addition, the plaintiff contends that Dr. Kim's report overlooks the findings in the 2014, 2015, and 2018 MRI reports that there were bulges, protrusions, and herniations, plus radiculopathy and carpal tunnel syndrome in plaintiff's left hand. Plaintiff notes that Dr. Kim's conclusion that plaintiff's medical problems resulted from preexisting degenerative conditions directly contradicts those of plaintiff's treating physicians. In addition, plaintiff argues that Dr. Feit's conclusions are less reliable because he did not examine plaintiff personally and relied on medical records.

In reply, the defendants argue, *inter alia*, that their objective medical evidence conclusively establishes that plaintiff's alleged injuries were actually preexisting and degenerative conditions unrelated to the accident. According to defendants, plaintiff has not established a causal connection between her medical problems and the car accident, and that Dr. Kim's opinion is credible, as he based it not only on an examination of plaintiff years after the accident but on more contemporaneous medical records including MRIs.

Discussion

Under *New York Insurance Law (Insurance Law) § 5102(d)*, a serious injury is one that, among other things,

"results in . . . 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."

Insurance Law §5102(d)

Here, defendants bear the *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of the statute. *See, Brown v. Achy*, 9 A.D.3d 30, 31 (1st Dep't 2004). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), citing, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-76 (1979). Upon examination of the papers submitted to this Court, the defendants' motion is denied because there are issues of fact precluding summary judgment, such as conflicting medical reports pertaining to the causation of

plaintiff's injuries and whether plaintiff's injuries are permanent in nature.

Furthermore, this Court finds that the plaintiff satisfied her burden of showing that issues of fact exist. Here, the medical records and the reports of plaintiff's treating physicians indicate that, in addition to plaintiff's herniated and bulging discs, she experienced a decrease in her ranges of motion. Additionally, their reports stated that plaintiff's injuries were causally related to the car accident and that there was no evidence that plaintiff suffered from any contributing preexisting condition. The defendants' experts provide the reasons that they believe that there were preexisting conditions, there are no medical records showing that such conditions existed – and, moreover, the experts opine that there was no evidence of substantial problems shortly after the accident occurred. "The medical experts' conflicting opinions on the cause and extent of these injuries raise issues of fact that must be resolved at trial." *Hendricks v. Transcare N.Y., Inc.*, 158 A.D.3d 477, 478 (1st Dep't 2018).

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment on the issue that plaintiff did not sustain a serious injury under *New York's Insurance Law §5102(d)* is DENIED; and it is further

ORDERED that the prong of defendants' motion seeking summary judgment dismissing co-defendant Sigfrido R. Jorge's cross claims is denied as moot, as Mr. Jorge's answer has been dismissed in its entirety; and it is further

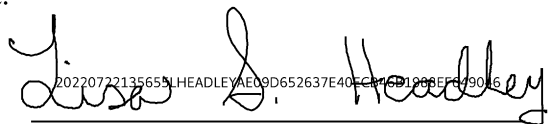
ORDERED that any requested relief sought not expressly addressed herein has nevertheless been considered; and it is further

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

This constitutes the Decision/Order of the Court.

7/22/2022

DATE


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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