Tavarez v Joseph
2022 NY Slip Op 32512(U)
January 21, 2022
Supreme Court, Queens County
Docket Number: Index No. 719766/2020
Judge: Robert J. McDonald

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. MCDONALD** **IAS PART 34**
Justice

- x

TERESA TAVAREZ,

Plaintiff,

- against -

RONALD JOSEPH, ALL TRANSIT, LLC., NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, ACCESS-A-RIDE, SHAMRAIZ AKHTAR, S. ULJAQ VARDA, OLGA D. LANOQUERDE, LITTLE RICHIE BUS SERVICE, INC., CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

Index No.: 719766/2020

Motion Date: 1/20/22

Cal. Nos.: 39 & 40

Seq. Nos.: **10 & 11**

- X

The following electronically filed documents read on this motion by defendants RONALD JOSEPH, ALL TRANSIT, LLC. and NEW YORK CITY TRANSIT AUTHORITY (**seq. no. 10**); on this cross-motion by defendants OLGA D. LANOQUERDE, LITTLE RICHIE BUS SERVICE, INC., CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION; and on this motion by defendants SHAMRAIZ AKHTAR and S. ULJAQ VARDA (**seq. no. 11**) for an Order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d);

	Papers Numbered
Notice of Motion(**seq. no. 10**)-Affirmation-Exhibits-Memo. of Law	EF 127 - 146
Notice of Cross-Motion-Affirmation-Exhibits	EF 155 - 158
Affirmations in Opposition-Exhibits	EF 162 - 180
Affirmation in Reply	EF 189 - 191
Affirmation in Reply to Cross-Motion	EF 187 - 188
Notice of Motion(**seq. no. 11**)-Affirmation-Exhibits	EF 147 - 150
Affirmation in Opposition	EF 159 - 161
Affirmation in Reply	EF 185 - 186

This personal injury action arises out of a three-car motor vehicle accident that occurred on October 16, 2014 on Horace Harding Expressway at its intersection with College Point Boulevard, in Queens County, New York. As a result of the accident, plaintiff alleges serious injuries to her cervical and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on March 20, 2015. Defendants all move to dismiss this action on the grounds that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

At her examination before trial, plaintiff testified that she returned to work one day after the accident. When she initially returned to work, she returned to the same duties.

David A. Fisher, M.D. reviewed the X-rays of plaintiff's lumbar spine, cervical spine, and chest taken on October 16, 2014 and the CT of plaintiff's cervical spine taken on October 16, 2014. Dr. Fisher concludes that there is no evidence of recent traumatic or causally related injury to the lumbar spine or cervical spine. There are no fractures. There are mild degenerative changes.

Arnold Berman, M.D. performed an independent orthopedic medical examination on plaintiff on April 26, 2018. Dr. Berman identifies the records reviewed prior to rendering the report. Plaintiff presented with current complaints of pain in her neck and low back. Dr. Berman performed range of motion testing with a goniometer and recorded normal ranges of motion in plaintiff's cervical spine, thoraco-lumbar spine, and bilateral shoulders. Dr. Berman did note a decreased range of motion in plaintiff's' lumbar spine regarding flexion. All other objective testing was negative and normal. Dr. Berman concludes that the mild decrease in the lumbar spine range of motion does not prevent plaintiff from performing her daily activities. Plaintiff can participate in all activities of daily living without restrictions. Plaintiff may work full time with no restrictions. There were no objective findings to substantiate plaintiff's subjective complaints. There was no aggravation to pre-existing conditions. The cervical and lumbar spine procedures are unrelated to the subject accident and are due to pre-existing degenerative disc disease. There was no evidence of any acute trauma. Plaintiff has no functional loss, and no disability as a result of the subject accident.

Elizabeth Ortof, M.D. performed an independent neurologic examination on plaintiff on April 27, 2018. Dr. Ortof identifies the records reviewed prior to rendering the report. Plaintiff presented with current complaints of back pain, neck pain, and

headaches. Dr. Ortof performed range of motion testing with a goniometer and recorded normal ranges of motion in plaintiff's cervical spine and lumbar spine. All other objective testing was negative and normal. Dr. Ortof concludes that plaintiff is capable of working and performing all normal activities of daily living from a neurological perspective.

Jean-Robert Desrouleaux, M.D. performed an independent neurologic examination on plaintiff on June 25, 2018. Dr. Desrouleaux identifies the records reviewed prior to rendering the report. Plaintiff presented with current complaints of pain in her lower back. Dr. Desrouleaux performed range of motion testing with a goniometer and recorded decreased ranges of motion in plaintiff's cervical spine and lumbar spine. All other objective testing performed was normal and negative. Dr. Desrouleaux concludes that plaintiff is capable of performing activities of daily living and returning to work with the restriction of no lifting greater than fifty pounds.

Defendants also submit, inter alia, an affidavit from Joseph Iaquinto, a private investigator. Mr. Iaquinto took surveillance videos of plaintiff on November 9, 2015, November 20, 2015; December 11, 2015; and September 22, 2016. He observed plaintiff walking and standing for extended periods without the use of any assistive device. Plaintiff exhibited no signs of discomfort. She did not walk with a limp. She bent down without any limitation to adjust her boots before walking down her steps. She walked at a brisk pace for an extended period and over the course of several blocks. She was able to turn her neck and body. She fully bent down. She ran to chase after a dog. She picked up a dog, carried the dog back to her home, and walked up the steps while holding the dog. She raised her arms over her head and bent her neck down.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a serious injury.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Drs. Berman and Desrouleaux who examined plaintiff more than three years after the subject accident and recorded objectively-measured limitations in range of motion (see Sook Houng v Beers, 151 AD3d 995 [2d Dept. 2017]; Mercado v Mendoza, 133 AD3d 833 [2d Dept. 2015]; Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]). Moreover, Dr. Desrouleaux even acknowledges that plaintiff may return to work with a restriction.

Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]).

In any event, in opposition, plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting, inter alia, the medical reports of Drs. Lattuga, Mikelis, and Hausknecht, finding that plaintiff had suffered traumatic injuries and had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]).

Accordingly, for the reasons stated above, it is hereby,

ORDERED, that the motions (**seqs. nos. 10 & 11**) and cross-motion are all denied.

Dated: Long Island City, N.Y.
January 21, 2022

Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.