

Suarez v Alam

2022 NY Slip Op 33207(U)

September 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 516620/2017

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

ELADIA SUAREZ,

Plaintiff,

DECISION/ORDER

-against-

Index No. 516620/2017

**MOLLAH ALAM, STARA TAXI CORP.,
and LOURDES LEBRON,**

Motion Seq. No. 6 & 7

Date Submitted: 5/26/2022

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motions for summary judgment.

Papers	NYSCEF Doc.
Notices of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>64-83; 84-86</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>90-99; 100-108</u>
Reply Affirmations.....	<u>109</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a personal injury action arising from an automobile accident that occurred on March 23, 2017¹, on the southbound FDR, at or near East 6th Street in New York, New York. At the time of the accident, plaintiff was driving her own vehicle, when it was allegedly hit in the rear by the vehicle owned by defendant Stara Taxi Corp. and operated by defendant Mollah Alam. The plaintiff testified that the southbound FDR in the area where the accident occurred has three lanes for moving traffic and that she was traveling in the right lane when the accident occurred. Plaintiff testified that there were three vehicles involved in the accident. Plaintiff testified that she first became aware that she was in an accident when she felt the impact to the rear of her vehicle, which she described

¹ The court notes that defendants Stara and Alam incorrectly state the date of the accident in their motion papers as August 18, 2019, despite referring to the complaint in their papers, which does contain the correct date of accident.

as a heavy impact. The plaintiff further testified that her vehicle was in motion when the accident occurred, that she only felt one impact, which pushed her vehicle forward, but it did not make contact with any other vehicles or objects. Plaintiff also testified that after the accident, she observed the damage to the taxi that struck her, stating that the front was “pushed inward” and further stating that the trunk of her car was also “pushed in.” How defendant Lebron is related to this accident is not clear.

Plaintiff was offered an ambulance, but she said she declined because her car was still drivable, and because she was nervous about leaving it at the scene. Although she testified that her body didn’t strike any portion of the interior of her car, she stated that she felt pain in her left leg immediately after the accident. The plaintiff left the scene of the accident in her own car, but her granddaughter took her to the emergency room at New York Presbyterian Hospital later on the same day, where she complained of pain in her left foot and her neck. She recalled that x-rays of her neck were taken, but couldn’t recall any other treatment rendered in the emergency room. Plaintiff testified that following her release from the hospital, she sought further medical treatment approximately one week later in the Bronx, where she complained of neck pain, bilateral shoulder pain and low back pain. She further testified that she received treatment for two years following the accident, initially going two times per week, then reducing her treatment to one time per week. In addition to her treatment, she testified that she had epidural injections in her spine. Plaintiff testified that she was told that her neck required surgery, but that she declined “out of fear.” She also testified that the pain that she experiences in her neck is related to the pain that she experiences in her shoulders and arms. Although she did have pain in her foot after the accident, she said that pain “went away.”

In her bill of particulars [Doc 104], the plaintiff claims that, as a result of the accident, she injured her lumbar spine, her cervical spine, and her right shoulder. At the time of the accident, the plaintiff was approximately 56 years old. At her deposition [Doc 107], she testified that immediately prior to, and on the date of the accident, she was employed as an Uber driver. However, she is not making a claim for lost wages as a result of the accident. She was asked if she made a claim for Worker's Compensation, and she said she had not [Doc 107 Page 41]. Plaintiff also testified that she'd never injured her neck or shoulders prior to this accident and that, as a result of the injuries that she sustained in the accident, "she is restricted in the kitchen, she has pain when she bends over, and she has no strength in her arms". She also testified that she loves to dance, and that, as a result of the injuries sustained in the accident, she can no longer dance.

Defendants Alam and Stara move for summary judgment dismissing the complaint [MS #6]. Co-defendant Lourdes Lebron also moves the court, in a motion which is incorrectly designated as a cross-motion (the motion is not made against the moving party), for an order granting her summary judgment and dismissing the complaint [MS #7]. In both motions, the defendants contend that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of their motion, defendants Alam and Stara submit an attorney's affirmation, copies of the pleadings, the plaintiff's bill of particulars, a copy of an order striking the note of issue, the plaintiff's deposition transcript, an affirmed report from Dr. Jeffrey Guttman, an orthopedist, who examined the plaintiff on behalf of defendants Alam and Stara, and an affirmed report from Dr. Darren Fitzpatrick, a radiologist, who reviewed the MRIs of the plaintiff's cervical spine, lumbar spine, and right shoulder.

Defendant Lebron joins in the co-defendants' application, essentially adopting and repeating what was presented and argued in the co-defendants' motion.

Dr. Guttman examined the plaintiff on July 21, 2021, more than four years after the accident [Doc 108]. He tested the strength and range of motion in the plaintiff's cervical spine, lumbar spine, and right shoulder, and reported completely normal results. In his report, he states that he reviewed the plaintiff's bill of particulars, the police accident report, reports from Dr. Felix Karafin dated May 26, June 23, and July 7, 2017, including an EMG/NCV study of the upper extremities dated May 26, 2017, a report of Dr. Kevin Weiner from October 13, 2017, records from New York Presbyterian Hospital dated March 23, 2017, records from an "independent emergency medicine review submitted from Marc Probst, M.D.", the report from the radiological review conducted by Dr. Fitzpatrick, and the MRI report of the plaintiff's lumbar spine from Kolb radiology.²

The court notes that Dr. Guttman did not review the original MRI reports from plaintiff's treating radiologist for either her cervical spine or her right shoulder and, while he refers to them, he does not offer or comment on either the EMG/NCV study of the upper extremities conducted by Dr. Karafin or the "independent emergency medicine review submitted from Marc Probst, M.D." Despite not reviewing the actual MRI films or the reports, he opines that the MRI findings from Kolb Radiology "do not support the presence of any acute, causally related injury but are suggestive of degenerative changes." His impression was that the plaintiff sustained cervical, thoracic, and lumbar sprains, which have all resolved, as well as shoulder sprains which have resolved. He opines that "the medical records provided offer no objective evidence that the above

² The court notes that none of the aforementioned records were submitted by any of the parties for the court's review and consideration in determining these motions.

injuries are causally related to the motor vehicle accident of March 23, 2017. The objective test results do not support the claimant's subjective complaints as related to the reported accident." Finally, he opines that "[t]oday's examination indicates that the injured body parts alleged in the Bill of Particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability, or functional impairment, which prevents the examinee from engaging in ADLs, including work, school, and hobbies."

The defendants' radiologist, Dr. Fitzpatrick, did not examine the plaintiff. He reviewed the MRI films of the plaintiff's cervical spine, lumbar spine, and right shoulder [Doc 109]. In his review of the plaintiff's cervical spine MRI, he notes "diffuse loss of disc height and disc signal, multilevel disc osteophyte complexes spanning C3-C4 to C6-7 which efface the ventral thecal sac, and large disc osteophytes at C4-C5 and C6-C7 which produces mild to moderate canal stenosis." He concludes that there was "no traumatic injury" and his impression is that the plaintiff has "moderate to severe multilevel degenerative disc disease." Finally, he opines that the presence of endplate osteophytes or productive changes "suggests" chronic disc degeneration, as this type of new bone formation requires at least six months to develop.

In his review of the plaintiff's lumbar spine MRI, he notes that there was a "diffuse loss of disc signal with relative preservation of disc height" and that there are "[m]ultilevel disc bulges with endplate productive changes." He concludes that there was "no traumatic injury" and his impression is that the plaintiff has "moderate, multilevel lumbar degenerative disc disease." Lastly, he opines that "[t]hese MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic lumbar spine injury."

In his review of the MRI of the plaintiff's right shoulder, Dr. Fitzpatrick notes that "the marrow signal is normal, the biceps tendon is unremarkable, and the musculature is normal." He further notes "mild to moderate acromioclavicular arthrosis" and that "there is lateral down sloping of the acromion with a broad-based enthesophyte as well as acromioclavicular osteophytes which abut the bursal surface of the supra-spinatus tendon with mild overlying bursitis." He also notes that "the glenohumeral joint and labro-ligamentous complex are intact and that there is no fluid collection or effusion." His impression is that the plaintiff "has rotator cuff tendinosis with findings of subacromial impingement and moderate acromioclavicular arthrosis." He concludes that there is no traumatic injury, opining that "tendinosis is a non-traumatic entity that is the result of chronic overuse, resulting in protracted tendon degeneration over the course of months to years," and he further opines that "subacromial impingement is an acquired degenerative condition with no traumatic basis." Lastly, he opines that "acromio-clavicular arthrosis is a degenerative entity due to repetitive, normal forces acting across the joint, resulting in gradual wear of the joint surface cartilage". Dr. Fitzpatrick states that this process occurs over a protracted course of time, requiring months to years to develop, and "therefore has no traumatic basis," and "was not a result of the injury on the stated date of loss."

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's bill of particulars and her deposition testimony are clear that, although she was working as an Uber driver on the date of the accident, she is neither making a lost wage claim nor is she claiming that she missed any time from her job as a result of any injuries sustained in this accident. At her deposition, she was clearly asked if she missed any time from work due to this accident, to which she responded "No." The court additionally notes

that the plaintiff's papers in opposition make no argument to counter the defendant's contention that the plaintiff's testimony is proof that she cannot satisfy the 90/180 category of injury. Based on the foregoing, defendant makes a *prima facie* showing on the 90/180-day category of injury (see *Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked 'light duty' is fatal to her 90/180-day claim."]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis."]).

The court finds that defendants have also made a *prima facie* showing of their entitlement to summary judgment with regard to the other applicable categories injury (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyster*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of Dr. Guttman, the defendants' examining orthopedist, and Dr. Fitzpatrick, the radiologist who examined the plaintiff's MRIs, establish that plaintiff did not sustain a serious injury as a result of the subject accident. The burden of proof then shifts to plaintiff.

Plaintiff argues that the medical evidence she has submitted overcomes the motion and raises a triable issue of fact as to whether she sustained serious injuries, as defined by Insurance Law § 5102 (d), as a result of this accident.

Plaintiff provides an affirmation of counsel, a memorandum of law, and an affirmed narrative report from Dr. Kevin Weiner [Doc 120]. This two-page report, dated February 4, 2022, is problematic. First, it is single-spaced, a violation of Section 202.5 (a) of the

Uniform Rules for Trial Courts. This section clearly states that all papers must be double spaced and have at least a one-inch margin. Further, it is insufficient. Although plaintiff testified that she started treating “[i]n the Bronx where they began therapy for me” approximately one week after the subject accident occurred, she never testified as to the name of the facility or the name of her doctor and Dr. Weiner fails to state when he first saw the plaintiff and whether he is a treating doctor or a doctor who examined the plaintiff for the purpose of opposing the defendants’ motions. Dr. Weiner states in his report that “[i]nitially, after the accident, she complained of neck pain, bilateral shoulder pain, more pronounced on the right side, and lower back pain.” However, he fails to state the source of this information and fails to annex any other medical records. Dr. Weiner states that the plaintiff “participated in physical therapy” but similarly fails to state where, or by whom, the type of therapy that was performed, or for what duration.

At one point in his report, Dr. Weiner repeats the findings of the radiologist regarding the MRIs of the plaintiff’s lumbar and cervical spine, but he fails to indicate if he actually reviewed the films or is simply repeating the original radiologist’s findings, which would be hearsay if he is not a treating doctor. He also notes that the plaintiff had an EMG, but again fails to state whether he performed the test or if he’s just repeating the results of reports which were not provided to the court. In another paragraph, labeled “Updated Impressions”, Dr. Weiner repeats the findings that he initially listed for the plaintiff’s cervical and lumbar spine, but he also lists “Posttraumatic labral tear of the right shoulder.” However, he still fails to indicate if this finding was revealed in an MRI or other radiological study, whether he is just repeating what another radiologist found, or if he actually reviewed the MRI films.

At his exam of plaintiff in February of 2022, Dr. Weiner performed range of motion tests on the plaintiff's cervical and lumbar spine, as well as her shoulders. Unfortunately, the plaintiff fails to offer any medical records that are contemporaneous to the time of the subject accident. In this case, the only medical record plaintiff offers, this one affirmation, was created almost five years after the accident occurred. *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, [2002]; *Perl v Meher*, 18 NY3d 208 [2011]. Dr. Weiner's affirmation alone is insufficient to overcome the motion and raise a triable issue of fact requiring a trial.

Here, the applicable categories of injury are "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system." It was not necessary for quantitative measurements to have been made contemporaneous with the accident (*Perl v Meher*, 18 NY3d 208, 214 [2011]). The Court of Appeals has said "We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery." Therefore, "an expert's *qualitative* assessment of a plaintiff's condition 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" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]).

For these two statutory categories, the Court of Appeals has held that "whether a limitation of use or function is 'significant' or 'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795 at 798 [1995]). Without any medical records for the first few months after the accident to describe the "qualitative nature" of plaintiff's

limitations "based on the normal function, purpose and use of the body part" the only evidence provided is plaintiff's EBT testimony, and "subjective complaints alone are not sufficient" to support a claim of serious injury; there must be "objective proof" (*Perl v Meher*, 18 NY3d 208, 216 [2011]). This is because a contemporaneous doctor's report is important for proof of *causation*; an examination by a doctor years later cannot reliably connect the symptoms with the accident (*Perl v Meher*, 18 NY3d 208, 217-218 [2011]). Based on the foregoing, the Court finds that the plaintiff has failed to raise a question of fact regarding the defendants' contention that she did not sustain a serious injury as defined in Insurance Law § 5102.

Accordingly, it is **ORDERED** that the defendants' motions are both granted, and the plaintiff's complaint is dismissed.

This constitutes the decision and order of the court.

Dated: September 22, 2022

ENTER :



Hon. Debra Silber, J.S.C.