

<b>Leyba v Jettex, LLC</b>
2022 NY Slip Op 33905(U)
November 10, 2022
Supreme Court, New York County
Docket Number: Index No. 150107/2019
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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ALONDRA LEYBA,

Plaintiff,

- v -

JETTEX, LLC, NIKOLA JOVANOVIC

Defendant.

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INDEX NO. 150107/2019

MOTION DATE 07/13/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion by defendants Jettex, LLC and Nikola Jovanovic pursuant to CPLR 3212 (b) for summary judgment and dismissal of the complaint against them on the grounds that Plaintiff has failed to establish that she sustained a serious injury under Insurance Law 5102 (d) is denied as to the significant injury categories of significant disfigurement, permanent consequential limitation, and significant limitation of use and is granted as to the 90/180-day category for the reasons that follow. Plaintiff opposes the motion.

Plaintiff commenced this action alleging that she sustained serious injuries within the meaning of Insurance Law 5102 (d), as a result of a June 26, 2018 motor vehicle accident between Plaintiff's vehicle and a vehicle owned and operated by defendants Jettex, LLC and Nikola Jovanovic (Defendants).

Plaintiff's bill of particulars alleges she sustained injuries to her cervical, lumbar, and thoracic spine that meet the following serious injury categories under Insurance Law 5102 (d): significant disfigurement; permanent consequential limitation; significant limitation of use; and 90/180-day.

It is well established that when a defendant relies on the findings of defense experts, those findings must be in admissible form, i.e., affidavits or affirmations, not unsworn reports, in order to make a prima facie showing of entitlement to summary judgment (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011] quoting *Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Defendant may also rely upon plaintiff's sworn testimony or plaintiff's unsworn treating physician's records (*Arjona v Calcano*, 7 AD3d 279 [1st Dept 2004]).

Defendants' submission relies on an affirmed report of an independent medical examination of the plaintiff on September 10, 2020 by neurologist Dr. Kathryn Ko and the unaffirmed report of biomechanical expert Dr. Kevin K Toosi. Dr. Ko opined in her affirmed report, that based on her examination of the Plaintiff and her review of relevant medical records, the Plaintiff's claimed cervical spine injury, which resulted in a minimally invasive cervical fusion (cervical spine ACDF), which took place in December of 2018, is resolved, and found with regard to Plaintiff's thoracic spine, that Plaintiff had pre-existing scoliosis and myofascitis. Dr. Ko also noted that Plaintiff underwent a lumbar spine percutaneous discectomy on April 17, 2019. Dr. Ko concluded that Plaintiff "did not sustain a permanent injury to her neck and back as a result of the [June 26, 2018] accident" and further found that "(t)here is no significant limitation of the neck or back as a result of the accident" and that Plaintiff "is capable of working and engaging in all of her activities of daily living without restrictions." Dr. Ko's report reflected that Plaintiff's range of motion testing was normal, and that Plaintiff revealed no functional disability at the time of examination.

The report of the Defendants' biomechanical expert, dated December 15, 2020, is not affirmed. Defendants attempt to cure this defect by submitting an affidavit for the first time in reply fails. The Court will not consider the unaffirmed report of Defendants' biomechanical expert on the motion for summary judgment (*Am. Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1st Dept 2015]). Despite this, Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Plaintiff raised an issue of fact concerning a significant limitation and a permanent consequential limitation with respect to Plaintiff's lumbar, cervical and thoracic spine injuries. Plaintiff underwent two surgical procedures that were medically related to the accident. The first involved a cervical discectomy and decompression of the C6-C7 disc and the second involved a lumbar discectomy and decompression of the L4-L5 disc. Contrary to the findings of Defendants' experts that Plaintiff showed normal range of motion with regard to her lumbar and cervical spine, Plaintiffs' submission, through the records of Plaintiff's treating physician, Dr. Stella Mansukhami as well as Plaintiff's experts, Dr. Arden M Kaisman, spinal surgeon, and Dr. Paul Lerner, neurologist, found significantly decreased ranges of motion.

Dr. Mansukhami examined Plaintiff on July 9, 2019, July 30, 2018, August 28, 2018, and October 3, 2018.<sup>1</sup> Dr. Mansukhami conducted range of motion exams at every visit with the use of a handheld goniometer. In relation to the final examination on October 3, 2018, Dr. Mansukhami's records reveal that as to Plaintiff's cervical spine, flexion was 40 degrees (normal 50 degrees), extension was 50 degrees (normal is 60 degrees), rotation was 70 degrees to the right and 60 degrees to the left (normal is 80 degrees). As to Plaintiff's lumbar spine, Dr. Mansukhami found that range of motion on flexion was 60 degrees (normal 90 degrees), extension was 20 degrees (normal is 30 degrees), lateral bending was 30 degrees to the right and 30 degrees to the left (normal is 40 degrees). Dr. Mansukhami also noted in her records, that there is a causal relationship between Plaintiff's complaints and the motor vehicle accident of June 26, 2018.

Dr. Kaisman examined Plaintiff on September 27, 2018 and conducted range of motion examinations with a goniometer pursuant to the AMA guidelines. With regard to the lumbar spine, the exam revealed that forward flexion was to 50 degrees (normal is to 90 degrees); lumbar spine extension was to 25 degrees (normal is to 40 degrees); right and left lateral bending were to 30 degrees (normal is to 40 degrees); right and left lateral rotation were to 50 degrees (normal is to

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<sup>1</sup> While an unexplained cessation of medical treatment may be fatal to a plaintiff's claim of a significant or consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 [1st Dept. 2005]), Plaintiff explained that her no-fault benefits ran out, and she could not afford to pay for further treatment on her own. (*Streeter v Stanley*, 128 AD3d 477 [1st Dept 2015]).

80 degrees). Dr. Kaisman also examined Plaintiff's cervical spine and found that forward flexion was to 35 degrees (normal is to 45 degrees); cervical spine extension was to 20 degrees (normal is to 45 degrees); right and left lateral bending were to 30 degrees (normal is to 45 degrees); right and left lateral rotation were to 50 degrees (normal is to 80 degrees). Almost three years later, on August 25, 2021, Plaintiff was examined by Dr. Lerner, who found that Plaintiff still experienced a loss of range of motion. Dr. Lerner conducted a range of motion examination on Plaintiff's cervical spine which revealed 50 degrees flexion (50 degrees normal), 45 degrees extension (60 degrees normal, 25% loss), 60 degrees rotation right (80 degrees normal, 25% loss) and 70 degrees rotation left (80 degrees normal, 12% loss). Active range of motion at the lumbar spine revealed 50 degrees flexion (60 degrees normal, 17% loss) and 20 degrees extension (25 degrees normal, 20% loss). Dr. Lerner measured Plaintiff's range of motion with inclinometers and an arthrodiagonal protractor pursuant to the AMA guidelines. In affirmed statements, Drs. Kaisman and Lerner concluded that Plaintiff's injuries were causally related to the motor vehicle accident of June 26, 2018. Upon review of Plaintiff's records and history and as a result of his examination, Dr. Lerner also concluded to a reasonable degree of medical certainty that the surgical treatment to the cervical and lumbar spine were appropriate and medically necessary. Dr. Lerner further noted that Plaintiff "may reasonably anticipate the need for indefinite treatment of the above conditions which may cost thousands of dollars annually."

By relating Plaintiff's injuries to the accident, Plaintiff's physicians raised triable issues of fact (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; (*Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011])).

With regard to the final category claimed under Insurance Law 5102 (d), 90/180, a plaintiff must submit objective medical evidence to establish a claim, namely that s/he was prevented from performing substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009])). Here, Plaintiff did not submit any objective medical evidence of a substantial physical limitation during the requisite time period. Plaintiff, who was unemployed at the time of the

accident, testified at her examination before trial that with the exception of approximately one week following her surgery, she was not confined to her home following the accident. Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury under the significant disfigurement, permanent consequential limitation, and significant limitation of use categories of Insurance Law § 5102 (d); and it is further

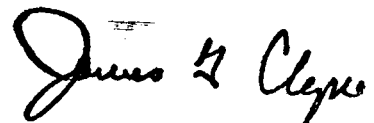
ORDERED that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law § 5102 (d); and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

11/10/2022

DATE



JAMES G. CLYNES, 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