

Lafond v Lux Credit Consultants LLC
2022 NY Slip Op 34212(U)
December 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 512540/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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EVELYNE LAFOND,

Plaintiff,

DECISION / ORDER

-against-

Index No. 512540/2018

Motion Seq. No. 3

LUX CREDIT CONSULTANTS LLC and JANI AVERY,

Date Submitted: 10/27/22

Defendants.

_____x

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>51-64</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>66-75, 81</u>
Reply Affirmation.....	<u>76-77</u>

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

This is a personal injury action which arises from a motor vehicle accident which took place on January 30, 2017 on Lexington Avenue near the intersection with Lewis Avenue in Brooklyn, NY. Plaintiff testified that she was a rear seated passenger in a livery vehicle which rear-ended another vehicle, driven by a non-party. She was removed from the scene in an ambulance and was treated at Woodhull Hospital. At the time of the accident, plaintiff was fifty-four years of age. In her Bill of Particulars, plaintiff claims that as a result of the accident, she sustained injuries to her cervical and lumbar spine, to her right shoulder and to her left knee. She had arthroscopic surgery to her right shoulder and claims it was necessitated by the accident.

Defendants initially seek permission to make a late motion for summary judgment, and then contend that they are entitled to summary judgment dismissing the complaint, and

argue that plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and the affirmed IME reports from an orthopedist, a neurologist, and a radiologist. With regard to the timeliness of the motion, it was filed on January 10, 2021, and the note of issue was filed on May 20, 2020. Nine days after the note of issue was filed, defendants moved to strike it, in motion seq. #2, and for other relief. The motion was withdrawn, and a stipulation was filed, at Doc 47, which states that the "time to move for summary judgment is extended to sixty days from the full completion of discovery." The stipulation is not so-ordered. Attorneys cannot extend a statutory deadline – a court order is needed. That leaves only the court's discretion to apply the analysis in *Brill v City of NY*, 2 NY3d 648 [2004].

Movants' counsel avers that defendants have good cause for the court to hear and determine the late motion, as the plaintiff had health issues that prevented her from attending the neurological IME defendants had requested, and also because the parties stipulated to do so, therefore defendants contend there is no prejudice to plaintiff. Counsel avers that he finally received the IME report on January 8, 2021, after plaintiff had rescheduled several times due to her spine surgeries. He argues that as the motion was filed two days after he received the IME report, he has thus demonstrated good cause. The court, in its discretion, finds that good cause existed for the late motion, and grants defendants' attorneys leave to make this late motion. The court recommends that, in the future, the stipulation provide a date certain and be so-ordered.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on January 29, 2020, on behalf of the defendants, which was three years after the accident. He reports that she ambulates with a walker. Plaintiff told him that she had arthroscopic surgery to her shoulder

in July 2018, and that she has not worked since the accident. Plaintiff told him that she still had pain in her lower back and left knee, and that the pain radiates into her left lower leg. Dr. Guttman tested the range of motion in plaintiff's cervical spine, lumbar spine, right shoulder and left knee. He reports that plaintiff had abnormal ranges of motion in her lumbar spine, with pain, specifically, 65 degrees of flexion (90 degrees normal) and 20 degrees of extension (25 degrees normal). He also reports abnormal ranges of motion in her right shoulder, with forward flexion to 155 degrees (180 degrees normal) and abduction to 155 degrees (180 degrees normal), external rotation 75 degrees (90 degrees normal), and internal rotation to 55 degrees (70 degrees normal). He notes "there are multiple well healed arthroscopic portals present." Her left knee exam was abnormal as well, with range of motion of flexion to 110 degrees (140 degrees normal), patellar grind test position, with "grinding and crepitus". He states that there was swelling, and notes "there are multiple well healed arthroscopic portals present from a prior surgery unrelated to this incident."

Despite these findings, Dr. Guttman concludes that plaintiff's strains to her spine have resolved, that her left knee contusion has resolved, that she is "status post right shoulder arthroscopy resolved," and that with regard to her knee, she has "underlying osteoarthritis, exacerbation of preexisting condition." He provides no explanation for the abnormal range of motion test results, and concludes that "based on today's examination there is not objective medical evidence in the medical chart and imaging which substantiates that the examinee had incurred traumatic injury to their body, in the vehicle during the accident. There are no objective clinical findings indicative of a mild present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies."

Dr. Michael J. Carciente, a neurologist, examined plaintiff on December 29, 2020, almost four years after the accident. He states that she complained of pain in her right shoulder and left knee, but not to her neck or back. Plaintiff told Dr. Carciente that she had been hit by a car in 2009, when she was a pedestrian, and injured her left knee. She said she had arthroscopic surgery to her left knee at that time. Dr. Carciente states that plaintiff came to the exam in a wheelchair, and told him that she has been using a wheelchair since October 30, 2020 due to a tumor in her spine. She told him that she had two spinal surgeries, one in 2019 and one in April of 2020.

As a neurologist, Dr. Carciente did not examine plaintiff's knee or shoulder. He examined her spine and reports no tenderness or spasm. He reports "in reference to the injuries claimed in the Bill of Particulars, the claimant has no objective findings." Specifically, "there was no objective evidence of either a cervical or lumbar radiculopathy. I will defer assessment in reference to any reported shoulder or knee conditions to the independent orthopedist consultant. Note a history of a prior injury involving her left knee and requiring surgery as mentioned above. The claimant also reports a history of a spine tumor which required 2 surgeries and left her in a wheelchair. In any case as mentioned, I find [sic] no evidence of an ongoing neurological injury, disability or permanency as it refers to the aforementioned motor vehicle accident."

Dr. Scott A. Springer, a radiologist, reviewed the MRIs of plaintiff's left knee and right shoulder, the CT scan of her brain and cervical spine, and x-rays of her chest and ribs. He finds many problems in her left knee, and concludes that most of them are degenerative. As regards her left knee, he states "there is a partial thickness tear at the insertion of the anterior cruciate ligament on the tibia. There is no underlying bone marrow edema as would be expected with an acute injury." He opines that degenerative findings

“could not have occurred in the short time interval between the incident and the examination.” As regards her right shoulder, Dr. Springer states “There is a focal articular surface tear at the insertion on the footprint of the rotator cuff, which is most likely due to the chronic tendinosis seen due to weakening of the tendon fibers. In addition, such etiology is increasingly common with advancing age. If related to recent trauma, this tear would be associated with underlying bone marrow edema, which is not seen on this study.” He concludes that there are “no posttraumatic changes causally related to the 1/30/2017 incident.” As regards her cervical spine, Dr. Springer reports two disc bulges, two herniations, disc space narrowing and other abnormalities, but concludes “No posttraumatic changes causally related to the 1/30/2017 incident.” As regards the x-rays, he notes that there are no fractures, but finds “degenerative changes of the spine.”

Defendants contend that their medical evidence, combined with plaintiff’s testimony at her EBT, eliminate all categories of injuries in the statute. Counsel states that as plaintiff testified at her EBT, taken on June 10, 2019, and thus before she started using a wheelchair, that she missed two days from work after the accident, citing Page 8. She then she testified, however, [Page 12] that she could not work more than two or three days a week after the accident because of the pain, that she stopped entirely for some point and then returned, but not full time. However, at another point in the deposition, she said that she missed 23 days from work after the accident [EBT Page 59], and defendants argue that this testimony entitles them to summary judgment on the 90/180-day category of injury.

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Defendants’ counsel argues that she testified that she had only missed two days from work in the six months after the

accident, referring to pages 7-8 of her EBT transcript, and that this 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”]). At another point she said that she missed 23 days from work after the accident [EBT Page 59]. Whichever of these numbers are correct, they are both fewer than ninety days, and so defendants do make a prima facie case with regard to the 90/180 category of injury. However, defendants have not made a prima facie case for the other applicable categories of injury.

The court finds that the IME report of Dr. Guttman, which finds significant limitations in plaintiff’s range of motion in her right shoulder and left knee as well as in her spine, does not make a prima facie case for dismissal. While he concludes that all of her injuries have “resolved,” he does not explain the abnormal findings, and his only explanation is his statement that her knee problems are degenerative. Dr. Carciente did not examine plaintiff’s right shoulder or her left knee.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v*

Maselli, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctor's affirmation is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Plaintiff's doctor, Dov J. Berkowitz, M.D. provides affirmed reports (Docs 70 and 75) indicating significant and quantified restrictions in plaintiff's ranges of motion, from tests performed contemporaneously with the accident and in 2021, four years later, and he opines that plaintiff's injuries were caused by the subject accident. He performed the right shoulder surgery in 2018, and with regard to her left knee, he states that "her MRI is significantly positive for a torn meniscus. The patient is still a candidate for arthroscopic surgery in the left knee as she is still clinically symptomatic and with positive MRI findings. The patient was not able to be authorized by the insurance for arthroscopic surgery to the left knee, so she has just been continuing with at home exercises only."

Thus, had defendants made a prima facie case for summary judgment, Dr. Berkowitz's affirmations would have been found to raise a "battle of the experts," requiring a trial.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: December 9, 2022

ENTER :



Hon. Debra Silber, J.S.C.