Mosely v Uber Tech., Inc.
2022 NY Slip Op 34213(U)
December 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 518235/2019
Judge: Debra Silber

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

X

BARBARA MOSELY,

Plaintiff,

-against-

UBER TECHNOLOGIES, INC., UBER U.S.A LLC, ZWEI-NY LLC, MDALA UDDIN AND "JOHN DOE",

Defendants.

X

DECISION/ORDER

Index No. 518235/2019
Motion Seq. No. 2

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

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed…….	37-46
Affirmation in Opposition and Exhibits Annexed.....	53-59
Reply Affirmation.....	60

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In this personal injury action arising from a motor vehicle accident, defendant Mdala Uddin moves for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, based upon his contention that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d).

The accident in question occurred on the afternoon of July 13, 2018, at the intersection of Sutter Avenue and Euclid Avenue in Brooklyn, New York. At the time of the accident, the plaintiff was a pedestrian, crossing Sutter Avenue on her way to a bus stop. She testified at her EBT that she waited for the light, with the intersection to her left, then looked both ways, and started to cross the street at the crosswalk with the green light in her favor. As she approached the middle of the street, defendant Uddin came along on Euclid

Avenue, and made a left turn from Euclid Avenue onto Sutter Avenue, driving a car he owned and operated, and hit her on her left side. Plaintiff claims (in her Bill of Particulars) that she sustained injuries to her cervical and lumbar spine, and to her left shoulder, left knee and left ankle. She testified that she was "shaken up" and went home. A bystander had taken a photo, and he sent her the photo. At the time of the accident, plaintiff was approximately sixty-six years old.

The defendant supports the motion with the pleadings, plaintiff's EBT, and an affirmed report from one doctor, Dr. Jeffrey Guttman, an orthopedist.

Dr. Jeffrey Guttman examined the plaintiff on January 14, 2021, on behalf of the defendant, which was more than two years after the accident. Plaintiff told him that she still had pain in her neck, lower back, and left knee. Dr. Guttman lists the documents he reviewed, which were the police report and plaintiff's MRI reports, but none of her other medical records. He tested the range of motion in plaintiff's cervical spine, lumbar spine, left shoulder, left knee, and left ankle.

Dr. Guttman reports that plaintiff had normal ranges of motion in her cervical and lumbar spine, with no tenderness or spasms. He reports that she had normal ranges of motion in her left shoulder, and that all other tests were negative. He reports that the range of motion in her left knee and ankle were normal, and all other tests performed were negative.

Dr. Guttman concludes that plaintiff's sprains to her spine, left shoulder, and left ankle have resolved, that her left knee contusion has resolved, and that she has "underlying osteoarthritis." He discusses the MRI reports, but he does not indicate that he reviewed any of plaintiff's other medical records. He states the wrong date for the accident, and opines that "the objective test results do not support the claimant's subjective complaints as related

to the reported accident." Dr. Guttman concludes 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."

Plaintiff testified at her EBT that she did not miss any work as a result of the accident, as she worked in a public school which was on summer break [Doc 42, Pages 12-13] so, with regard to the "90/180" category of injury, defendant has established that plaintiff did not have an injury that meets the requirements.

The court finds that the defendant has made a *prima facie* showing of his entitlement to summary judgment as to all of plaintiff's claimed injuries and all applicable categories of injury in the statute, and has shifted the burden of proof to the plaintiff.

In opposition to the motion, the plaintiff submits an affirmation from counsel, a memo of law, her own affidavit, a counter-statement of material facts, two affirmations from Dr. Hank Ross, an orthopedist, discussed below, and over a hundred pages of medical records from Metro Pain Specialists PC, which are "certified" by a records custodian with an out-of-state notary, no certificate of conformity, and without an affirmation from a physician.

Dr. Ross examined the plaintiff four years after the accident for the first time, and finds abnormal ranges of motion in her neck, back, shoulder, and left knee. He states in his addendum [Doc 57 Page 5] that he reviewed the plaintiff's MRI films and her medical records. He also reviewed Dr. Guttman's report, and describes him as "defendant's radiologist". Dr. Ross states "I disagree with the findings of Dr. Guttman that the left knee, left shoulder, cervical and lumbar spines injuries of Ms. Mosley are due to degeneration. In my opinion, to a reasonable degree of medical certainty, these films show tears of the left

shoulder, tear of the anterior cruciate ligament and meniscal tears in the left knee, herniated and bulging disc in the cervical and lumbar spines are causally related to her motor vehicle accident of 7/13/18 and not due to degeneration or a preexisting condition. My opinion to a reasonable degree of medical certainty is based on my review of Ms. Mosley's MRI films, her MRI reports, her treating medical records, my own examination of her, her lack of any prior injuries to her left knee, left shoulder, cervical and lumbar spines injuries before the subject accident and her acute onset of pain in the left knee, left shoulder, cervical and lumbar spines directly after the accident."

The court wants to be clear that Dr. Ross's affirmation in Doc 56, which seems to try to authenticate the MRI reports of Dr. Ralph Dauito, the radiologist who read the films, does not succeed in doing so. He cannot merely say "I also reviewed and agree [sic] the findings of the films by Dr. Dauito regarding the left shoulder, left knee, cervical and lumbar spines. The copies of Dr. Dauito reports and the findings within the report is attached hereto, the contents of which I adopt herein as accurate and true." If he reviewed the films, he needs to say what he saw on them in order for this affirmation to be admissible as evidence.

A records custodian cannot submit 130 handwritten pages of medical records for the court to read, even if the certification is properly notarized. This submission [Doc 58] is inadmissible as proof that plaintiff's injuries were caused by the accident. Certified medical records without an affirmed medical report may be considered only for limited purposes, such as showing that plaintiff sought treatment after the accident (*see Gomez v Davis*, 146 AD3d 456 [1st Dept 2017]). Additionally, the records do not become admissible if defendant's expert reviewed them unless the expert relies on them (*Rivera v Lopez-Reyes*, 203 AD3d 554, 555 [1st Dept 2022]). Here, Dr. Guttman, defendant's IME doctor, states that he reviewed the plaintiff's MRI reports, but not her other medical records.

The affirmed report from Dr. Ross is admissible, but he did not examine plaintiff until four years after the accident. Nonetheless, he opines that the injuries she sustained, which he claims are visible on her 2018 MRI films, were caused by the pedestrian knock-down accident which occurred on July 13, 2018, and are not due to degeneration or a pre-existing condition. While there is a preference for plaintiff to submit admissible medical records which are contemporaneous with the accident, and this motion raises a close question, the court finds that Dr. Ross' review of the MRI films, not just the reports, wherein he finds nine herniated discs, two of which are in the thoracic spine which is not usually a finding of degeneration, and tears in her meniscus and ligaments in her left knee, tears in the glenoid labrum and supraspinatus tendon (rotator cuff) in her left shoulder, and then concludes that these injuries were caused by the accident, which had occurred only a few weeks before the MRIs were taken, are sufficient to overcome the defendant's prima facie case.

Based upon the foregoing, the court finds that the plaintiff has sufficiently raised triable issues of fact regarding her claims of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system", to warrant denial of the defendant's motion for summary judgment.

In conclusion, plaintiff's examining doctor's affirmed report 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]). Dr. Ross' report indicates significant, quantified restrictions in plaintiff's range of motion, and opines that plaintiff's injuries were caused by the subject accident. Thus, he raises a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial and the denial of the motion.

Accordingly, it is **ORDERED** that defendant's motion for summary judgment is denied.

It is further **ORDERED** that, as the action has been discontinued as against defendants Uber Technologies, Inc., Uber U.S.A LLC, and Zwei-NY LLC, and as plaintiff has not identified or served "John Doe," the caption is amended to reflect that there is only one defendant, Mdala Uddin. The action is dismissed as abandoned as against "John Doe."

This constitutes the decision and order of the court.

Dated: December 13, 2022

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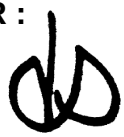

Hon. Debra Silber, J.S.C.