

Washington v Perez

2022 NY Slip Op 34333(U)

December 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 505561/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

_____x

FRANCES WASHINGTON,

Plaintiff,

DECISION / ORDER

-against-

**Index No. 505561/2019
Motion Seq. No. 2**

**RAMON PEREZ and PROFESSIONAL
TRANSPORTATION ENTERPRISES, INC.,**

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>25-34</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>44-50</u>
Reply Affirmation.....	<u>54</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 December 1, 2017 in Queens, NY. Plaintiff alleges that her vehicle was rear-ended by a vehicle driven by defendant Perez and owned by co-defendant Professional Transportation Enterprises Inc. At the time of the accident, plaintiff was approximately twenty-nine 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.

Defendants 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 affirmed IME reports from an orthopedist and a radiologist.

Dr. Pierce J. Ferriter, an orthopedist, examined plaintiff on May 24, 2021, on behalf of the defendants, which was more than three years after the accident. He did not review any of her medical records. Plaintiff informed him that the pain in her neck and back had not subsided since the accident, despite treatment. Dr. Ferriter tested the range of motion in plaintiff's cervical spine and lumbar spine. He reports that plaintiff had normal ranges of motion in all planes, and all tests were negative. There was no swelling, and no tenderness to palpation.

Dr. Ferriter concludes that plaintiff's sprains and strains to her spine have resolved. He states that there "is no evidence of an orthopedic disability, permanency or residuals. The claimant is able to work without limitations. The claimant is able to perform normal activities of daily living without limitations."

Dr. Scott A. Springer, a radiologist, reviewed the MRIs of plaintiff's cervical spine which were conducted on January 17, 2018. As regards her cervical spine, Dr. Springer reports that "C6-C7 demonstrates a mild left paracentric disc herniation with mild resultant narrowing of the left neuroforamen. There is an associated left-sided posterior disc osteophyte complex, which is a chronic, bony productive change. There is mild mass effect on the left thecal sac. The right neuroforamen is patent. There is no mass effect on the exiting nerve roots. Given that there is no increased signal in the annular ligament on T2 or FLAIR weighted sequences, the disc herniation seen is chronic."

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 March 26, 2021, that she missed three weeks from work after the accident [Doc 32 Page 9], that this testimony entitles them to summary judgment with regard to the 90/180-day category of injury.

The court agrees. Dr. Ferriter's "normal" exam makes a prima facie case with regard to the other applicable categories of injury, and plaintiff's testimony that she only missed three weeks of work 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 the defendants have made a *prima facie* showing of their entitlement to summary judgment as to all of plaintiff's claimed injuries and all applicable categories of injury in the statute, and have thus 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, an affirmed MRI report for the MRI performed in 2018 of her cervical spine [Doc 47], two affirmed reports from Nicky Bhatia, M.D., a neurologist [Doc 48], affirmed medical records from Dr. Harold James in the office of Barry Sloan, M.D. [Doc 49] and inadmissible physical therapy and chiropractic records for 2017 and early 2018 [id].

Dr. Bhatia first saw plaintiff in December of 2021, four years after the accident. He reports that she told him that she was in another motor vehicle accident in March of 2021, but there is no mention of this in her EBT taken on March 26, 2021 or in Dr. Ferriter's IME report following his exam on May 24, 2021. Perhaps it is an error in Dr. Bhatia's report as it is the only mention of another motor vehicle accident in the record before the court. He

tested the range of motion in plaintiff's cervical spine and reports significant limitations in flexion and extension, and describes plaintiff's condition as follows:

"This is a patient who is s/p traumatic injury as detailed above and has had ensuing chronic neck pain. There appears to be a significant amount of musculoskeletal pathology at the cervical spinal region overlying spinal pathology with neural impingement as a result of spinal derangement. The examination is notable for significant restriction on range of motion testing at the cervical region as noted above. MRI of the cervical spine reveals focal disc displacements notably disc herniation at C5/6 and C6/7 levels. Overall, these findings suggest structural impairment with functional dynamic derangement of central spinal and/or supporting musculoskeletal structures, resulting in continued pain and disability. Based on the proximity of the symptoms to the traumatic injury and lack of prior such symptoms, and further based on the mechanism of injury and site and nature of pathology involved, I believe to a reasonable degree of medical certainty that the above conditions and associated impairments are causally related to the traumatic injury sustained on 12/1/17. The patient has been symptomatic and has to date received adequate physical therapy and medical treatment. I believe the patient has at this point reached essentially maximal medical improvement and prognosis is poor for further recovery. With a reasonable degree of medical certainty, the patient's condition is permanent in nature. She has a permanent partial disability reflecting the consequential limitation of use of the cervical spine. She will periodically require physical therapy, systemic or intramuscular pain management and possibly interventional procedures to help alleviate pain for the short-term."

Dr. Bhatia's second affirmation was prepared five months later and states, in pertinent part, that he had reviewed the MRI films of plaintiff's cervical spine, and the IME report of Dr. Springer, and "I disagree with the findings of Dr. Springer that the positive findings within Ms. Washington's cervical spine are due to degeneration. In my opinion, to a reasonable degree of medical certainty, these films show broad based central disc herniation at C5/6 of the cervical spine that are causally related to her motor vehicle accident of 12/1/17 and not due to a pre-existing condition or degeneration. My opinion to a reasonable degree of medical certainty is based on my review of Ms. Washington's MRI films, her treating medical records, my own examination of Ms. Washington, her lack of any

prior cervical spine injuries before the subject accident and her acute onset of pain in the cervical spine directly after the accident.”

Dr. Bhatia opines that the injuries plaintiff sustained to her cervical spine, which he claims are visible on her MRI films, were caused by the subject accident, and are not due to degeneration or a pre-existing condition. He also reports that plaintiff still has restrictions in the range of motion in her cervical spine in December 2021.

There is a preference for plaintiff to submit admissible medical records which are contemporaneous with the accident. Here, plaintiff provides affirmed medical records from Dr. Barry Sloan’s office, commencing on December 6, 2017, six days after the accident. Page 4 of Doc 49 indicates that she had significant restrictions in the range of motion of her cervical spine on that first visit. She was referred for physical therapy, chiropractic care and acupuncture. There are also reports for follow up visits on January 17, 2018 and February 21, 2018.

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 reports are 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. Bhatia’s report indicates significant, quantified restrictions in plaintiff’s range of motion in her cervical spine, that she has two herniations in her cervical spine on films taken when she was 29 years old, and he opines that plaintiff’s injuries were caused

by the subject accident. Thus, he raises a “battle of the experts.” This is sufficient to overcome the motion and raise an issue of fact which requires a trial.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: December 20, 2022

ENTER :



Hon. Debra Silber, J.S.C.