

**Mullings v Azizian**

2022 NY Slip Op 34926(U)

October 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 510469/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7<sup>th</sup> day of October 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
LORRAINE MULLINGS,

Index No.: 510469/2018

*Plaintiff,*

-against-

DECISION AND ORDER

SHMUEL AZIZIAN and RIGO LIMO-AUTO, CORP.,

Motions Sequence #2

*Defendants.*  
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	37-46
Opposing Affidavits (Affirmations).....	49,
Reply Affidavits (Affirmations).....	51

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After a review of the papers and oral argument the Court finds as follows:

Plaintiff Lorraine Mullings (“Plaintiff”) alleges in her complaint that she suffered personal injuries when on August 28, 2017, the vehicle owned by Defendant Rigo Limo-Auto, Corp. (“Rigo”) and operated by Defendant Shmuel Azizian (“Azizian”)(collectively the “Defendants”) collided with her as she crossed the street as a pedestrian. The Plaintiff claims, in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to her left shoulder, right shoulder, left knee, right knee, cervical spine, and lumbar spine. The Plaintiff also alleges that she was prevented from performing “substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during

the one hundred eighty days immediately following the occurrence of the injury or impairment.” (“90/180 claim”).

The Defendants move (motion sequence #2) pursuant to CPLR 3212 for summary judgment and dismissal of the complaint contending that the Plaintiff has failed to meet serious injury threshold requirements pursuant to Insurance Law 5104(a) and 5102(d). The Plaintiff opposes the motion, arguing, *inter alia*, that the Defendants have failed to meet their *prima facie* burden and that in any event the Plaintiff has raised material issues of fact as to the severity of Plaintiff’s injuries.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing

papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of their motion, the Defendants proffer the affirmed medical reports of Dr. Scott A. Springer and Dr. Alan J. Zimmerman. Dr. Springer did not examine the Plaintiff but reviewed the MRI of the Plaintiff's left knee, right knee and left shoulder. The left knee MRI was performed on October 2, 2017, a little more than one month after the Plaintiff's accident. Dr. Springer states that "[t]here is no fracture or dislocation." He also states that regarding the left knee, "[t]here is mild-to-moderate tricompartmental degenerative change and spurring." Dr. Springer opines that "[t]hese are degenerative, non-traumatic findings that could not have occurred in the time interval between the incident and the examination." The right knee MRI was also performed on October 2, 2017. Regarding the right knee MRI, Dr. Springer states that "[t]here is no acute fracture or dislocation." Dr. Springer concluded that a "[r]eview of the MRI of the right knee performed one month and four days following the incident reveals mild-to-moderate tricompartmental degenerative change and narrowing with associated spurring and a small reactive joint effusion." The left shoulder MRI was performed on October 10, 2017, approximately six weeks after the accident. Regarding the left shoulder, Dr. Springer states that "[t]here is no fracture, dislocation or acromioclavicular joint separation." Dr. Springer concludes that a "[r]eview of the left shoulder MRI examination performed one month and 12 days following the incident reveals moderate narrowing and degenerative spurring of the acromioclavicular joint, which are degenerative findings typical of arthritis that could not have occurred in the time interval between the incident and the examination." (See Defendants' Motion, Report of Dr. Springer, Exhibit E).

Dr. Alan J. Zimmerman, a board-certified orthopedic surgeon, examined the Plaintiff on February 25, 2020, more than two years and four months after the date of the accident. Dr.

Zimmerman conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, left and right shoulders and left and right knees and found no limitation in the Plaintiff's range of motion in relation to these areas. Dr. Zimmerman opined that the cervical spine sprain had resolved, the lumbar sprain had resolved, the right and left shoulder sprains had resolved and the right and left knee sprains had resolved. Dr. Zimmerman also stated that "[t]here is no disability. There is no permanency." Dr. Zimmerman also opined that "[t]here was no medical necessity for the left shoulder surgery which was carried out for preexisting, degenerative and not causally related conditions." (See Defendant's Motion, Report of Dr. Zimmerman, Exhibit F).

When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, the Defendant may utilize those factors in support of its motion for summary judgment. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars states (paragraph 13) that the "Plaintiff was not employed at the time of the accident." The Plaintiff stated she was retired at the time of the accident and when asked what activities she can no longer accomplish, the Plaintiff states that "[i]n terms of lifting things, if it has any weight to lift it, I can't lift." When asked how much strength she has lost, the Plaintiff states "a lot of things I can't do because my hands are weak." When asked where she experiences pain she states "[b]oth shoulders." When asked if she can move her right shoulder, the Plaintiff states "[y]es, with pain." When asked how this impacts her, the Plaintiff states "[u]sually, when I travel, I can pull my suitcase. I can't do that anymore. As a result, I have to request a wheelchair." (See Defendant's Motion, Exhibit D, Pages 42-48). When asked again how she has been impacted the Plaintiff stated

“I can't walk. I used to walk every single day for exercise. I can't do that anymore.” (See Defendant's Motion, Exhibit D, Page 53). The Court also notes that Dr. Springer did not relate any of his findings to an MRI of the right shoulder. Dr. Zimmerman states that he reviewed an MRI of the right shoulder but does not state the date the MRI was conducted. Therefore, based upon the Plaintiff's testimony and the failure of the Defendant's doctors to address the right shoulder injury [Plaintiff testified she is right-handed at page 34 of her deposition] in relation to the 90/180 period, there is an issue of fact as to Plaintiff's 90/180 claim. *See Rodriguez v. McCullough*, 184 AD3d 735, 124 N.Y.S.3d 218 [2d Dept 2020]; *Calucci v. Baker*, 299 AD2d 897, 750 N.Y.S.2d 675 [2d Dept 2002].

Assuming that the Defendants had made a *prima facie* showing that the Plaintiff had not sustained a serious injury as defined by the statute, it therefore becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of her action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

Dov J. Berkowitz, M.D., first examined the Plaintiff on September 25, 2017 (less than one month after the accident), and on a number of other occasions, including a final exam on February 7, 2022. After the initial examination, Dr. Berkowitz found “[i]n the right shoulder, there was marked rotational pain at 90 degrees of abduction, also positive Hawkin's and positive O'Brien's sign with weakness with downward pressure against abduction.” Dr. Berkowitz also found

“reduced range of motion in the patient's bilateral shoulders, cervical and lumbar spine.” Dr. Berkowitz stated that “[o]n November 22, 2017, I performed arthroscopic repair of the patient's left rotator cuff which included intraarticular debridement of the subscapularis tearing as well as SLAP and labral tearing and anterior labral tearing.” Dr. Berkowitz examined the Plaintiff again on February 15, 2018 and found “the patient's range of motion in the left shoulder was limited on forward flexion to 100 degrees (180 normal); abduction to 90 degrees (180 normal). In her right shoulder, she could forward flex to 90 degrees (180 normal) with marked rotational pain. She could extend and flex to 90 degrees (150 normal).” Dr. Berkowitz found that “[b]ased on my treatment of the patient, her medical history, diagnostic test results, and present complaints, it is my opinion within a reasonable degree of orthopedic certainty that the patient's injuries to her bilateral shoulders and right knee are permanent in nature.” Dr. Berkowitz also stated that “[i]t is also my opinion within a reasonable degree of orthopedic certainty, based on my treatment of the patient, her medical history, and diagnostic test results, that the patient's... injuries are causally related to the motor vehicle accident which occurred on August 28, 2017.” Dr. Berkowitz also stated that an objective test instrument was utilized in relation to his findings. He acknowledged that after a course of physical therapy the Plaintiff “continued at home with good results in the left shoulder.” This evidence supports the position that the Plaintiff sustained a serious injury within the meaning of Insurance Law 5102(d) under the significant limitation of use and permanent consequential limitation of use categories.

In relation to the Defendant's reply, the Plaintiff's doctor did discuss the purported gap in treatment, indicating that the Plaintiff continued therapy at home. Moreover, much of Dr. Berkowitz's findings were a result of his examination of the Plaintiff. As to Dr. Berkowitz not addressing the position of Dr. Springer that any injury was degenerative in nature, Dr. Springer

did not render an opinion as to the Plaintiff's right shoulder and Dr. Zimmerman only references degeneration in a conclusory fashion. In addition, Dr. Berkowitz made a causation finding and made observations and findings during the surgical procedure he performed on the Plaintiff, and found limited range of motion in the right shoulder.

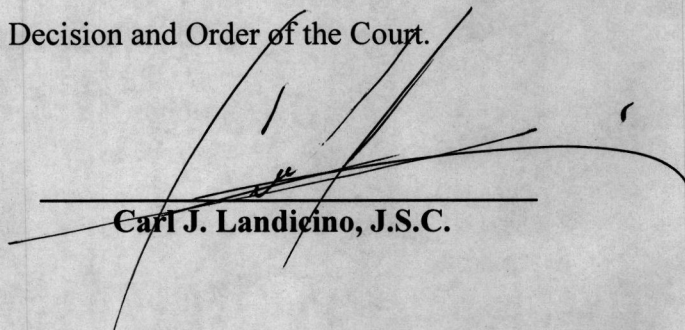
As a result, the Court finds that the Plaintiff has raised material issues of fact that prevents the Court from granting summary judgment to the Defendants. *See Chul Koo Jeong v. Denike*, 137 AD3d 1189, 1190, 28 N.Y.S.3d 393, 394 [2d Dept 2016]; *Casiano v. Zedan*, 66 AD3d 730, 730, 887 N.Y.S.2d 613, 614 [2d Dept 2009]. "An expert's qualitative assessment of a plaintiff's condition also 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 Systems Inc.*, 98 NY2d 345, 774 N.E.2d 1197 [2002]; *see also Mitchell v. Casa Redimix Concrete Corp.*, 83 AD3d 1015, 1015, 921 N.Y.S.2d 543 [2d Dept 2011].

Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment by the Defendants (motions sequence #2) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino, J.S.C.

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