

Hilarie v Val

2022 NY Slip Op 34999(U)

December 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 501870/2020

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
SYLVIE HILARIE,

Plaintiff,

Index # 501870/2020

-against-

ORDER

Motion Seq. #2 and 3

CARL MILANDY VAL, MELANDE CHERY and
ADEBOWALE M ADETUNJI,

Defendants.
-----X

HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on July 11, 2022.

Papers	Numbered
Order to Show Cause and Affirmation	1& 2 [Exh. A-I]
Affidavit in Support of Order to Show Cause.....	3 (Exh. A)
Affirmation/Affidavit in Opposition.....	5(Exh. A-B)
Memoranda of Law.....	4 and 6

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KINGS COUNTY CLERK
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Plaintiff commenced this action to recover for personal injuries allegedly sustained by plaintiff, because of a motor vehicle accident which occurred on July 5, 2019, at or near Avenue B and East 91st Street, Brooklyn, New York. At the time of the accident, plaintiff was a passenger in the vehicle owned by defendant, Melande Chery, and operated by defendant Carl Milandy Val.

Defendants, Carl Milandy Val and Melande Chery move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as set forth in CPLR 5102(d). Defendant, Adebowale M. Adetunji, cross-moves for summary judgment on the same grounds. Plaintiff opposes the motion on the grounds that the plaintiff has sustained a serious injury as defined by CPLR 5102(d) of the New York Insurance Law.

After oral argument, careful review of the moving papers, opposition and reply, the court finds as follows:

Plaintiff alleges that she sustained the following injuries due to the accident: Left shoulder: partial non-retracted tear of distal aspect of the supraspinatus tendon along artificial surface and infraspinatus tendon along bursal surface; labral tear; partial rotator cuff tear; rotator cuff tendinitis; synovitis; left shoulder/upper arm muscle and ligament sprain/strains; Left Knee: partial tear of inferior aspect of the anterior cruciate ligament; small joint effusion; prepatellar soft tissue edema; sprains/strains; Cervical spine: straightening of the cervical lordosis associated with muscle spasm; cervical paraspinal muscle and ligament sprains/strains (whiplash injury); Lumbar spine: L5-S1 central and bilateral paracentral disc herniation; L5 and S1 radiculopathy on the left; lumbar paraspinal muscle and ligament sprains/strains; Left ankle: moderate ankle joint effusion and post traumatic headaches; and post-traumatic stress disorder. In addition, the plaintiff alleges that she underwent procedures to the left shoulder on January 10, 2020 for injuries including: Arthroscopy; synovectomy; debridement of labrum and rotator cuff; tenotomy of left rotator cuff with a pre-operative diagnosis of partial left rotator cuff tear and a post-operative diagnosis of synovitis, left shoulder; labral tear; partial rotator cuff tear and rotator cuff tendinitis left shoulder.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, *Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), “where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement.” See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

In support of the defendants’ motion and cross-motion for summary judgment, defendants argue that the plaintiff’s injuries do not satisfy the “serious injury” threshold requirement pursuant to CPLR Section 5102(d) of the New York State Insurance Law. Specifically, defendants argue that the plaintiff’s alleged injuries are not permanent, did not result in a significant limitation of use of a body part, and did not prevent plaintiff from performing substantially all of her customary daily activities for the 90 days following the accident in question. Defendants submit the independent medical evaluation and findings of Dr. Jeffrey Passick, an orthopedist, who performed an independent medical examination of the plaintiff on October 25, 2021, and also reviewed records from plaintiff’s prior losses in 2014 and 2017. The IME of October 25, 2021 revealed full range of motion to all examined parts of the plaintiff’s body, as well as no objective evidence of radiculopathy, nor any acute findings of the cervical spine. In addition, Dr. Passick found no objective evidence of impingement or internal derangement of the left shoulder, nor any objective evidence of internal derangement in relation to the left knee and left ankle, and the plaintiff has no complaints of pain of the left knee or ankle. In conclusion, Dr. Passick found no objective

evidence of a disability from a medical standpoint and determined that plaintiff can perform her customary activities of daily living without limitation, and no objective evidence of permanency or residual effects in regard to injuries sustained on the date of loss. In further support of the motion and cross-motion for summary judgment, defendants also argue that the plaintiff's prior losses reveal a significant medical history which relate to the body parts plaintiff is alleging were injured because of the subject accident. Defendants point out that plaintiff had pre-existing injuries to the left knee in 2019; the left ankle in 2014, as well as cervical and lumbar spines, due to an accident in 2017, which defendant argues was diagnosed and assessed by plaintiff's medical doctor, Sachin K. Shah, as lumbar and cervical radiculopathy. With regard plaintiff's left shoulder injury, defendants argue that plaintiff underwent surgery in 2017 for a sustained injury prior to the subject accident.

In opposition to defendants' motion and cross-motion, plaintiff argues that a series of objective range of motion tests performed on plaintiff's neck, back, left shoulder, left knee and left ankle by Dr. Osei-Tutu determined that plaintiff was 50-74% moderately disabled. Plaintiff quotes Dr. Osei-Tutu as follows: "According to my best judgment, if the history given by the patient is accurate, the above-mentioned accident seems to be the causative factor of the patient's symptomology." In addition, plaintiff sought further medical evaluation and treatment from Dr. Paul Ackerman in November 2019, who performed objective range of motion tests on plaintiff's left shoulder which revealed a partial tear of the rotator cuff, which he opined is causally related to the motor vehicle accident of July 5, 2019. He further indicated that orthoscopic surgery on the left shoulder was necessary. Plaintiff further argues, thereafter, that treatment continued with Dr. Osei-Tutu whose objective range of motion tests on plaintiff revealed moderate pain and restriction on her cervical and lumbar spine range of motion and decreased range of motion on her left shoulder, knee, ankle, and foot. In January 2020, plaintiff returned to Dr. Ackerman, who after objective range of motion tests found deficiencies and limitations in range of motion on the left shoulder. In February 2020, additional objective tests were done by Dr. Osei-Tutu which revealed moderate range of motion decreases and pin in palpation of the cervical and lumbar spine, with a positive SLR test at 45 degrees on the right, 30 degrees on the left, a positive Kemp's test bilaterally and decreased range of motion of the left shoulder, knee and ankle. In March 202 and May 2021, the plaintiff's continued evaluations and objective tests found deficiencies and limitations which Dr. Ackerman opined were related to the motor vehicle accident of July 5, 2019, and "demonstrated permanence." Dr. Ackerman also opined that the injuries to the plaintiff's neck, lower back, left knee and left shoulder are not of degenerative changes, and that the plaintiff did not have complaints prior to the July 5, 2019, accident. In January and April 2022, plaintiff sought further treatment from Dr. Golai Nejati, who conducted objective range of motion tests which revealed deficiencies in range of motion of the cervical and lumbar spine, left shoulder and left knee.

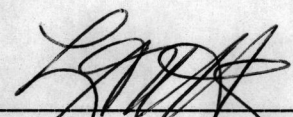
The court finds that the defendants established their prima facie entitlement to judgment as a matter of law by showing that plaintiff did not sustain a serious injury within

the meaning of Insurance Law §5102(d) as a result of the subject accident. *See, Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865; *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990. In opposition, although the plaintiff presented medical evaluations and opinions from her treating doctors, the plaintiff failed to raise a triable issue of fact. The evaluations and opinions supporting plaintiff's claim of a serious injury did not set forth any objective evidence to support the assertion that a pre-existing injury from two prior accidents, which were not described, was exacerbated by, and causally related to the subject accident. *See, Wettstein v. Tucker*, 178 A.D.3d 1121, 112 N.Y.S.3d 557 (2nd Dept., 2019); *Inzalaco v. Consalvo*, 115 A.D.3d 807, 982 N.Y.S.2d 165 (2nd Dept., 2014). The plaintiff has a history of two accidents involving injury to the parts of her body at issue in this case, which were not adequately addressed. In fact, Dr. Osei-Tutu's opinion states: "according to my best judgment, if the history given by the patient is accurate, the above-mentioned accident seems to be the causative factor of the patient's symptomology." Dr. Osei-Tutu's conclusion and best judgment about causality is speculative and insufficient. *See, Frisch v. Harris*, 101 A.D.3d 941, 957 N.Y.S.2d 335 (2nd Dept., 2012). The plaintiff's papers also fail to raise a triable issue of fact regarding the 90/180-day category of the Insurance Law §5102(d). The plaintiff initially testified at her deposition that she went to work, as a home health aide, two days after the accident without any restrictions and was able to work for an entire week following the accident. (*See, plaintiff's deposition testimony, Exh. "D" at pages 18, 51-53 and 55.*)

Accordingly, defendants' motion [Seq. #2] and cross-motion [Seq. #3] for summary judgment dismissing the plaintiff's complaint, are hereby granted in the entirety.

This constitutes the decision of this Court.

Dated: Brooklyn, New York
December 13, 2022



HON. LISA S. OTTLEY, J.S.C.
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