

Nicholls v NGB Bay LLC

2023 NY Slip Op 30670(U)

March 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 512612/2018

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

CHERYL NICHOLLS,

Plaintiff,

-against-

NGB BAY LLC and ESSAM ABDELAZIZ,

Defendants.

_____X

DECISION / ORDER

Index No. 512612/2018

Motion Seq. No. 2

Date Submitted: 11/17/22

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>30-37</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>41-49</u>
Reply Affirmation.....	<u> </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 October 2, 2017, near the intersection of Broadway and West 111th Street in Manhattan. At her EBT, plaintiff testified that she was pulling out of a parking spot when defendants' vehicle hit hers. Plaintiff declined medical attention at the scene and went to a doctor the next day. At the time of the accident, plaintiff was approximately forty-eight years of age. In her Bill of Particulars, [Doc 17] plaintiff claims that as a result of the accident, she sustained injuries to her cervical spine and to her left shoulder. In addition, she claims that if the injuries were not caused by the accident, they were "aggravated, and/or exacerbated, and/or accelerated, and/or precipitated, and/or enhanced, and/or intensified as a result of the Defendants' negligent conduct herein."

Defendants contend that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain a serious injury 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, an affirmed IME report from an orthopedist and an affirmation from an independent radiologist.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on September 30, 2021, on behalf of the defendants. This was four years after the accident. Plaintiff told him that because of her shoulder injury from this accident, she had a left shoulder arthroscopy in 2018, and that she still had occasional pain in the left shoulder. She reported a prior motor vehicle accident [in 2008] which resulted in a right knee arthroscopy. Dr. Guttman did not review any of the plaintiff's medical records. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in her cervical spine and left shoulder, with no tenderness or spasm. Dr. Guttman also reports that all related tests were negative. The doctor concludes that plaintiff's "alleged" cervical sprain and "alleged" left shoulder arthroscopy have resolved, and states that "[t]he 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."

Dr. Scott A. Springer, a radiologist, reviewed the MRIs of plaintiff's cervical spine and of her left shoulder. The cervical spine MRI was performed on November 24, 2017, less than two months after the accident. He states, after reviewing the MRI films, that all of the abnormalities are unrelated to the 2017 motor vehicle accident. Specifically, he reports that he observed that "[t]here are moderate degenerative changes at C4-C5 and C5-C6, which are a chronic process and could not have occurred in the time interval between the incident and the examination. C2-C3 and C3-C4 demonstrate disc desiccation with normal disc space height. C4-C5 demonstrates disc desiccation with mild loss of disc space height. C5-C6 and C6-C7 demonstrate disc desiccation with moderate loss of disc space height. C7-

T1 disc maintains normal height and signal. Disc desiccation is a drying out and loss of disc substance process. This could not have developed in the one month and 22 day interval between the examination and the incident and is indicative of degenerative disc disease. Given the associated degenerative changes, the disc space height loss is chronic in nature. C2-C3 demonstrates no disc bulge or disc herniation. C3-C4 demonstrates a mild disc bulge with mild mass effect on the anterior thecal sac. The neuroforamen are patent. C4-C5 demonstrates a moderate-sized broad-based disc herniation with a disc osteophyte complex. This causes mild mass effect on the anterior thecal sac. There is mild narrowing of the central canal at this level, which is secondary to the herniation. The neuroforamen are patent. C5-C6 demonstrates a mild broad-based disc herniation with a disc osteophyte complex. This causes mild mass effect on the anterior thecal sac. There is mild narrowing of the central canal at this level, which is secondary to the herniation. The neuroforamen are patent. The most common cause for disc herniations is degenerative disc disease and, given the associated degenerative changes and the lack of increased signal in the annular ligament, the disc herniations seen are chronic in nature. Disc osteophyte complexes, as described above, are chronic, bony productive changes. C6-C7 demonstrates a mild disc bulge with mild mass effect on the anterior thecal sac. The neuroforamen are patent. The disc bulging, as described above, has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. C7-T1 demonstrates no disc bulge or disc herniation.”

Dr. Springer’s impression is that the plaintiff’s cervical MRI shows “[s]traightening of the normal cervical lordosis. Moderate degenerative changes, C4-C5 and C5-C6. Disc desiccation, C2-C3 through C6-C7. Disc space height loss, C4-C5, C5-C6 and C6-C7. Disc bulges, C3-C4 and C6-C7. Disc herniations, C4-C5 and C5-C6. Central canal narrowing,

C4-C5 and C5-C6. Disc osteophyte complexes, C4-C5 and C5-C6. No fracture or subluxation. No posttraumatic changes causally related to the 10/2/2017 incident.”

The left shoulder MRI was performed on November 17, 2017, and Dr. Springer states, after reviewing the films, that “[t]he rotator cuff tendons are grossly intact. The long head of the biceps tendon is intact and anchors anatomically. The humeral head maintains a normal spherical configuration. The glenohumeral joint is intact. There is no joint effusion. The labrum is intact. There is no bone marrow edema. There is no soft tissue swelling. The surrounding musculature is unremarkable.” He concludes that he sees “[n]o fracture, dislocation, or acromioclavicular joint separation. No posttraumatic changes causally related to the 10/2/2017 incident.”

Defendants contend that their medical evidence, combined with plaintiff’s testimony at her EBT, eliminates all categories of injuries in the statute. Plaintiff testified at her EBT, held on August 26, 2021, that she has not worked since her earlier accident in 2008. She was a bus driver for the MTA. The case involving that accident was settled, she said, and she did not remember if it was settled before suit [Page 15]. She had a baby after the accident [Page 17] who has been diagnosed with autism, and she now cares for this child and is not working. Counsel avers that plaintiff testified that this accident has not prevented her from performing any of her usual and customary activities, including during the six months after the accident. She testified (on August 26, 2021) that she has had some difficulty with her arm when she goes swimming, but she has not been going to any public pools as they were closed due to the Covid-19 Pandemic. When asked if there are “any other activities besides swimming that you cannot do at all or cannot do as well?” she responded [Doc 37 Page 69] “no.” When plaintiff was asked if the left shoulder arthroscopy alleviated the pain, she said “yes, it helped” [Page 63]. She testified [Page 67] that she takes Aleve, an over the counter anti-inflammatory,

“maybe three times in a month.” The defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have 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 Eyley*, 79 NY2d 955, 956-957 [1992]). The affirmed report of the orthopedist who examined plaintiff, combined with the affirmation from the radiologist who opines that none of plaintiff’s injuries were caused by the accident at issue, demonstrate that she did not sustain a serious injury as a result of the subject accident. Further, plaintiff’s testimony that her activities have not been curtailed and that the arthroscopic surgery to her left shoulder on January 6, 2018 relieved the pain she was experiencing, makes a *prima facie* showing on the 90/180-day category of injury. The burden of proof then shifts to plaintiff.

Plaintiff contends that the medical evidence she has submitted overcomes the motion and raises a triable issue of fact as to whether she sustained a serious injury under Insurance Law § 5102(d). Plaintiff opposes the motion with an attorney’s affirmation, her own affidavit, a supplemental bill of particulars dated August 17, 2022 which (improperly) reports new injuries, specifically a brand-new claim of four disc herniations in her lumbar spine and additional alleged injuries to her left shoulder and cervical spine, an affirmation from a physician, and medical records.

Dr. Alexios Apazidis, an orthopedic surgeon, provides an affirmation [Doc 42] which describes his examination of plaintiff on October 10, 2022, which was his first contact with plaintiff since he performed her arthroscopic shoulder surgery on January 6, 2018, and appears to have been conducted so plaintiff could oppose this motion. Dr. Apazidis summarizes plaintiff’s medical records, including the MRI reports, but this discussion constitutes inadmissible hearsay. He states that he first saw plaintiff on November 29, 2017 for her left shoulder. By the date of the surgery, January 6, 2018, he says “[t]he patient has

already undergone an extensive conservative course of physical therapy treatment. However, her left shoulder condition has not improved. In fact, the condition of her left shoulder was getting worse; the patient had difficulties to perform activities of daily living. The patient opted for diagnostic and operative arthroscopy of the left shoulder.” He then says she had the surgery on January 6, 2017, which should say 2018.

Dr. Apazidis states that he tested plaintiff’s range of motion with a goniometer on October 10, 2022, and she had significant restrictions in her range of motion in her left shoulder, as well as in her cervical and lumbar spine. However, he did not conduct any range of motion tests of her cervical or lumbar spine in the five years prior, that is, since the accident. It seems she was referred to him for her left shoulder, and that is what he treated. He tested the range of motion of her shoulder at the initial visit, on November 29, 2017, and reports that “Abduction was restricted at 100 degrees with pain (normal is 180 degrees); Adduction was restricted at 0 degrees with pain (normal is 30 degrees); Flexion was restricted at 110 degrees with pain (normal is 180 degrees); Extension was restricted at 20 degrees with pain (normal is 60 degrees); Internal Rotation was restricted at 45 degrees with pain (normal is 90 degrees) and External Rotation was restricted at 65 degrees with pain (normal is 90 degrees). Hawkins and Neers tests were positive, painful external and internal rotation, anterior tenderness and edema present with positive Speed and Obrien tests.” These are almost the identical findings he relates for the October 10, 2022 testing, four years after the arthroscopic surgery.

Dr. Apazidis concludes that “[i]t is my opinion, that all of the above injuries and disabilities in the left shoulder and lumbar and cervical spines are casually related to the motor vehicle accident of October 2, 2017. The injuries sustained to the patient’s left shoulder and lumbar and cervical spines have and will interfere with her ability to perform daily functions and activities. The injuries are such that she shall, as the years progress,

sustain additional loss of range of motion to her left shoulder and lumbar and cervical spines thereby further restricting the daily functions and activities that she will be able to participate in. In addition, the injuries sustained are such that Mrs. Nicholls will suffer substantial pain on a permanent basis and that such pain will restrict daily functions and activities and will interfere with her enjoyment of life. It is also my opinion, that Mrs. Nicholls has sustained a permanent loss of use of her left shoulder and lumbar and cervical spines, as well as a significant limitation of use of those parts of her body. My opinion is based upon the patient's complaints, the history obtained, my review of the medical records, and the positive objective findings of my physical examination.”

Dr. Apazidis also disputes Dr. Springer’s opinions, stating “I state in my professional medical opinion that the injuries patient received to her lumbar and cervical spines, cannot possibly be attributed to any degenerative changes [Doc 42 ¶21].”

Document 46 is a cervical spine MRI report for a November 24, 2017 study, and an MRI report for a left shoulder MRI which was performed on November 17, 2017, which are not in admissible form and could not be considered. Document 47 is a lumbar spine MRI report for a May 17, 2018 study, which is not in admissible form and could not be considered. Document 44 is an affirmation from a physician, Dr. Omar Ahmed, which states that the annexed 210 pages of handwritten records from Modern Brooklyn Medical PC are authentic and complete and maintained in the ordinary course of his practice. The records appear to start on October 4, 2017 and end on June 21, 2018. The court declines to read the handwritten records. There are also records from a chiropractor’s office, named PCC Chiropractic PC, which are not in admissible form and were not considered. Document 45 is another affirmation from Dr. Omar Ahmed, which states that the annexed 22 pages of handwritten physical therapy notes are authentic and complete and maintained in the ordinary course of his practice. The records appear to start on October 4, 2017 and end on

June 21, 2018. The court declines to read the handwritten records, which are signed by the physical therapist and not Dr. Ahmed.

Document 43 is another affirmation from Dr. Alexios Apazidis, which states that the annexed records from Allcity Family Healthcare Center are authentic and complete and maintained in the ordinary course of his practice. The records include the operative report for plaintiff's arthroscopic shoulder surgery on January 6, 2018.

The court finds that, with regard to her shoulder injury, plaintiff's 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]). Plaintiffs' doctor provides an affirmation indicating significant and quantified restrictions in her range of motion in her shoulder, both contemporaneously with the accident and recently, and opines that plaintiff's injuries were caused by the subject accident. He also disputes defendants' radiologist's claim that none of the abnormal MRI findings were caused by the accident on October 2, 2017. Thus, he raises a "battle of the experts," with defendants' doctors, requiring a trial.

It must be clarified that where a plaintiff overcomes the defendants' motion with regard to one injury, but not all of her alleged injuries, the decisional law in the Second Department does not permit the court to dismiss some claims and leave others. Plaintiff is entitled to a trial with regard to all of her claimed injuries (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]).

However, that being said, the supplemental bill of particulars which plaintiff includes as an exhibit to the opposition papers [Doc 49], which is dated after the defendants' motion was made and served, and which asserts claims of lumbar spine injuries not disclosed in the five years since the accident, is hereby stricken. Supplementing the bill of particulars to add new injuries five years after the accident requires leave of court. Plaintiff may not seek to prove these lumbar injury claims at trial. At her EBT, when she was asked "what complaint did you make to that doctor?" she replied [Doc 37 Page 56] "My left shoulder, my neck." Then, when she was asked what part of her body she received physical therapy for, she said [Page 60] "my left shoulder, my neck." and when she was asked which parts of her body she had MRIs to, she said [Pages 60-61] "my left shoulder, my neck." She does not claim she injured her back (lumbar spine) at any point in her 2021 EBT.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: March 6, 2023

ENTER:



Hon. Debra Silber, J.S.C.