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

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TANASHIA SANDERS,

Plaintiff,

-against-

BENNIE REDDISH, BRANDON T. REDDISH, RIGO LIMO AUTO GROUP, LLC, and GEORGE I. ST. BERNARD,

Defendants.

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DECISION / ORDER

Index No. 517275/2019
Motion Seq. No. 3, 4
Date Submitted: 2/23/23

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Rigo Limo and St. Bernard's motion and co-defendants Reddish and Reddish's cross-motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	71-79
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	80-85
Affirmations in Opposition and Exhibits Annexed.....	86-88
Reply Affirmation.....	

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

This is a personal injury action which arises from a motor vehicle accident which took place on July 1, 2018, when the plaintiff was a passenger in her friend defendant Brandon Reddish's car, which was driving on Jamaica Avenue in Brooklyn, NY, when it was hit by a vehicle owned by co-defendant Rigo Limo Auto Group LLC[1] (hereinafter "Rigo) and driven by co-defendant St. Bernard. Plaintiff testified that she was seated in the front passenger seat, and that her door was the point of impact of the two vehicles, as the co-defendant St. Bernard "ran a stop sign" coming from their right. Plaintiff was taken by ambulance from the scene to the emergency room at Brookdale Hospital, then went to a doctor subsequently. At the time

[1] The defendants' answer states that the correct name is Rigo Limo Auto Corp. but does not correct the name of the driver, which seems to be George St. Bernard.

of the accident, plaintiff was approximately twenty-seven years of age. In her Bill of Particulars [Doc 76], plaintiff claims that as a result of the accident, she sustained injuries to her cervical and lumbar spine and to her right shoulder. In addition, she claims that her "injuries were caused, and/or aggravated, and/or exacerbated, and/or accelerated, and/or precipitated, and/or enhanced, and/or intensified as a result of the Defendants' negligent conduct."

Defendants Rigo and St. Bernard contend in their motion (Seq. #3) and the Reddish defendants contend in their cross-motion (Seq. #4) 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 bill of particulars, plaintiff's deposition transcript, an affirmed IME report from an orthopedist and a review of plaintiff's MRIs from a radiologist. The Reddish defendants submit as additional evidence the plaintiff's emergency room records and an affirmation of counsel, but otherwise bootstrap on the Rigo and St. Bernard motion in what is commonly known as a "me too" motion.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on February 11, 2021, on behalf of the defendants. This was two and a half years after the accident. Plaintiff told him that she had arthroscopic surgery to her right shoulder, and was still experiencing pain in this shoulder. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in her cervical and lumbar spine, and in her right shoulder, with no tenderness, swelling or spasm. Dr. Guttman reports that all related tests were negative.

Dr. Guttman concludes that plaintiff's cervical and lumbar spine sprains have resolved, and that her right shoulder arthroscopy has resolved. He opines that "The medical records provided offer no objective evidence that the above noted injuries are causally related to the motor vehicle accident of July 1, 2018. The objective test results do not support the claimant's

subjective complaints as related to the reported accident. Today'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."

The defendant's radiologist, Audrey Eisenstadt, M.D. did not examine the plaintiff. She reviewed the MRI films taken of plaintiff's cervical and lumbar spine and her right shoulder [Doc 78]. All of the studies were done less than a month after the accident. Dr. Eisenstadt concludes that all of the abnormal findings on the MRIs are all degenerative or congenital and are not causally related to the subject accident. She reports that the lumbar MRI is completely normal and that the cervical MRI shows minimal bulging at C3-4 to C5-6 with no herniations. Dr. Eisenstadt describes the right shoulder MRI as follows: "[r]eview of the limited MRI scan of the right shoulder performed nineteen days following the incident reveals narrowing of the subacromial space due to an impingement or a pinching narrowing on the structures passing through the subacromial region. The narrowing of the subacromial space is a result of the downsloping acromion, which is a congenital abnormality, present since childhood, causing a pinching action on the structures passing through the subacromial region. These structures include the rotator cuff musculature, glenoid labrum and biceps tendon. Minimal distal supraspinatus tendinopathy is seen beyond the downsloping acromion, with no subacromial-subdeltoid bursal fluid noted or marrow edema at its insertion into the greater tuberosity of the humerus. Any trauma occurring to the supraspinatus tendon nineteen days prior to this examination would be associated with fluid in the bursal sac located directly above the supraspinatus tendon, as well as edema at its insertion into the greater tuberosity of the humerus. Other structures affected by impingement or narrowing of the subacromial space

include the biceps tendon and glenoid labrum, both of which are entirely normal on this study. No posttraumatic osseous, tendinous, ligamentous, labral or musculature abnormality is seen. Not even a joint effusion or subacromial bursal fluid is seen to indicate any recent trauma or active inflammation causally related to the 09/01/18 [sic] incident."

Defendants contend that their medical evidence, combined with plaintiff's testimony at her EBT, eliminate all categories of injuries in the statute. Counsel for Rigo and St. Bernard doesn't address the 90/180 category of injury in his affirmation, and simply concludes that the plaintiff would not be able to prove an injury in this category at trial.[2] The Reddish defendants' counsel avers [Doc 81 ¶15] that "Under the prevailing law, plaintiff's testimony that the only activities that she was limited in performing after the Accident was shooting basketball with kids at weekly basketball practice and jump-roping, is insufficient to establish a "serious injury" under the 90-180 day category. See *Alloway v Rodriguez*, 61 AD3d 591 (1st Dept. 2009) (holding that any limitations on the plaintiff's recreational activities did not prove to be a restriction on the plaintiff's usual and customary daily activities for at least 90 days of the 180 days following the accident); *Omar v Goodman*, 295 AD2d 413 (2d Dept. 2002) (holding that the "curtailment of recreational and household activities and an inability to lift heavy packages is insufficient" to raise a triable issue of fact)."

The medical affirmations provided by defendant make out a prima facie case for summary judgment with regard to the categories of injury "a permanent consequential limitation of use of a body organ or member" as well as "a significant limitation of use of a body function or system."

[2] Counsel states [Doc 72 ¶28], without any cite to evidence submitted, that "defendants' proof ruled out the 90/180-day category of the statute. Putting aside, for the moment, that this category requires proof that there was a causally related, medically determined injury, this category requires proof that plaintiff was medically prevented from performing "substantially all" of his [sic] usual and customary activities for the requisite period."

With regard to the 90/180 category of injury, the only evidence is plaintiff's EBT testimony. Plaintiff testified that she was not working at the time of the accident. At her EBT, she was asked "Are there any activities you used to participate in before the accident of July 1st, 2018 that you were limited or you are still limited in your abilities to participate in?" [Doc 79 Page 75], and she responded that she could not jump double Dutch jump rope and could not help her son's basketball team at their practices. She was again asked "Are there any activities that you used to participate in before the accident that you are claiming you can no longer participate in at all due to the injuries you sustained?" and she gave the same answer [Pages 76-77]. Asked "anything else?" [Page 77] plaintiff said, "that's it."

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 (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

In opposition to the motion, the plaintiff submits an affirmation from counsel, an affirmation from her treating doctor, Gordon Davis, M.D., and an affirmation from Richard Pearl, M.D., certifying his annexed records which describe an initial visit on August 9, 2018 and the arthroscopic surgery he performed to plaintiff's right shoulder on October 10, 2018.

Dr. Davis saw plaintiff for the first time only a few days after the accident, and oversaw her physical therapy, according to plaintiff's EBT testimony [Page 53]. He re-examined her on August 31, 2022 in order to oppose this motion. Dr. Davis states that at the emergency room, plaintiff received pain medications, oxygen, a neck brace and a back brace. He started her on physical therapy at her initial visit on July 6, 2018. She complained of pain and stiffness to her right shoulder, back and neck. He tested the range of motion in her right shoulder and

in her cervical and lumbar spine at that initial exam and it was significantly restricted [Doc 87 Pages 4-5]. In taking a history, he learned that she had been in a prior accident in 2009, that she had injured her neck and back in that accident, and that she was asymptomatic at the time of the 2018 accident. He states that [Doc 87 ¶11] "Based on my examination of the patient's lumbar and cervical spines, as well as the results of the MRI exams, the patient was diagnosed in addition to her originally diagnosed injuries with activation/aggravation of pre-existing asymptomatic condition of the lumbar and cervical spines that created susceptibility to injury and/or made her injuries more serious than they otherwise would have been." He referred plaintiff for MRIs and reports that he reviewed the films, and that the right shoulder MRI indicated a tear, among other things, that the lumbar spine MRI indicated two bulges, and the cervical MRI showed a disc herniation at C7-T1 and three bulges in the three levels above.

Plaintiff went to see Dr. Pearl, who reported to Dr. Davis that conservative treatment had not helped, and that "the patient had difficulties to perform activities of daily living. The patient opted for diagnostic and operative arthroscopy of the right shoulder" [Doc 87 ¶19]. The surgery "revealed a right shoulder SLAP I lesion of the labrum, anterosuperior hypertrophic synovitis of the glenohumeral joint, acromion type II impingement syndrome and traumatic bursitis."

Dr. Davis states, at ¶21, that "Mrs. Sanders discontinued her rehabilitation treatment, over four months after her treatment has begun, as she was advised that her no-fault benefits were discontinued, and she could no longer afford to keep treating. I discharged Mrs. Sanders with instructions to refrain from her regular physical activities and continue to exercise at home. Patient continued to do prescribed exercises at home to alleviate pain on temporary basis. At that time, she was deprived of her daily and regular activities."

Dr. Davis tested the plaintiff's range of motion in her right shoulder and cervical and lumbar spine at the August 2022 exam, and reports that she continues to have significant restrictions when compared to normals [Doc 87 ¶¶27-31]. He also reports that there was radiating pain, with numbness and tingling in her feet and her fingers. He opines that her injuries were caused by the accident and/or were aggravated by the accident, and that "Additionally, I state in my professional medical opinion that the injuries patient received to her right shoulder, lumbar spine and cervical spine cannot possibly be attributed to any degenerative changes. The fact that patient was asymptomatic prior to the July 1, 2018 accident, the symptoms of pain which the patient it demonstrated right after the July 1, 2018 accident and presently, the complains [sic] of pain in the right shoulder, back and neck, which patient exhibited immediately after her accident at the Brookdale University Hospital emergency department, the objective testing performed to patient's right shoulder, back and neck since the date of the accident, as well as during the recent examination which I performed on August 31, 2022 without any significant improvements, the fact that the patient reached only partial recovery and presently expresses the symptoms of pain in her back and neck, as well as in her right shoulder even after the arthroscopic surgery was performed, all of these factors taken in summation support my professional medical opinion that the above described injuries Mrs. Sanders sustained to her right shoulder, back and neck could only be caused by a traumatic event of July 1, 2018 motor vehicle collision."

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 defendants' motions for summary judgment.

In conclusion, plaintiff's treating doctor's affirmation is sufficient to overcome the motions 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. Davis's affirmation indicates significant, quantified restrictions in plaintiff's range of motion in her cervical spine, lumbar spine and right shoulder, both contemporaneously with the accident and recently, that she had bulges and herniations in her spine on films taken when she was only 27 years old, and he opines that plaintiff's injuries were caused (right shoulder), and aggravated and exacerbated (spine) by the subject accident. Thus, he raises a "battle of the experts." This is sufficient to overcome the motions and raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that the motions are both denied.

This constitutes the decision and order of the court.

Dated: March 8, 2023

ENTER:

Hon. Debra Silber, J.S.C.