

**Winston v Jae Taek Shim**

2023 NY Slip Op 31372(U)

April 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 505698/2018

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 6<sup>th</sup> day of April, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X

DOROTHY WINSTON,

Index No.: 505698/2018

*Plaintiff,*

- against -

DECISION AND ORDER

Motion Sequence #6 &

JAE TAEK SHIM, RAW EQUIPMENT BUILDING MATERIALS, RICHARD D. GONZALEZ, LIMO SEVEN TRANSPORTATION, INC., and ABDURASUL MAKGMUDOV,

*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.....	110-129, 132-149,
Opposing Affidavits (Affirmations).....	153-155, 165, 167-173, 175-180,
Reply Affidavits (Affirmations).....	162-164,
Memorandum of Law.....	150, 166, 174

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

This is an action for personal injuries allegedly sustained by the Plaintiff, Dorothy Winston (hereinafter the "Plaintiff") on October 7, 2017. The Plaintiff alleges in her Complaint that she suffered personal injuries when, as a passenger in vehicle owned by Co-Defendant Limo Seven Transportation, Inc. ("Defendant LST") and operated by Co-Defendant Abdurasul Makgmudov ("Defendant Makgmudov") (collectively, the "Limo Defendants"), the Limo Defendants' vehicle was involved in a collision with a vehicle owned and operated by Defendant Jae Taek Shim (hereinafter "Defendant Shim"). The collision purportedly occurred on the Long Island

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Expressway, at or near its intersection with 160th Street, in Queens, New York. The Plaintiff claims, in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to her left knee, right knee, left shoulder, cervical spine and lumbar spine. The Plaintiff also alleges that she sustained “a disabling injury for a period in excess of 90 out of the first 180 days following this occurrence.” (the “90/180 claim”).

The Limo Defendants now move (motion sequence #6) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that the Plaintiff failed to sustain a “serious injury” as defined by Insurance Law § 5102(d). In support of this application, the Limo Defendants rely on the deposition of the Plaintiff and the reports of Dr. Jeffrey Guttman, Dr. Scott A. Springer, and Dr. Darren Fitzpatrick.

The Plaintiff opposes the motion. The Plaintiff contends that the Limo Defendants have failed to meet their *prima facie* burden. The Plaintiff also contends that, in any event, she has submitted sufficient evidence to create a material issue of fact that serves to prevent the Court from granting summary judgment. The Plaintiff relies primarily on the reports of Dr. Simon Ryoo, Dr. Vladimir Shur and Dr. Jerry A. Lubliner, and other related documents.

Defendant Shim cross-moves (motion sequence #7) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against him on the issue of liability. Shim also contends that the Plaintiff failed to sustain a “serious injury” as defined by Insurance Law § 5102(d). Both the Plaintiff and the Limo Defendants oppose that aspect of Defendant Shim’s motion that seeks summary judgment in relation to Defendant Shim’s liability. The Plaintiff opposes that aspect of Defendant Shim’s motion relating to Insurance Law § 5102(d) and relies on the reports of the doctors previously referenced and other related documents.

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].

#### Liability (Motion Sequence #7)

Turning to that aspect of Defendant Shim’s motion (motion sequence #7) that argues that summary judgment should be granted to him as he was not liable for the accident, the Court finds that there are issues of fact regarding whether Defendant Shim was a proximate cause of the accident. When asked in his deposition whether the vehicle that the Plaintiff was a passenger in was stopped, Defendant Shim stated “I think it was stopped, yeah.” (Page 30). When asked why he believed it was stopped, Defendant Shim stated “[s]oon I hit the bumper [sic], I think taxi [Limo Defendants’ vehicle] was stopped.” (Page 30). When asked again whether the taxi was stopped when he made impact with it, Defendant Shim stated “[n]o, when I hit it, taxi stopped, yeah, that's

it.” (Page 30). When asked if the vehicle the Plaintiff was a passenger in moved when his vehicle struck it, Defendant Shim stated “[y]es, when I hit the taxi moved, yeah, move him, yeah, move it little.” (Page 31). When asked in what direction the Limo Defendants’ vehicle moved when he struck it, Defendant Shim stated “[n]o, no, no, no, just go front, front.” (Page 33). This testimony raises an issue of fact regarding the proximate cause of the collision and whether Defendant Shim was comparatively negligent in causing the collision at issue. *See Polanco-Espinal v. City of New York*, 84 AD3d 914, 915, 921 N.Y.S.2d 862 [2d Dept 2011]; *Vavoulis v. Adler*, 43 AD3d 1154, 1156, 842 N.Y.S.2d 526, 528 [2d Dept 2007]. As a result, that aspect of Defendant Shim’s motion that seeks summary judgment regarding liability is denied, and there is accordingly no need to address the opposition papers.

Insurance Law 5102 (Motions Sequence #6, #7)

In support of their motion, the Defendants proffer the affirmed medical reports of Dr. Jeffrey Guttman, Dr. Scott A. Springer, and Dr. Darren Fitzpatrick. Dr. Guttman, examined the Plaintiff on March 31, 2021, more than three years after the date of the accident. Dr. Guttman conducted range of motion testing with the use of a goniometer. He examined the Plaintiff’s cervical spine, lumbar spine, left shoulder, knees and right ankle and found no limitation in the Plaintiff’s range of motion in relation to those areas. Dr. Guttman found that the cervical spine sprain had resolved, the lumbar sprain had resolved, the left shoulder sprain had resolved, the bilateral knee sprains had resolved, and the right ankle sprain had resolved. Dr. Guttman also stated that “[t]he medical records provided offer no objective evidence that the above injuries are causally related to the motor vehicle accident of October 7, 2017.” Dr. Guttman also opined that “[t]he objective test results do not support the claimant’s subjective complaints as related to the reported accident.” Dr. Gutman further opined that “[t]he claimant did not sustain any significant or

permanent injury as a result of the motor vehicle accident.” (See Limo Defendants’ Motion, Report of Dr. Guttman, Exhibit F). Dr. Guttman did not address the six months immediately following the accident.

Dr. Scott A. Springer, radiologist, reviewed the x-ray of the Plaintiff’s left knee performed on November 21, 2018 (approximately one month and 14 days post-accident). Dr. Springer stated that “[t]he patient is status post total left knee replacement.” Dr. Springer also stated that “[n]o posttraumatic changes causally related to the October 7, 2017 incident.”

Dr. Fitzpatrick reviewed the MRI of the Plaintiff’s right knee performed December 12, 2017 (approximately two months post-accident). As to the Plaintiff’s right knee, Dr. Fitzpatrick found “[i]rregularity of the free edge of the body and posterior horn of the medial and lateral menisci with intrasubstance degeneration of the posterior horn segments.” Dr. Fitzpatrick also found that “[d]egenerative tears of the meniscus results from normal, repetitive forces acting upon a worn-down meniscus.” Dr. Fitzpatrick, *inter alia*, opined that “[t]here is no other evidence of traumatic injury to the pes anserine tendons to indicate the etiology of bursitis is related to trauma.” Dr. Fitzpatrick also reviewed the MRI of the Plaintiff’s left shoulder performed on December 12, 2017 (approximately two months post-accident). Dr. Fitzpatrick found that “acromioclavicular and glenohumeral arthrosis are degenerative entities due to repetitive, normal forces acting across the joint spaces, resulting in gradual wear of the joint surface cartilage.” Dr. Fitzpatrick opined that “[t]his results in periarticular compensatory bony overgrowth, productive changes or osteophytes, due to chronic capsular traction in order to limit motion across the joint.” (See Limo Defendants’ Motion, Reports of Dr. Springer and Dr. Fitzpatrick, Exhibit G). These doctors do not address any other areas for which the Plaintiff contends she suffered injury (i.e. the cervical and lumbar spines). Both Dr. Springer and Dr. Fitzpatrick fail to address the 90/180 claim.

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, at Paragraph 12, that the Plaintiff “was confined to bed and to home for a period of approximately 15 weeks to date, except for necessary and essential excursion for required purpose.” During her deposition, when asked how things had changed as a result of the accident, the Plaintiff stated “[n]ot able to do like I used to do.” When asked to elaborate, the Plaintiff stated “I used to like go up and down stairs, lifting and carrying things. I miss that. That was my job, you know, lifting and carrying. Swimming. I went, I tried, and my leg just dropped down and I live swimming.” (Page 79). When asked about the assistance she receives from her daughter, the Plaintiff stated, “[w]ell, she cooks a lot for me, and she definitely goes down the basement and washes my clothes. She don’t trust me to go down the steps, the stairs.” When asked about grocery shopping, the Plaintiff stated, “[s]he goes with me and I take my walker and she put everything in the car and do everything else.” (Page 80).

Assuming that the Defendant had made a *prima facie* establishing that the Plaintiff had not sustained a serious injury as defined by the statute, it 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 his 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].

Dr. Simon Ryoo, a board-certified radiologist, did not physically examine the Plaintiff but reviewed the MRIs of the Plaintiff's lumbar and cervical spines, right ankle, right knee and left knee. The Court notes that portions of a number of these reports are illegible. As to the left knee, the MRI was performed on October 28, 2017, approximately three weeks after the Plaintiff's accident. As to the left knee, the MRI report stated, "[a] focal flap tear involving the posterior horn of the medial meniscus is demonstrated, extending to the superior articular." The MRI report also stated that "[m]oderate fluid tracks along the pes e bursa, compatible with pes anserine bursitis." As to the right knee, an MRI was performed on October 19, 2017, 12 days post-accident. As to the right knee, the MRI report reflects that, "[n]o discrete tendon tear visualized." "No acute fracture is seen." An MRI of Plaintiff's lumbar spine was performed on November 6, 2017, approximately one month post-accident. In the MRI report of the lumbar spine, Dr. Ryoo found no herniation, but did identify disc bulges. Dr. Ryoo does not causally relate any of these findings to the accident. (See Plaintiff's Affirmation in Opposition, Report of Dr. Ryoo, Exhibit B)

However, Dr. Vladimir Shur affirms that he performed left knee surgery on the Plaintiff on June 26, 2018. Dr. Shur states that "[o]n June 26, 2018, Ms. Winston underwent left total knee arthroplasty with the bone grafting of the distal femur, soft tissue rearrangements, and layered closure by me at Beth Israel Medical Center." Dr. Shur opined that "[u]nder a reasonable degree of medical certainty, it is my medical opinion that Ms. Winston's injuries to her left knee as well as her need for left knee surgery are causally related to her accident of 10/7/17 and not due to a pre-existing condition or degeneration." (See Plaintiff's Affirmation in Opposition, Report of Dr. Shur, Exhibit C)

Dr. Jerry A. Lubliner, an orthopedist, examined the Plaintiff on February 22, 2022, more than four years and three months after the date of the accident. Dr. Lubliner conducted range of motion testing of the Plaintiff's neck, lumbar spine, shoulders, knees and right ankle, using a goniometer, and found limitation in the Plaintiff's range of motion in relation to all of these areas. Based on his MRI review, the Plaintiff's medical history and his range of motion testing, Dr. Lubliner opined that the Plaintiff "has and will continue to have permanent scarring, permanent loss of range of motion, permanent swelling of the left knee, permanent recurrent pain, permanent limitation of her activities of daily living and permanent increase in her pain as described after her accident of 10/07/2017." Dr. Lubliner also opined that "[t]he accident of 10/07/2017 is the competent cause for injuries to her neck, her back, left shoulder, both knees and exacerbation of a previous existing condition to her right ankle, for traumatic arthritis to the left knee, for increase of pain in her neck and back, for the need for treatment, for the need for surgery and for the permanent impairments/conditions as described." (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Lubliner, Exhibit D).

The Plaintiff in her affidavit did discuss the purported gap in treatment and provided an adequate explanation for the gap in her treatment history. See *Pommells v. Perez*, 4 N.Y.3d 566, 576, 830 N.E.2d 278, 284 [2005]. An affidavit stating that a Plaintiff stopped receiving treatment because her benefits were terminated and she could not afford to continue to pay for such treatment out of pocket is an adequate explanation for the gap in his treatment history. See *Delorbe v. Perez*, 59 AD3d 491, 492, 873 N.Y.S.2d 198, 199 [2d Dept 2009]; see also *Black v. Robinson*, 305 AD2d 438, 439-40, 759 N.Y.S.2d 741, 742 [2d Dept 2003] [plaintiff's testimony at deposition, that she underwent therapy until her insurance stopped, sufficiently addressed gap in treatment]. Here, as part of her affidavit, the Plaintiff stated that, "I stopped treating because my medical bills for the treatment I received were paid by what I have been informed are commonly referred to as "no

fault" benefits." The Plaintiff also stated that "[o]nce payment for my medical care was terminated by no-fault, I had to stop treating because I could not afford to pay for treatment out of my own pockets." This is an adequate explanation for the alleged gap in treatment. See *Gutierrez v. Yonkers Contracting Co.*, 61 A.D.3d 823, 824, 877 N.Y.S.2d 226, 227 [2d Dept 2009][Plaintiff stated in his affidavit that he stopped treatment because his no-fault benefits were terminated and he could not afford to pay "out of pocket"]. (See Plaintiff's Affidavit, Plaintiff's Opposition to motion sequence #7, Exhibit "A").

Plaintiff's testimony is sufficient to establish a non-conclusory allegation of a 90/180 claim. Defendants have failed to rebut this showing. See *Aujour v. Singh*, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]; *Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d 2009]; *Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006]. Accordingly, the Defendants' motions are denied.

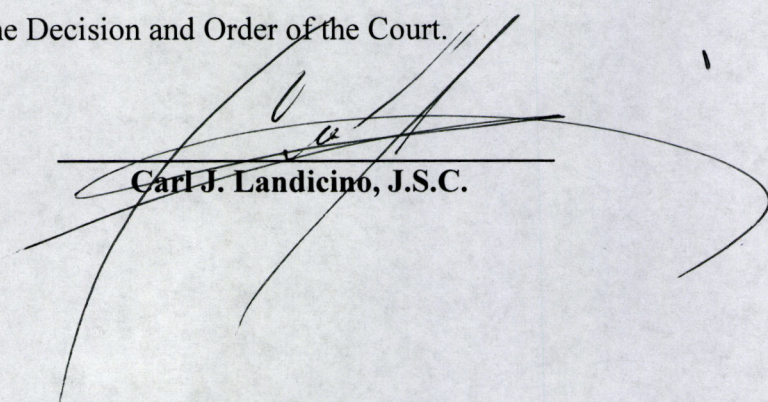
Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment by the Limo Defendants (motion sequence #6) is denied.

The motion for summary judgment by Defendant Shim (motion sequence #7) is denied.

This constitutes the Decision and Order of the Court.

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