

Sellars v Gonshack

2023 NY Slip Op 32765(U)

August 8, 2023

Supreme Court, Kings County

Docket Number: Index No. 515219/2020

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

DEBORAH A. SELLARS,,

Plaintiff,

-against-

**ROBERT GONSHACK, BIANCA M. GONSHACK,
123 LIMOUSINE, INC. and MERVIN N. VIGILANCE,**

Defendants.

_____x

DECISION / ORDER

Index No. 515219/2020

Motion Seq. No. 2

Date Submitted: 5/25/23

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>39-47</u> |
| Affirmation in Opposition and Exhibits Annexed..... | <u>49-54</u> |
| Reply Affirmation..... | <u> </u> |

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is a personal injury action arising from a motor vehicle accident which took place on December 26, 2019. The plaintiff was a passenger in the taxi owned by defendant 123 Limousine and driven by defendant Vigilance. The taxi was rear-ended by the vehicle owned and driven by the Gonshack defendants. Plaintiff has discontinued the action as against the Gonshack defendants, presumably after a settlement [Doc 22]. The moving defendants did not execute the stipulation of discontinuance. Thus, the cross claims asserted against the Gonshack defendants in movant's answer are deemed converted to third-party claims. The plaintiff testified that, as a result of the impact, she injured her right shoulder, neck and back. She had surgery to her lumbar spine on December 2, 2020, which she claims was necessitated by the accident. Plaintiff testified

that she received physical therapy for about a year and stopped due to the Covid-19 Pandemic.

The defendants contend in their motion (Motion Seq. #2) 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). The defendants support their motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcripts, and an affirmed IME report from an orthopedist, Dr. Howard A. Kiernan [Doc 45].

Dr. Kiernan, an orthopedist, examined plaintiff on May 2, 2022, on behalf of the defendants. This was two years and five months after the accident. Under the section of his report entitled "Review of Available Records," he only lists plaintiff's bill of particulars, and her supplemental bill of particulars. He states, "At the time of this examination, Mrs. Sellars has complaints of pain in his [sic] neck, low-back and right shoulder."

Dr. Kiernan examined plaintiff and tested her range of motion in her cervical and lumbar spine and in her right shoulder. He states that he used a hand-held goniometer and used the "Guidelines to the Evaluation of Permanent Impairment" 5th edition, published by the American Medical Association. Dr. Kiernan reports that plaintiff had normal ranges of motion in her cervical spine and her right shoulder, that all related tests were negative, and that her sprain/strain had "resolved". However, his testing of her lumbar spine did not produce normal results.

The description of the exam of plaintiff's lumbar spine is as follows:

Examination reveals a healed surgical scar. There is mild muscle spasm noted upon palpation of the paralumbar muscles bilaterally. There is complaint of mild tenderness noted upon palpation bilaterally. Active range of motion reveals flexion at 30 degrees (60 degrees normal), extension at 20 degrees (25 degrees normal), right lateral flexion at 20 degrees (25 degrees normal) and left lateral flexion at 20 degrees (25 degrees normal).

There are no complains of pain with motions.”

Dr. Kiernan concludes that plaintiff sustained sprains and strains to her cervical spine and to her right shoulder, which are “resolved.” His impression of the lumbar spine is “[s]tatus post-surgery – healed .”

There is no explanation offered for the abnormal lumbar spine test results. Dr. Kiernan opines that “[t]here is no disability, permanency or residuals. Based on the examination there is evidence of muscle spasms on the lumbar spine however this is an incidental findings not related, and limited ranges of motion are consistent with unrelated surgery however functional for the claimant.” The court cannot decipher what this means. He concludes “[t]he claimant is able to work without restrictions. The claimant is able to perform normal activities of daily living as she was doing prior to this accident.”

Defendants contend that [Doc 40 ¶18] “[b]ased on the medical evidence submitted by defendants coupled with plaintiffs’ testimony, we submit that plaintiffs’ allegations of injury were not the result of this minor accident that plaintiffs did not sustain trauma, and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute. Specifically, defendants’ showing includes objective evidence establishing an ‘absence of trauma.’ See, *Kester v Sendoya*, 123 AD3d 418 [1st Dept 2014]. Defendants provide radiological evidence confirming that no traumatic injury was sustained. This negates a claim of any causally related serious injury under the statute and is therefore sufficient to meet the defendants’ burden on this motion. See *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]; *Johnson v Singh*, 82 AD3d 565 [1st Dept 2011]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009].” The court notes that there is no “radiological evidence” submitted in support of this motion.

Defendants' attorney next argues (Aff. Doc 40 ¶25) that "defendant's proof rules out the 90/180-day category of the statute. Putting aside that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish, the 90/180 category requires proof that plaintiffs were medically prevented from performing 'substantially all' of his usual and customary activities for the requisite period." The only "proof" that counsel could be referring to would be the plaintiff's EBT [Doc 47]. Plaintiff testified at her EBT that on the date of the accident, she was employed by the New York City Housing Authority and that she missed only one day of work as a result of this accident [Doc 47 Page 23].

The court finds that defendants do not make a prima facie case for summary judgment. As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (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]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctors' affirmations, and in particular, the affirmation of Dr. Christopher Kyriakides [Doc 53], who describes the surgery on the plaintiff's lumbar spine as a "lumbosacral microdiscectomy at L4-L5 and L5-S1," and performed a recent exam of her

cervical and lumbar spine, neither of which produced normal results, is sufficient to overcome the motion and raise a triable issue of fact 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]). Plaintiff thus can be deemed to have raised a “battle of the experts.” This is sufficient to raise a triable issue of fact which requires a trial.

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

This constitutes the decision and order of the court.

Dated: August 8, 2023

ENTER :



Hon. Debra Silber, J.S.C.