Jannat v Yasia Taxi Corp.
2023 NY Slip Op 32788(U)
August 11, 2023
Supreme Court, Kings County
Docket Number: Index No. 504872/2020
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

x

FATEMA R. JANNAT,

Plaintiff,

-against-

YASIA TAXI CORP. and SALEH AHMED,

Defendants.

x

DECISION / ORDER

Index No. 504872/2020
Motion Seq. No. 3
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.....	34-43
Affirmation in Opposition and Exhibits Annexed.....	44-50
Reply Affirmation.....	51

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 August 21, 2018. The plaintiff was driving her car, which collided with a car owned and driven by defendants on 76th Street near the intersection of Glenmore Avenue in Queens, NY. The plaintiff claims in her bill of particulars that, as a result of the accident, she injured her neck and back. She went home from the scene of the accident but then called an ambulance that day, which took her to Brookdale Hospital, and subsequently sought treatment from other providers. She had physical therapy for some period of time, pain injections, and an endoscopic lumbar discectomy surgery. At the time of the accident, plaintiff was approximately 30 years old.

The defendants contend in their motion (Motion Seq. #3) 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 transcript, and an affirmed IME report from an orthopedist, Dr. Pierce J. Ferriter [Doc 41].

Dr. Ferriter, an orthopedist, examined plaintiff on October 7, 2021, on behalf of the defendants. This was three years after the accident. Under the section of his report entitled "Review of Submitted Medical Records," he only lists plaintiff's bill of particulars, and the police report. He states, "Ms. Jannat has complaints of pain in her neck and low back."

Dr. Ferriter examined plaintiff and tested the range of motion in her cervical and lumbar spine. 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. Ferriter reports that plaintiff had normal ranges of motion in her cervical and lumbar spine, that all related tests were negative, that her cervical sprain/strain had "resolved", and her lumbar spine was "status post alleged endoscopic discectomy – healed by exam".

Dr. Ferriter opines that "[t]he examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including work duties. There is no disability or permanency."

Defendants contend that [Doc 35 ¶21] "[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 35 ¶27) 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 their usual and customary activities for the requisite period." The only "proof" that counsel could be referring to would be the plaintiff's EBT [Doc 39]. Plaintiff testified at her EBT that on the date of the accident, she was employed part-time as a home health aide, and that she missed only one week of work as a result of this accident [Doc 39 Page 32].

The court finds that defendants make a prima facie case for summary judgment dismissing the complaint (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v*

Eyler, 79 NY2d 955, 956-957 [1992]). The affirmed report of the orthopedist who examined plaintiff, who states that she had a completely normal exam, demonstrates that she did not sustain a serious injury as a result of the subject accident. Further, plaintiff's testimony that she only missed a week of work after the accident 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, an affirmation from Dr. Losik, the radiologist who read her MRIs, an affirmation from her treating doctor, Dr. Mian, who performed the surgery and his affirmed medical records, and an affirmation from the treating doctor, Dr. Chen, who oversaw her physical therapy. She also provides 262 pages of inadmissible medical records at Document 50, which Dr. Chen attempts to certify, stating "I have reviewed the attached medical records and reports of Ms. Jannat which were written based on the treatment of him [sic] at my office, I affirm under the penalty of perjury that the reports were made in the regular course of business, and the contents, findings, conclusions and opinions contained within the reports/records are true and accurate." However, Dr. Chen did not complete these forms, which are signed by Dr. Henry Kim or various physical therapists, on forms that say "Henry Kim Medical, PC" at the top, and Dr. Kim does not provide an affirmation or a certification.

Dr. Steve B. Losik of Ozone Park Radiology provides an affirmation that states that plaintiff had MRIs of her cervical and lumbar spine in September 2018, and he found, *inter alia*, herniations in her lumbar spine at L4-5 and L5-S1, a herniation in her cervical spine at C4-5, and cervical disc bulges at three other levels.

Dr. Shahid Mian, an orthopedic surgeon, provides an affirmation [Doc 48] which describes his treatment of plaintiff. He also affirms his recent letter which summarizes the treatment [Doc 49]. Plaintiff first was examined on November 8, 2018. He tested her range of motion in her neck and back and it was significantly reduced as compared to normals. He states that "On July 17, 2019, Ms. Jannat underwent endoscopic lumbar discectomy performed from a far lateral transforaminal transpedicular approach at the L4-5 level, annuloplasty, diskography at L4-5 and lumbar epidural steroid injection at L4-5 her lumbar spine by me." He annexes his operative report. Dr. Mian last examined plaintiff on December 22, 2022. She reported pain in her neck radiating to her arms, with numbness, and pain in her lumbar spine radiating to her legs, with numbness. The range of motion in her cervical and lumbar spine was still significantly restricted. His prognosis is: "guarded. Patient injuries are causally related to 08-21-2018 accident with injury neck and low back. Injury low back is permanent. Considering longevity of complaint, positive clinical findings and positive MRI, EMG, permanency is expected in neck."

Dr. Donghui Chen provides an affirmation [Doc 50], which states that he first examined plaintiff on August 29, 2018. At that time, he performed range of motion tests, and her range of motion was significantly restricted in her cervical and lumbar spine. He states that he oversaw her physical therapy, which stopped when her no-fault benefits were terminated. He states "When she stopped treating at my facility, she was still experiencing pain in her cervical and lumbar spines. Under a reasonable degree of medical certainty, it is my medical opinion that Ms. Jannat's injuries to her cervical and lumber spines as well as her need for cervical spine injections are causally related to her accident of 8/21/18 and not due to a pre-existing condition or degeneration." He also states, "[o]n October 24, 2018, November 14, 2018, December 5, 2018, and February 6,

2019, Ms. Jannat underwent inter-laminar epidural steroid injection, bilateral paraspinal muscles and trapezius muscle spasm, myofascial pain and fluoroscopic injections to her cervical spine by me at Barnet Surgery Center."

The court finds that plaintiff's doctors' affirmations are 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]). Plaintiff's doctors provide documentation of significant and quantified restrictions in her range of motion in her neck and back, both contemporaneously with the accident and recently, and opine that plaintiff's injuries were caused by the subject accident. Thus, plaintiff raises a "battle of the experts" with defendants' doctors, requiring a trial.

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

This constitutes the decision and order of the court.

Dated: August 11, 2023

ENTER:

Hon. Debra Silber, J.S.C.