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

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FLORA KENDRICK,

Plaintiff,

-against-

SERGE RIBOUL, HUB TAXICAB CORPORATION, DOING BUSINESS AS HUB TAXI DISPATCHING SERVICE, and JOHN DOE, A FICTITOUS NAME,

Defendants.

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DECISION / ORDER

Index No. 505473/2021
Motion Seq. No. 1
Date Submitted: 5/11/23

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Riboul's motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	17-25
Affirmation in Opposition and Exhibits Annexed.....	31-39
Reply Affirmation.....	

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 September 2, 2020 in Nassau County, New York. The plaintiff was a passenger in a taxi owned and driven by defendant and movant Riboul. Defendants Hub, which is described as a dispatcher, and defendant John Doe have not appeared, and a default has not been taken. Thus, this action was abandoned as against them. The accident took place as plaintiff was exiting the defendant's taxi. The plaintiff testified that, as she was stepping out of the vehicle, she fell to the ground. She said her left foot had become tangled in some wires which were somehow attached to the vehicle [Doc 25 Pages 40-43]. In her bill of particulars, plaintiff claims that as a result of the fall, she injured her right

ankle, which required surgery, her right knee, and her right shoulder. At the time of the accident, plaintiff was approximately sixty-nine years old. She testified that after she got up from the ground, she and her friend went into the store, bought a few groceries and called another cab to go home. She sought medical care subsequently.

Defendant Riboul contends in his motion (Seq. #1) that he is 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 defendant supports his motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, an affirmed IME report from an orthopedist, Dr. Pierce J. Ferriter, and an independent radiological review from Dr. Audrey Eisenstadt, a radiologist.

Dr. Pierce J. Ferriter examined plaintiff on May 17, 2022, on behalf of the defendant. This was almost two years after the accident. Dr. Ferriter describes some other case's sideswipe accident, and makes note that plaintiff was not pregnant at the time of the accident. Under the section of his report entitled "Review of Available Records," he only lists plaintiff's bill of particulars, and an accident report for an accident on a different date. Plaintiff told him that she had pain in the right ankle/foot. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in her shoulders, knees, and ankles. Dr. Ferriter reports that all related tests were negative.

Dr. Ferriter concludes that plaintiff's "right knee sprain/strain", and "right shoulder sprain/strain alleged have "resolved", and her "right ankle/foot status post-surgery – healed". He concludes that "[t]he Bill of Particulars alleges injuries to the right shoulder, right knee and right ankle/foot resulting from the motor vehicle accident of September 9, 2020 [sic]." He opines that "Based on today's examination, the claimant is able to perform

her activities of daily living. There are no objective findings noted in my examination to correlate with the claimant's subjective complaints. Today's examination indicates that the injured body parts alleged in the Bill of Particulars have resolved. There are no indications for further Orthopedic treatment including physical therapy. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident."

The defendant's radiologist, Audrey Eisenstadt, M.D. did not examine the plaintiff. She reviewed the MRI films taken of plaintiff's right shoulder, right knee and right ankle [Doc 24]. Dr. Eisenstadt concludes that all of the abnormal findings on the MRIs are either degenerative or congenital and are not causally related to the subject accident.

Dr. Eisenstadt reports that the right ankle MRI is completely normal. She states that the right shoulder MRI shows a prior surgical repair of the humerus, which placed screws and caused scarring that interferes with the MRI view. She states that the MRI was taken on 11/20/20, two months after the accident, which Dr. Eisenstadt incorrectly states was "eight months, seventeen days following the 03/03/20 incident." Her conclusion is "There is hypertrophic bony spurring at the acromioclavicular joint with osteophyte formation and capsular expansion noted. These degenerative changes are chronic in duration and have no traumatic etiology. A low-lying acromion is also noted. This developmental abnormality which has been present since childhood results in an effacement of the subacromial fat pad and impression on the structures passing through the reduced subacromial region. These structures include the rotator cuff musculature, glenoid labrum and biceps tendon. Mild distal supraspinatus tendinopathy is seen beyond the narrowing of the subacromial space from the low-lying acromion. No marrow edema is seen at its insertion into the greater tuberosity of the humerus and no significant fluid in the subacromial bursa located directly above the supraspinatus tendon. Also affected

by impingement is the biceps tendon obscured by the susceptibility artifacts from prior surgery. The glenoid labrum is also affected by impingement, but no labral tear or underlying glenoid bone marrow edema is seen. The cartilaginous labrum is firmly attached to the glenoid bone and any trauma to the glenoid labrum would be associated with a significant glenohumeral joint effusion, as well as a bone marrow edema in the glenoid bone where the cartilage is ripped off the underlying bone. None of these findings are seen to indicate any labral pathology."

In her review of the plaintiff's right knee MRI, taken on 12/11/20, three months after the accident, which Dr. Eisenstadt incorrectly states was "nine months, eight days following the 03/03/20 incident", the doctor concludes that "reveals degenerative joint disease predominantly involving the lateral aspect of the knee joint. Lateral narrowing of the femoropatellar joint space is seen with superior and inferior osteophyte formation noted and cartilaginous loss along the lateral femoropatellar joint space. Cartilaginous loss is also seen in the lateral femoral tibial joint space. Both of these areas of the knee joint are associated with degenerative cyst formation in the underlying bone. No cortical disruption, osteochondral defect or fracture is seen. Not even a joint effusion to indicate any recent trauma or active inflammation is noted. No tendinous or ligamentous disruption is seen and the menisci are normal in appearance. No posttraumatic bony changes are seen. The degenerative cyst formation has no association with the incident with no cortical disruption or surrounding bone marrow edema have no causal relationship to the incident of 03/03/20 [sic]".

With regard to the 90/180 day category of injury, the defendant simply states that his "proof ruled out the 90/180-day category of the statute" [Doc 18 ¶28]. As defendant has not provided any medical records which were generated during the first six months

after the accident, the court must turn to plaintiff's EBT transcript to determine whether the defendant has submitted any admissible evidence with regard to the 90/180-day category of injury.

Plaintiff was asked at her EBT, held in December of 2021, more than a year after the accident, "[a]re there things that you can't do at all *these days* that you used to be able to do before the accident?" [Doc 25 Page 70 emphasis added]. When she tried to explain that her usual lengthy walking trips had been curtailed, counsel responded "I'm asking about at all. If you can still walk, then I don't want to know about that. I will ask another question about things you can still do, but not as well." She was asked what activities she had difficulty doing at the time of the deposition, she said "I have to go down very slowly sideways on the stairs. I have to take my time. Somebody has to take the stuff upstairs for me. I can't do that and I just have trouble -- I have pain in my leg. I can't do anything. I walk, but I walk slowly" [*id.* Page 71].

Although plaintiff was asked if there were activities that she used to do before the accident but could no longer do at all, or that she had difficulty doing at the time that the deposition was held, plaintiff was not asked at her EBT if there were any activities that she could not perform in the months immediately following the accident, and in particular, the first six months. The court finds that plaintiff's testimony does not make a prima facie case for defendants with regard to the 90/180-day category of injury, as she was not asked any questions about whether her usual and customary activities had been curtailed in the first six months after the accident.

Defendant contends that "[b]ased on the medical evidence submitted, defendant submits that plaintiff's allegations of injury were not caused in this minor accident, that no trauma was sustained, and/or 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], including radiological evidence confirming that no traumatic injury was sustained, which negates a claim of any causally related serious injury under the statute, and is sufficient to meet defendants' burden on this motion (see *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]; *Johnson v Ferriter*, 82 AD3d 565 [1st Dept 2011]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009])" [Doc 18 ¶21]. The defendant next argues that "[i]n light of the affirmations submitted by defendant's doctor, it is clear that defendants have made a prima facie showing that plaintiff's allegations of injury were either not caused in this accident, and/or have not resulted in impairments which would qualify as serious injury in this accident" [*id.* ¶24]. The defendant further argues that "[s]ince the medical proofs plainly establish that plaintiff did not sustain a complete loss of use of a body organ or member, he/she also cannot satisfy that category of the statute" [*id.* ¶26] and that "[b]y finding no current limitations, and also normal results on a variety of objective clinical tests, defendants' doctors also ruled out any basis for a permanent consequential limitation" [*id.* ¶27].

The court finds that defendant has not made a *prima facie* showing of his entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). While the IME report and radiologist's reviews make a prima facie showing on the "permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system" categories of injury in Insurance Law §5102(d), the plaintiff's EBT testimony does not make a prima facie case with regard to the 90/180-day category of

injury. There is thus nothing in the pleadings, the bill of particulars, or the plaintiff's EBT transcript that supports defendant's claim that plaintiff's usual and customary daily activities were not curtailed during the ninety days immediately following the accident.

As the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied. Since the movant has not sustained his prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact (*Hodge v St. Eloi*, 168 AD3d 690, 691 [2d Dept 2019]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctors' affirmations are 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 opposes the motion with an affirmation of counsel, affirmed medical records from Drs. John J. McGee [Doc 34], Allen Rothpearl [Doc 35], Steven Yager [Doc 36], and Philip M. Rafiy [Doc 38]. Dr. Yager, of the New York Foot and Ankle Institute, saw plaintiff on December 14, 2020. He says she initially went to an urgent care center, "who placed her in a CAM boot" and then her primary care doctor, then was referred to "Yellowstone" for physical therapy and was referred to him as physical therapy was not helpful after three months of treatment. He reports her pain level was 7/10, her ankle "clicked", and she felt unstable on her foot. He examined her and reports pain and swelling, and states that the MRI reported a partial tear of the anterior talofibular ligament. His diagnosed her with "right internal ankle joint derangement with peroneal tendon subluxation." She then had arthroscopic surgery to her right ankle on January 8, 2021.

Dr. Yager performed the surgery. He saw plaintiff for follow-up visits and referred her to post-surgery physical therapy.

Dr. McGee of Yellowstone Medical Rehabilitation PC provides an affirmed report of his initial evaluation on October 12, 2020. He states that she came complaining of pain in her right shoulder and right knee/ankle, with pain of 8/10. Her range of motion was limited and he set her up for physical therapy. He referred her for MRIs and told her to avoid strenuous activities. He examined her again a month later, with similar findings. Another follow-up after the ankle surgery indicates she was considering right knee surgery.

Dr. Rafiy initially examined plaintiff in February of 2023. He states, “The patient continues to complain of ongoing right knee pain, restricted range of motion as well as right ankle pain with restricted range of motion with difficulty walking and standing.” He describes his exam as follows: “She ambulates with a slight antalgic gait favoring her left lower extremity and has some mild/moderate difficulty getting on the examination table. Right knee tenderness. Positive patella compression test; positive ballottement test; 0-90 degrees of flexion (NL 0-140). Positive crepitus; positive clicking; positive McMurray test. No anterior or posterior instability. Pain with varus stress with tenderness on the medial and lateral joint line. Negative Lachman test. Negative anterior drawer test. Right ankle: demonstrates well healed incisions, anterior medial and anterior lateral. No drainage, erythema or warmth. Dorsiflexion is restricted to 0-10 degrees (NL 0-40); plantar flexion 0-30 degrees (NL 0-40); inversion 5 degrees (NL 35); external eversion 0-10 degrees (NL 0-45 degrees; 4/5 motor strength with atrophy of the right ankle.” His impression is “Right ankle anterior talofibular ligament tear with osteochondral lesion with impingement. Status post right ankle arthroscopic surgery with ATFL ligament repair and chondroplasty and

right knee osteochondral injury and patella chondral injury." Dr. McGee concludes "The patient continues to have ongoing right ankle pain, difficulty with putting boots/shoes and is only able to tolerate sneakers or flat surface sneakers. The patient continues to have difficulty with walking/standing for periods longer than 30 minutes and unable to ambulate for periods longer than 2-3 blocks. It is medically probable that the patient will develop posttraumatic right ankle osteoarthritis secondary to the injury to the ankle cartilage and ligament. The patient will also require continued care under the treatment of a podiatrist or foot/ankle orthopedic specialist. The patient will require continued analgesics and anti-inflammatory medication as well.as periodic physical therapy with strengthening exercises of her right knee and right ankle. The patient will need to remain under the care of an orthopedic surgeon. It is medically probable that the patient will develop posttraumatic osteoarthritis of the right knee joint secondary to the osteochondral injuries of the cartilage. The patient sustained a posttraumatic right knee osteochondral lesion as well as patella chondral lesion. As a result, the patient continues to have ongoing right knee pain with restricted range of motion, difficulty negotiating stairs, climbing and walking for periods longer than 2-3 blocks. The patient remains a candidate for right knee visco-supplement injections as well as right knee steroid injections. She remains a candidate for continued physical therapy with knee strengthening exercises. It is my professional opinion that the patient sustained injuries to the right ankle and right knee as a direct result of the motor vehicle accident of September 3, 2020, necessitating the right ankle surgery which is directly and causally related. The injury to the right knee and right ankle are permanent in nature and directly and causally related to the motor vehicle accident of September 13, 2020."

In conclusion, had defendant made out a prima facie case for summary judgment dismissing the action, plaintiff's treating doctor's affirmed reports would be found 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]). These reports indicate significant, quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and recently, and her doctors opine that plaintiff's injuries were caused by the subject accident. Plaintiff thus raises a "battle of the experts."

Accordingly, it is

ORDERED that, as defendant Hub has not appeared, and "John Doe" has never been identified or substituted, and no default judgment order has been issued against either of them and more than a year has passed since their default, this action is dismissed as against Hub and "John Doe." The caption is hereby amended to reflect this, leaving defendant Riboul as the sole remaining defendant; and it is further

ORDERED that defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: August 8, 2023

ENTER:

Hon. Debra Silber, J.S.C.