

Murray v Espinal

2023 NY Slip Op 32844(U)

August 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 510268/2019

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

SHEENA MURRAY and JEVAUGHAN MURRAY,

Plaintiff,

-against-

KATHERINE ESPINAL and JOSE ESPINAL,

Defendants.

_____x

DECISION / ORDER

Index No. 510268/2019

Motion Seq. No. 4

Date Submitted: 6/15/23

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>50-58</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>77-84</u>
Reply Affirmation.....	<u>85</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 May 8, 2016. The plaintiff Sheena Murray was driving her car, which collided with a car owned and driven by defendants. The co-plaintiff, her brother, was a passenger. The plaintiff claims in her bill of particulars that, as a result of the accident, she injured her neck, back and left knee. She left the scene of the accident in an ambulance, which took her to kings County Hospital, and subsequently sought treatment from other providers. At the time of the accident, plaintiff was approximately 26 years old. The other plaintiff, Jevaughan Murray, is not the subject of this motion, although he too claims he sustained injuries as a result of the accident. For simplicity, the court will refer to the plaintiff Sheena Murray, the only plaintiff this motion is addressed to, in the singular form, "plaintiff."

The defendants contend in their motion (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). 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 58].

Dr. Ferriter, an orthopedist, examined plaintiff on August 26, 2022, on behalf of the defendants. This was six years after the accident. Under the section of his report entitled "Review of Available Records," Dr. Ferriter states that he reviewed a list of twenty-four items of plaintiff's medical records. They are all from 2016. At the time of the exam, Dr. Ferriter states that "Ms. Murray reports that she is a 32-year-old right-handed female. Her reported height is 5 feet 5 inches and his [sic] reported weight is 163 pounds." In the heading "present complaints," he states "At the time of this examination, Ms. Murray states that she has a complaint of pain in the low back. She reports that her symptoms have worsened since the reported date of injury."

Dr. Ferriter tested plaintiff's range of motion with a 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, thoracic and lumbar spine, with no tenderness or spasm. Dr. Ferriter reports that all related tests were negative.

Dr. Ferriter tested the range of motion in both of plaintiff's shoulders, both of plaintiff's elbows, both of plaintiff's wrists, both of plaintiff's hips, both of plaintiff's knees and ankles, plaintiff's left hand and fingers, and both of plaintiff's feet and toes, and reports that plaintiff had

normal ranges of motion in all of these body parts. Dr. Ferriter also reports that all related tests were negative.

Dr. Ferriter's "diagnoses/impression" is that plaintiff's "cervical spine "sprain/strain," thoracic spine "sprain/strain," lumbar spine "sprain/strain," right shoulder "sprain/strain," left shoulder "sprain/strain," and left knee "sprain/strain" have all resolved.

Dr. Ferriter opines that "[b]ased on today's examination and within reasonable degree of a medical certainty, there is no objective evidence of an orthopaedic disability." Dr. Ferriter then has a heading for "causality" and states "The diagnoses are causally related to the accident of record. Within reasonable medical probability, the proximate cause of the diagnosed injuries was as a result of the motor vehicle accident. There is no evidence of any contributing pre-existing conditions, prior injuries that impact on the current injuries. No subsequent or additional injuries or conditions have been reported."

Defendants contend that [Doc 51 ¶6] "The affirmations of defendant's physician, taken together with the plaintiff's own deposition testimony, make out a prima facie case, that the plaintiff did not sustain a serious injury." Plaintiff testified that she missed three or four weeks of work after the accident, maybe a little more [Doc 57 Page 50]. Plaintiff testified at her EBT that on the date of the accident, she was employed full time at a school as a teacher's assistant. She was asked "currently are there any activities you can no longer do at all as a result of the accident in May of 2016?" and she replied, at her EBT on November 19, 2021, "I can't sit for too long without discomfort, um, I can't walk too long without discomfort, and standing too long also brings me discomfort." She was asked about things she has difficulty with, and she said "lifting things" [*id.* Page 46]. Plaintiff was not asked to be more specific with these answers.

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 Eycler*, 79 NY2d 955, 956-957 [1992]). The affirmed report of the orthopedist who examined plaintiff states that she had a completely normal exam. The burden of proof then shifts to the 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 and a number of medical records, none of which are submitted in admissible form and thus could not be considered. The items in Document 79 are not authenticated, and are all from physical therapy administered in 2016. Document 80 contains plaintiff's MRI reports which are not authenticated. Document 81 seems to be a doctor's handwritten records, all from 2016 and none of which are affirmed or otherwise authenticated. Document 82 are the handwritten notes from a different doctor, also from 2016 and also not in admissible form. Document 83 is a typewritten report from a third doctor, also from 2016 and not in admissible form.

Defendants reply "[a]s a result, as stated in the defendant's Affirmation in Support of Motion for Summary Judgment, there is no objective medical evidence of permanent consequential injuries, significant limitation, or 90/180-day disability. In the case before us, Plaintiff has not provided admissible proof of any medical treatment whatsoever. The defendant is therefore entitled to summary judgment dismissing the complaint in its entirety" [Doc 85 ¶17].

The court finds that plaintiff's submissions are not 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, as “serious injury” is defined in Insurance Law §5102(d) (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is **ORDERED** that the defendants’ motion is granted and the complaint, as filed by co-plaintiff Sheena Murray, is dismissed.

This constitutes the decision and order of the court.

Dated: August 15, 2023

ENTER:



Hon. Debra Silber, J.S.C.