

Thornton v Veloz Livery Rentals, Inc.

2023 NY Slip Op 33462(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 152902/2019

Judge: James G. Clynnes

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES **PART** **22M**

Justice

-----X

EDIN THORNTON, MONIQUE BERNIER,
Plaintiff,

INDEX NO. 152902/2019

MOTION DATE 10/28/2022

MOTION SEQ. NO. 001

- v -

VELOZ LIVERY RENTALS, INC., LYFT, INC.,
JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY

Introduction

In this negligence action, plaintiff Edin Thornton seeks damages for personal injuries allegedly sustained on September 17, 2017 as a passenger in a Lyft vehicle that came into contact with another vehicle in New York County, New York.¹ Defendant Veloz Lively Rentals, Inc., now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that Thornton cannot meet the serious injury threshold requirement as mandated by Insurance Law 5102 (d). Plaintiff Thornton opposes the motion. For the reasons set forth below, defendant's motion for summary judgment is denied.

Background

On September 17, 2017, Thornton was a passenger in a Lyft that collided with another vehicle at or near Chrystie Street in Manhattan at approximately 1:29 a.m. (DiBari Affirmation

¹ The parties filed a stipulation of discontinuance against defendant Lyft, Inc. on November 18, 2019, and by a stipulation and order dated April 12, 2021, plaintiff Bernier's action has also been settled.

[Dkt. 24], Ex. C [Dkt. 28] [Bill of Particulars], ¶¶ 4-5). The day after the accident, she received emergency medical attention at Mount Sinai Beth Israel hospital in Manhattan for treatment of spinal and brain injuries allegedly resulting from the accident (*id.*, ¶¶ 10, 11). In the bill of particulars, Thornton alleges that she suffered cervical spine syringomyelia and derangement, whiplash, shoulder pain, tenderness, muscle spasms, and limited range of motion (*id.*, ¶ 10). She further alleges that, with respect to her head and brain, she suffered a diffuse cerebral dysfunction, traumatic brain injury, post-concussion syndrome, neurocognitive disorder, anxiety disorder, mood disorder, chronic migraines, vertical nystagmus, panic attacks, shock, aphasia, headaches, short term memory loss, difficulty concentrating, indecisiveness, difficulty balancing, dizziness, stress, and confusion (*id.*). In addition, she claims she suffers from back pain, chest tightness, numbness in hands, tinnitus, difficulty sleeping, loss of energy, dizziness, and fatigue, among others (*id.*). The bill of particulars further alleges that “Plaintiff cannot return, nor is it expected that plaintiff will ever be able to return to, a level of function consistent with plaintiff’s abilities prior to the accident...” (*id.*).

Thornton was deposed on January 6, 2021 (DiBari Aff., Ex. F [Dkt. 31]). She testified that a CT scan was performed when she arrived at the hospital the morning after the accident, but “there was nothing overly notable there or concerning” (*id.*, 27:5-24). She was diagnosed with a concussion and was referred to a neurologist (*id.*, 28:3-13). She left the hospital that same day without being prescribed any medication or given any devices, braces, or slings to wear (*id.*, 28:3-9).

Within a month of the accident, Thornton saw Aric Hausknecht, M.D. of Complete Care, a neurologist who diagnosed Thornton with a traumatic brain injury (*id.*, 32:10-16, 44:12-16). Dr. Hausknecht also referred Thornton to Sarah Palmer, O.D. and Rima Bakhru, O.D. of the SUNY

College of Optometry for treatment of visual issues caused by the concussion (*id.*, 42: 21-24). They recommended that Thornton wear glasses stemming from a “decrease in visual function due to cognitive or traumatic brain injury” (*id.*, 61:16-23). Dr. Hausknecht also referred her to a chiropractor, Joel R. Mittleman, D.C. and a physical therapist, both of whom she saw two times a week for approximately six months (*id.*, 33:15-25). Dr. Hausknecht also referred the plaintiff to psychologist Juracia Da Silva, Ph.D of JM Da Silva Psychological Services, and Joel King, M.D., Director of Harris Psychiatric Services, to treat her lack of cognitive function and manage her anxiety (*id.*, 38: 3-6, 40:1-8).

Thornton further testified that as a result of her injuries, she missed a week and a half of school (*id.*, 50:17-22). She also stated that she needed academic accommodations for the rest of her academic career, such as additional time on assignments, double time on testing, and testing location accommodations, all of which she received with the proper recommendation from Dr. Hausknecht (*id.*, 51:3-14). Thornton further stated that she missed three weeks of work as a resident assistant and employee of the Office of Sustainability at New York University, and that she was subsequently limited in her duties in that she had to “take shorter meetings, do shorter events, do things online” (*id.*, 52:1-4, 15-25, 53:1-3). Lastly, she stated that she suffered a head and neck injury in 2011 from a horseback riding incident, but symptoms from that injury had ceased about six months before the accident and she was no longer receiving any medical treatment at the time of the accident (*id.*, 47:13-25, 48:1-25).

Discussion

“ [T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ ” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation

omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

Pursuant to Insurance Law 5104, when a plaintiff sues for personal injuries allegedly caused by the negligent operation of a motor vehicle there is no right to recovery of non-economic loss unless a serious injury has occurred. Movant argues that plaintiff has not sustained a serious injury as defined by Insurance Law 5102 (d). Under this provision,

“ ‘[s]erious injury’ means a personal injury which results in... permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (Insurance Law 5102 [d]).

The purpose of the No-Fault statute is to “weed out frivolous claims and limit recovery to significant injuries” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). Accordingly, a plaintiff must present objective proof rather than subjective complaints to meet the serious injury threshold (*Toure*, 98 NY2d at 350). To prevail on a motion for summary judgment under this statute, it is the defendant that has “the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury” (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citation omitted]; *Holloman v American United Transp. Inc.*, 162 AD3d 423, 423 [1st Dept. 2018]; *Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). Such evidence may consist of “affidavits

or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]; *Spencer*, 82 AD3d at 590), including a showing that the injuries have resolved (*see Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]; *Baez v Boyd*, 90 AD3d 524, 524 [1st Dept 2011]).

To meet the summary judgment burden under the 90/180 category of the statute, a defendant must provide medical evidence of the lack of an injury preventing 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). A defendant may also prevail on this issue without medical evidence by relying on other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities during the relevant period (*id.*; *Holloman*, 162 AD3d at 424). Once the defendant has met its burden, the plaintiff must raise a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). In this connection, "[a] plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion" (*Spencer*, 82 AD3d at 590).

In support of its motion, the defendant submits, *inter alia*, Thornton's deposition testimony and the reports of orthopedic surgeon Barbara J. Freeman, M.D. and radiologist Scott A. Springer D.O. Dr. Freeman examined Thornton on May 6, 2022 and her report is dated September 12, 2022 (DiBari Aff., Ex. D [Dkt. 29]). Dr. Freeman reviewed MRIs of plaintiff's spine and brain from November 9, 2017, approximately two months after the accident (*id.*, p. 3). Notably, Dr. Freeman performed range of motion tests on Thornton's cervical spine using a goniometer (*id.*, p. 2). She

assessed that Thornton was in no acute distress, there was no cervical spasm or report of tenderness, and that spurling and compressions tests were negative (*id.*, p. 2). Dr. Freeman concluded that the ranges of motion for Thornton's cervical spine are within normal ranges, that Thornton's injuries had resolved, and that she did not suffer a traumatic spinal injury (*id.*, pp. 2, 5-6).

The plaintiff correctly argues that although Dr. Freeman provided Thornton's ranges of motion in her report, she failed to compare her findings to the normal ranges of motion, "thereby leaving the court to speculate as to the meaning of those figures" (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006], quoting (*Manceri v Bowe*, 19 AD3d 462, 463 [2d Dept 2005]; see also *Toure*, 98 NY2d at 350; *Webb v Johnson*, 13 AD3d 54 [1st Dept 2004]). In addition, Dr. Freeman failed to provide any other objective medical basis or quantitative assessment supporting her conclusions regarding Thornton's injuries, rendering them "wholly speculative" (*Toure*, 98 NY2d at 351). Nor did Dr. Freeman's report include the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of her body parts (*Toure*, 98 NY2d at 355)

Dr. Springer reviewed Thornton's two cervical spine MRIs from November 9 and December 18, 2017, as well as her brain MRI also dated November 9, 2017 (DiBari Aff., Ex. E [Dkt. 30]). In his report, Dr. Springer deemed all three MRIs to be "unremarkable" (*id.*). Dr. Springer reported that both cervical spine MRIs showed "no fracture, subluxation, or disc herniation, and that there is normal cervical lordosis." (*id.*, pp. 1-2). He stated that the "vertebral bodies and intervertebral discs maintain normal heights and signals", that there was "no disc bulge or disc herniation." (*id.*). He further assessed that all three MRI's indicate "no posttraumatic changes casually related to the 9/17/2017 incident" (*id.*, pp. 1, 3, 5). The court notes that Dr. Springer failed to disclose what exactly he is comparing the November 9, 2017 cervical spine and

brain MRIs to, as no prior MRIs are mentioned in his report that would reflect any “posttraumatic changes.” Notwithstanding, the defendant has met its initial burden of establishing that plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d), and thus the burden shifts to the plaintiff to produce prima facie evidence to support her claim of serious injury (see *Green v Jones*, 133 AD3d 472 [1st Dept 2015]; *Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Thornton submits, *inter alia*, her deposition testimony and reports from (1) Drs. Hausknecht, Silva, King, Palmer, Bakhru and Mittleman, as well as Jason Brown, M.D. of the Center for Cognition and Communication (Rizzo Affirm. [Dkt. 41], Exs. B, D, E, F, G, I [Dkt. 44, 46-51). Dr. Hausknecht performed an EEG on October, 10, 2017, which revealed diffuse cerebral dysfunction (Rizzo Aff., Ex. D [Dkt. 46] p. 80). He concluded that Thornton sustained closed-head trauma with post-concussion syndrome and mild traumatic brain injury, reactive anxiety, and cervical derangement with posttraumatic cervical syrinx (*id.*, p. 5). He states that “with a reasonable degree of medical certainty, the motor vehicle accident of 9/17/17 is the substantial cause of her condition” (*id.*, p. 11). He further concludes that Thornton was “partially disabled” and he “advised her to restrict her activities” (*id.* p. 12).

Dr. Da Silva conducted a Back Depression Inventory (BDI-2) on Thornton on October 19, 2017, which revealed high levels of depression (Rizzo Aff., Ex. E [Dkt. 47] p. 121). He also utilized The Impact of Event Scale – Revised (IES-R), which revealed moderate traumatic event sequelae, depression, and anxiety (*id.*). He conducted a Symptom Checklist-90-R (SCL-90-R), which indicated distress and somatic complaints (*id.* p. 122). Dr. Da Silva diagnosed Thornton with trauma-induced depression, anxiety disorder, and post-concussion syndrome (*id.*, p. 38). His report further asserts that, with a reasonable degree of medical certainty, that Thornton’s

psychological condition is consequentially related to injuries sustained in the accident, and that from a psychological standpoint, she was 75% disabled as of the date of the evaluation, October 19, 2017 (*id.*, p. 123).

Dr. Jason Brown evaluated Thornton at the request of Dr. Hausknecht on November 17, 2017 (Rizzo Aff. Ex. F [Dkt. 48], p. 3). Based on the results of his objective tests, consisting of Mindstreams Scientific Cognitive Assessment System, WAIS-IV Digit Span, Raven's Standard Progressive Matrices Test, Rey Complex Figure Test, Rey 15 Items, and a clinical interview, he concluded that Thornton demonstrated weaknesses in her neuropsychological functions, such as working memory, sustained visual impairment and concentration, attention to visual details, and information processing speed (*id.*, pp. 4-5). Notably, he stated that the accident has aggravated her condition from her prior horseback riding incident (*id.* p. 4).

Dr. King conducted a mental health examination on Thornton on June 28, 2018, which stated that she suffered mild neurocognitive disorder due to traumatic brain injury (Rizzo Aff., Ex. G [Dkt. 49], p. 3). Thornton was subsequently prescribed Adderall to help with her "cognitive slowing related to TBI", a medication she had never previously been prescribed (*id.*, p. 4). A later appointment on March 7, 2019 revealed that Thornton's "current psychiatric illness is a direct consequence of the motor vehicle accident on 9/17/19" (*id.*, p. 5). In addition, Drs. Palmer and Bakhru evaluated Thornton on June 12, 2018 for a neuro-optometric consultation for visual symptoms related to multiple concussions, she was diagnosed with convergence insufficiency due to her blurred vision, eyestrain, headaches while reading, and reduced concentration abilities (Rizzo Aff., Ex. H [Dkt. 50], p. 4). She was prescribed two different sets of lenses, one for distance, the other for reading (*id.*, p. 5). Lastly, chiropractor Dr. Mittleman examined and performed a range of motion test on Thornton on October 19, 2017, approximately one month after the accident,

and found that her ranges of motion were not in the normal range (Rizzo Aff., Ex. I [Dkt. 51], p. 19).

Based on the foregoing, Thornton has raised a sufficient issue of fact as to her cervical spine and brain to warrant denial of summary judgment. Thornton argues that Dr. Springer's report fails to mention findings in Thornton's medical records from Dr. Hausknect or findings from the DTI. However, in reply, the defendant correctly argues that the reports of its medical experts were not insufficient merely because they did not mention specific findings in Thornton's previous medical records (*see Levinson v Mollah*, 105 AD3d 644, 644 [1st Dept 2013]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010]).

With respect to the 90/180 days category of serious injury, there is no competent medical evidence demonstrating that Thornton was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*see Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Thornton's own testimony states that she only missed a week and a half of classes and three weeks of work as a result of the accident (Thornton Dep., 50:17-22, 52:1-4). Despite having to take shorter meetings and events and less work online, Thornton was still able to perform her duties, as "substantially all" should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*id.* 52:20-25, 53: 1-3); (*see Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Accordingly, it is hereby

ORDERED that the motion of defendant Veloz Livery Rentals, Inc. for summary judgment upon the grounds that the plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102(d) is denied, except as to the 90/180 days category; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision and Order upon Plaintiff with Notice of Entry.

This constitutes the Decision and Order of the Court.

10/3/2023

DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE