

Windley v New York City Tr. Auth.

2023 NY Slip Op 33978(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 158820/2019

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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GAIL C. WINDLEY,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, MOUSSA BAKAYOKO,
ABDOULAYE SAWADOGO, ANGEL G. CUEVAS ROJAS

Defendant.

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INDEX NO. 158820/2019

MOTION DATE 01/20/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63,
64, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendants
Moussa Bakayoko and Abdoulaye Sawadogo and the cross-motion by Defendant Angel G. Cuevas
Rojas for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the
serious injury threshold requirement of Insurance Law 5102 (d) are decided as follows:

Plaintiff Gail Windley seeks recovery for injuries sustained as a result of a November 27,
2018 accident between a car owned by Defendant Bakayoko and operated by Defendant
Sawadogo, in which Plaintiff was riding as a passenger, and a car owned and operated by
Defendant Rojas. In her Bill of Particulars, Plaintiff alleges that she sustained injuries to her
lumbar, thoracic, and cervical spine; her head; her right shoulder, including a torn rotator cuff; and
her right elbow, hand, wrist, hip, knee, ankle, and foot; and her left wrist. She further alleges that
her injuries fall under the serious injury categories of Insurance Law 5102 (d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious
injury (Lowe v Bennett, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a
showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of
serious injury (see Lopez v Senatore, 65 NY2d 1017 [1985]).

In his cross-motion, Defendant Angel G. Cuevas Rojas agreed with and incorporated by reference the facts, legal arguments, procedural history, and exhibits of the Notice of Motion and Affirmation in Support of co-Defendants, Moussa Bakayoko and Abdoulaye Sawadogo.

In support of their motions, Defendants rely on the affirmed report of Dr. Pierre J. Ferriter, a board-certified orthopedic surgeon, who performed an independent medical examination (IME) of Plaintiff on August 23, 2021. Dr. Ferriter measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and recorded full range of motion and negative objective tests as to Plaintiff's cervical spine, thoracic spine, lumbar spine, right elbow, right wrist, right hand, left wrist, left hand, right hip, right knee, right ankle, and right foot. Dr. Ferriter concluded that the injuries to Plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, right elbow, right and left wrists and hands, right hip, right knee, and right ankle and foot had all resolved. He further opined that there was no evidence of orthopedic disability, permanency, or residuals; that Plaintiff was capable of seeking gainful work without restrictions; and that Plaintiff could perform her activities of daily living as she was doing prior to the accident.

With respect to Plaintiff's right shoulder, Dr. Ferriter evaluated Plaintiff's rotator cuff strength at 4/5 and measured forward flexion to 150 degrees (180 degrees normal), extension to 30 degrees (40 degrees normal), abduction to 150 degrees (180 degrees normal), adduction to 20 degrees (30 degrees normal), internal rotation to 70 degrees (80 degrees normal), and external rotation to 70 degrees (90 degrees normal). Dr. Ferriter noted that this decreased range of motion is "as allowed by the claimant." Dr. Ferriter's explanation as to why Plaintiff's examination resulted in decreased range of motion is equivocal. In *Toure v Avis Rent a Car Sys.*, the Court of Appeals held that "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). Here, Dr. Ferriter demonstrated that Plaintiff had a limitation in his range of motion, most notably a 30-degree limitation as to Plaintiff's right shoulder flexion, extension, and abduction, without adequate explanation. This restriction satisfies the standard enunciated by the Court of Appeals in *Toure* and is insufficient to eliminate all triable issues of fact (*Lewis v Revello*, 172 AD3d 505 [1st Dept 2019] [defendant failed to meet his prima facie burden of showing that the Plaintiff did not sustain a serious injury, in part, due to defendant's examining

orthopedist finding a significant 30-degree limitation in the range of motion of the plaintiff's cervical spine]; *Santos v NY City Tr. Auth.*, 99 AD3d 550 [1st Dept 2012] [defendant failed to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury; medical report of the defendant's examining orthopedist noted findings of significant range of motion limitations]).

However, even assuming that Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries under the remaining categories set forth under Insurance Law 5102 (d), the Plaintiff has produced sufficient prima facie evidence to support her claim of serious injury under those categories. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition to Defendants' motions, Plaintiff has submitted the affirmed report of Dr. Kaplan, who examined Plaintiff on December 3, 2018, and again on March 20, 2023. Dr. Kaplan states, based on his examination of Plaintiff and his review of her treatment records and medical reports, including MRI findings and diagnostic studies, that Plaintiff suffers from a disc bulge at the C5-C5 level; a disc bulge with protrusion at the C5-C6 level; a disc bulge at the C6-C7 level; right C6-C7 radiculopathy; a disc bulge at the L3-L4 level; exacerbation of lumbar disc injuries at the L4-L5 and L5-S1 levels; supraspinatus and infraspinatus tears of the right shoulder with tendinosis; subacromial bursitis of the right shoulder; cervical, thoracic, and lumbar sprains and internal derangement; right shoulder sprain and derangement; right elbow sprain; right wrist/hand sprain; right knee sprain; and right foot/ankle sprain, all of which he attributes, with a reasonable degree of medical certainty, to the November 27, 2018 accident.

At Dr. Kaplan's most recent examination of Plaintiff in March 2023, he observed bilateral upper trapezius spasms with positive Spurling test on the right; positive Hawkin's test and positive Empty Can sign of the right shoulder; and a positive McMurray's test of the right knee. Using a goniometer, Dr. Kaplan made the following measurements: positive straight leg raise at 30 degrees (normal 80 degrees); cervical flexion of 20 degrees (normal 50 degrees); cervical extension of 10 degrees (normal 60 degrees); cervical bilateral rotation 45 degrees (normal 80 degrees); and cervical left and right side-bending 15 degrees (normal 45 degrees); rotation of the thoracic spine 15 degrees (normal 30 degrees); lumbar flexion 40 degrees (normal 60 degrees); lumbar extension 5 degrees (normal 25 degrees); lumbar bilateral bending 15 degrees (normal 25 degrees); right

shoulder flexion 130 degrees (normal 180 degrees); right shoulder abduction 130 degrees (normal 180 degrees); internal rotation of right shoulder 60 degrees (normal 90 degrees); external rotation of right shoulder 70 degrees (normal 90 degrees); flexion of right elbow 135 degrees (normal 140 degrees); ulnar deviation of the right wrist 25 degrees (normal 30 degrees); radial deviation of the right wrist 15 degrees (normal 20 degrees); right knee flexion 105 degrees (normal 150 degrees); right ankle dorsiflexion 12 degrees (normal 20 degrees); right ankle plantarflexion 30 degrees (normal 40 degrees); right ankle inversion 15 degrees (normal 40 degrees), and right ankle eversion 10 degrees (normal 20 degrees). Dr. Kaplan notes that Plaintiff was suffering from lumbar stenosis and using a cane prior to the accident, but opines, based on his evaluation of Plaintiff's MRI records prior to the accident, that the injuries to her lumbar spine were worsened and that she sustained new injuries, notably to her right shoulder and cervical spine, as a result of the accident. Dr. Kaplan further states that he considers Plaintiff's injuries to be significant and permanent, given that her symptoms and limitations have persisted more than four years after the accident. The types of injuries Dr. Kaplan describes in his report can constitute serious injury under the statute. (*see Jankowsky v. Smith*, 294 AD2d 540 [2d Dept 2002] [disc herniation, limited range of motion]; *Rosmarin v. Lamontanaro*, 238 AD2d 567 [2d Dep't 1997] [bulging discs]; *Ferrara v. Middleton*, 116 AD3d 408 [1st Dept 2014] [shoulder injury]).

Plaintiff also submits certified medical records of her treatment by Dr. Fritzhard of NYU Langone, as well as by Dr. Charles Kim, Dr. Parul Jajoo, and Dr. John Michalisin, all specialists in the treatment of pain at Langone; Dr. Jeffrey Gross, an orthopedist at Langone; and Dr. David Manevitz, a medical acupuncturist. Plaintiff also submits certified reports of MRI and EMG studies performed at Langone, as well as certified records of the physical therapy she received at Langone and Function in Motion in the Bronx. These are evidence that Plaintiff sought and received treatment for pain and impairments related to injuries sustained in the November 27, 2018 accident from early 2019 until April 2022, nearly four years after the accident.

Plaintiff also submits records of her treatment in the emergency department at Harlem Hospital immediately after the accident, but these records are not certified and are therefore inadmissible. As such, the Court did not consider them in deciding this motion (*see Lazu v. Harlem Group Inc.*, 89 AD3d 435 [1st Dept 2011]).

In her deposition testimony, Plaintiff testified that Dr. Fritzhand put her on bedrest for about two and a half to three months, where she left her home only for treatment. In her Bill of Particulars, Plaintiff alleges that she was confined to her bed for two days and confined to her home for approximately one year. Plaintiff further testified that since the accident, she has been unable to engage in her volunteer work as a DJ, and in her affidavit in opposition to Defendants' motions, she states that she can no longer engage in activities she could perform before the accident, including grocery shopping, that she cannot lift more than three pounds, and that she is no longer able to sit or stand for more than 20 minutes at a time without experiencing pain.

Here, Plaintiff has raised sufficient issues of material fact as to whether the injuries she sustained in the November 27, 2018 accident meet the threshold for serious injury under Insurance Law 5102 (d) to preclude summary judgment in Defendants' favor.

Accordingly, it is

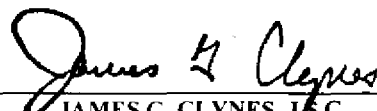
ORDERED that the motion by Defendants Bakayoko and Sawadogo and cross-motion by Defendant Rojas for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102 (d) are denied; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

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

This constitutes the Decision and Order of the Court.

11/9/2023
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE