

Terry v Adeniji

2023 NY Slip Op 34916(U)

March 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 520186/2019

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, Brooklyn, NY 11201, on the ___ day of _____ 2023.

MAR 09 2023

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 99

DECISION/ORDER

-----X
 RACKIEL TERRY,

Plaintiff,
 -against-

Index No.: 520186/2019
 Motion Date: 3/8/23
 Motion Cal. No.: 30
 Mot. Seq. 5

ABAYOMI ADENIJI and TAZAINE E. BROOKS,

Defendants.
 -----X

After oral arguments, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF #
Motion Sequence #5	
Plaintiff's Motion to Reargue this Court's Decision and Order (NYSCEF # 93), Plaintiff's Attorney Affirmation of Alexander Kraff, Esq., affirmed on September 12, 2022 (NYSCEF # 94), Exhibit A-E (NYSCEF # 95-99).....	93-99
Defendant Brooks' Attorney Affirmation of Sasha Ensslin, Esq., in Opposition, affirmed on January 26, 2023 (NYSCEF # 103).....	103
Defendant Adeniji's Attorney Affirmation of Stacy Seldin, Esq., in Opposition, affirmed on January 6, 2023 (NYSCEF # 105).....	105
Plaintiff's Reply Papers (NYSCEF # 104, 108).....	104, 108
Underlying Motions	
Motion Sequence # 3	
Defendant Adeniji's Motion pursuant to CPLR § 3212 for Summary Judgment under the Insurance Law (NYSCEF # 52); Statement of Material Fact dated June 10, 2021 (NYSCEF # 53); Attorney Affirmation of Jerry Lynch, Esq., affirmed on June 10, 2021 (NYSCEF # 54); Exhibits, inclusive of Affirmations from Doctors Springer and Guttman (NYSCEF # 55-63); Attorney Affirmation of Sasha Ensslin, Esq., affirmed on June 29, 2021 (NYSCEF # 64); Exhibits (NYSCEF #65-67).....	52-67
Plaintiff's Attorney Affirmation of Alexander Kraff, Esq. in Opposition, affirmed on August 6, 2021 (NYSCEF # 79); Exhibits, inclusive of Affirmations from Doctors Emerson, Amoachi, and Manes (NYSCEF # 80-83).....	79-83
Defendant Brooks' Attorney Affirmation in Reply, affirmed by Sasha Ensslin, Esq. on October 19, 2021 (NYSCEF # 88).....	88
Motion Sequence # 4	
Defendant Brooks' Notice of Motion pursuant to CPLR 3212 for Summary Judgment on the issue of Liability (NYSCEF # 68); Statement of Material Facts dated June 29, 2021	

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(NYSCEF # 69); Affidavit of Sasha Ennslin, Esq., affirmed on June 29, 2021 (NYSCEF #70); Exhibits (NYSCEF # 71-78).....	68-78
Defendant Adeniji's Attorney Affirmation in Opposition to Defendant Brooks' Motion, affirmed by Summer Tinnie, Esq. on October 19, 2021 (NYSCEF # 84); Exhibits inclusive of defendant Adeniji's Affidavit (NYSCEF # 85-86); Response to Statement of Material Facts dated October 19, 2021 (NYSCEF # 87).....	84-87
Defendant Brooks Attorney Affirmation in Reply affirmed by Sasha Ennslin, Esq. on October 20, 2021 (NYSCEF # 89).....	88-89

MONTELIONE, RICHARD J., J.

Before the court is plaintiff's motion to reargue this court's decision, dated August 31, 2022 (NYSCEF # 91). "Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Ito v. 324 E. 9th St. Corp.*, 49 A.D.3d 816, 817, 857 N.Y.S.2d 578, 579 (2d Dep't 2008). Plaintiff argues that the court misapprehended facts and overlooked medical evidence that the plaintiff submitted in in opposition to defendants' motion for summary judgment under the Insurance Law.

The court found in its prior decision that defendants met their burden of showing there is no serious injury to a body part or system, under the Insurance Law, suffered by the plaintiff as a result of the accident. N.Y. Ins. Law § 5102 (McKinney), "(d) 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system..."

However, upon a review of the record, plaintiff submitted documents in opposition that create a question of fact and defeat defendants' motion for summary judgment. Plaintiff submitted a report from Doctor Guenadi Amoachi, dated June 23, 2021, affirmed under penalty of perjury. Dr. Amoachi reviewed and interpreted MRI films taken of plaintiff on December 5, 2018, less than two months after the subject motor vehicle accident. Dr. Amoachi found disc herniations, disc bulges, tears of tendons, bone bruising, thinning of plaintiff's cartilage and cysts.

Plaintiff also submitted a report from Doctor Edwin Emerson, dated July 15, 2021, affirmed under penalty of perjury. Dr. Emerson examined plaintiff on October 19, 2018, July 16, 2019, and July 13, 2021. Dr. Emerson performed range of motion tests with a goniometer on all three dates, finding a significant limited range of motion each time. Dr. Emerson opined that plaintiff's cervical and lumbar spine injuries were caused by the subject motor vehicle accident and found that plaintiff was prevented from engaging in her normal activities for 90 out of 180 days after the accident. Dr. Emerson also reviewed Dr. Amoachi's MRI findings and concluded that plaintiff's injuries are "post-traumatic in nature and were directly caused . . . by the October 8, 2018, motor vehicle accident, not degenerative, as the patient was asymptomatic to any cervical spine conditions prior to this motor vehicle accident." While Dr. Emerson did reference and include unsworn medical records from PMR Medical Diagnostic, P.C., he objectively found a limited range of motion based on his own examination with a goniometer and established

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causation through his own examination and based on a review of the certified MRI report. See *Martin v. Portexit Corp.*, 98 A.D.3d 63, 67, 948 N.Y.S.2d 21, 23–24 (1st Dep't 2012).

Finally, plaintiff submitted a report from Doctor Harvey Manes, dated July 27, 2021, affirmed under penalty of perjury. Dr. Manes performed shoulder surgery on the plaintiff on July 24, 2019, which Dr. Manes opined was necessary due to the subject motor vehicle accident. Additionally, Dr. Manes examined plaintiff on December 26, 2018, July 24, 2019, and July 13, 2021. Each time Dr. Manes measured plaintiff's range of motion with a goniometer and found limited range of motion, restricted by 20%, which is sufficient to create a question of fact as to whether plaintiff suffered a serious injury under the Insurance Law. See *Mazo v. Wolofsky*, 9 A.D.3d 452, 453, 779 N.Y.S.2d 921 (2d Dep't 2004). Dr. Manes concluded that plaintiff's injuries were caused by the subject accident.

Plaintiff also sufficiently explained her gap/cessation of treatment. Dr. Emerson stated that plaintiff "was discharged from care as she reached maximum medical improvement and informed my office that treatment was no longer helping her in addition there were treatment concerns due to Covid." Plaintiff testified that she stopped treatment due to the COVID-19 pandemic. These constitute an adequate explanation for her cessation of treatment and the complaint will not be dismissed on this basis. See *Delorbe v. Perez*, 59 A.D.3d 491, 492, 873 N.Y.S.2d 198, 199 (2d Dep't 2009); see also *Pommells v. Perez*, 4 N.Y.3d 566, 574, 830 N.E.2d 278, 283 (Ct. of Ap. 2005) ("While a cessation of treatment is not dispositive . . . a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so").

Accordingly, the medical records submitted by plaintiff and plaintiff's testimony are sufficient to create a question of fact as to whether plaintiff suffered a serious injury under the insurance law. *Grossman v. Wright*, 268 A.D.2d 79, 85, 707 N.Y.S.2d 233, 238 (2d Dep't 2000).

The remaining issue is whether the defendants have met their burden of showing no medically determined evidence of a serious injury under the 90/180-day category under Insurance Law § 5102(d), and inasmuch as the defendants' IMEs took place over two years since the date of the accident, these IMEs are insufficient. See *Rouach v. Betts*, 71 A.D.3d 977, 897 N.Y.S.2d 242 (2nd Dep't 2010); see also *Rahman v. Sarpaz*, 62 A.D.3d 979, 880 N.Y.S.2d 125 (2nd Dep't 2009).

In the court's previous decision, the court held that the plaintiff admitted that her primary care physician ordered her back to work the same week as the subject motor vehicle accident, citing plaintiff's testimony. However, upon a closer review of the transcript, plaintiff was ordered back to work after she underwent a urinal prolapse surgery which took place prior to the subject motor vehicle accident, and that on the date of the subject motor vehicle accident, plaintiff was not working. There is no evidence in the record that plaintiff returned to work after the subject motor vehicle accident.

Accordingly, defendants did not meet their *pima facie* burden with respect to the 90/180-day category and the burden did not shift to plaintiff to create a question of fact. *Rouach v. Betts*, 71 A.D.3d 977, 897 N.Y.S.2d 242 (2d Dep't 2010).

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With respect to defendant Brooks' motion for summary judgment on the issue of liability (Motion Sequence # 4), movant relies on plaintiff's testimony to demonstrate that defendant Adeniji's vehicle, in which plaintiff was traveling, rear-ended defendant Brooks' vehicle. Defendant Adeniji is precluded from offering evidence for failure to appear for an examination before trial, pursuant to an order by Justice Knipel dated March 16, 2021 (NYSCEF # 77). Accordingly, the evidence submitted by defendant Adeniji in opposition to Motion Sequence # 4 cannot be considered, and defendant Brooks has met its burden.

Based on the foregoing, it is

ORDERED that plaintiff's motion to reargue (Motion Sequence # 5) this court's decision and order dated August 31, 2022 is **GRANTED**; and it is further


ORDERED that, upon reargument, defendant Adeniji and defendant Brooks' motions for summary judgment (Motion Sequence # 3) are **DENIED**; and it is further

ORDERED that the matter is restored to the active calendar; and it is further

ORDERED that defendant Brooks' motion for summary judgment on the issue of liability (Motion Sequence # 4) is **GRANTED**.

This constitutes the decision and order of the Court.

ENTER


Hon. Richard J. Montelione



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KINGS COUNTY CLERK
FILED