

Lloyd v Mills

2023 NY Slip Op 34940(U)

July 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 516339/2020

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of July 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
KIM LLOYD,

Plaintiff,

-against-

RICHARD MILLS and CHOCOLATE MOUSSE
CAB CORP.,

Defendants.
-----X

Index No.: 516339/2020

DECISION AND ORDER

Motions Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	40-51,
Opposing Affidavits (Affirmations).....	54-65,
Reply Affidavits (Affirmations).....	

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that purportedly occurred on March 11, 2020. Plaintiff, Kim Lloyd (hereinafter the "Plaintiff") claims in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to right shoulder, left shoulder and left knee together with loss of cognitive function. The Plaintiff also claims that she "was confined to her bed for five days immediately following the accident and further confined to her home from the time of the accident through the present and continuing, except while seeking intermittent medical care, and in any event for no less than 90 of the first 180 days following the accident." ("90/180 claim").

The Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendants rely on the reports of Dr. Jeffrey Guttman and Dr. Scott A. Springer. The Plaintiff opposes the motion. The Plaintiff contends that the Defendants have failed to meet their *prima facie* burden. The Plaintiff argues that the medical evidence submitted by the Defendants did not address Plaintiff’s allegations that she sustained a loss of cognitive function due to a brain injury as a result of the subject accident. Moreover, the Plaintiff argues that the Defendants failed to eliminate triable issues of fact regarding Plaintiff’s 90/180 claim.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”

Garnham & Han Real Estate Brokers v Oppenheimer, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of his motion, the Defendants proffer the affirmed medical reports of Dr. Jeffrey Guttman. Dr. Guttman examined the Plaintiff on December 9, 2021, more than a year and eight months after the date of the accident. Dr. Guttman conducted range of motion testing of the Plaintiff's left and right shoulders and left knee with the use of a goniometer, and found no limitation in the Plaintiff's range of motion in relation to these areas. Dr. Guttman stated "[s]tatus post bilateral shoulder arthroscopies, resolved." Dr. Guttman also found a "[r]esolved left knee contusion." Dr. Guttman further opined that "[t]he claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability, or functional impairment, which prevents the examinee from engaging in ADLs, including work, school, and hobbies." (See Defendants' Motion, Report of Dr. Guttman, NYSCEF Doc. 47).

Dr. Springer did not examine the Plaintiff, but instead reviewed the MRIs of the Plaintiff's left knee and left shoulder. There was no reading of an MRI of the Plaintiff's right shoulder. The MRI of the Plaintiff's left knee was performed on August 25, 2020, more than five months after the Plaintiff's accident. Dr. Springer stated that "[t]here is no fracture or dislocation." Dr. Springer further found that "[t]here is mild edema adjacent to the ligament compatible with a grade 1 sprain." Dr. Springer also opined that "[t]here are mild degenerative changes at the patellofemoral joint with chondromalacia and narrowing, which are chronic processes." Dr. Springer opined that there was "[n]o fracture, dislocation or internal derangement of the knee." Dr. Springer came to

the conclusion that there were “[n]o posttraumatic changes causally related to the 3/11/2020 incident.” (See Defendants’ Motion, Report of Dr. Springer, NYSCEF Doc. 48).

Turning to the merits of the motion made by the Defendants, the Court finds that the Defendants have failed to meet their *prima facie* burden. First, the Defendants failed to adequately address the Plaintiff’s claim, set forth in her Bill of Particulars, that she suffered from “[c]oncussion, post-concussive disorder, traumatic brain injury with cognitive deficit.” (See Defendants’ Motion, NYSCEF Doc. 46, Paragraph 10). While an MRI of the Plaintiff’s brain was reviewed, there was no direct examination of the Plaintiff regarding her cognitive function. Moreover, the Defendants failed to review the MRI of the Plaintiff’s right shoulder. Additionally, the Plaintiff was examined by Dr. Guttman more than a year and eight months after the accident, and neither Dr. Guttman nor Dr. Springer related their findings to the 90/180 category of serious injury alleged by the Plaintiff for the relevant period of time immediately following the accident. The Plaintiff stated during her deposition that she returned to work but after two weeks could not continue. (See Defendants’ Motion, NYSCEF Doc. 49, Page 35). See *Owens-Stephens v. PTM Mgmt. Corp.*, 191 A.D.3d 691, 137 N.Y.S.3d 734 [2d Dept 2021]; *Rouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010]; see also *Epstein v. MTA Long Island Bus*, 161 AD3d 821, 823, 75 N.Y.S.3d 532, 534 [2d Dept 2018]; *Stead v. Serrano*, 156 AD3d 836, 837, 67 N.Y.S.3d 244 [2d Dept 2017]; *Nembhard v. Delatorre*, 16 AD3d 390, 791 N.Y.S.2d 144 [2d Dept 2005]; *Peplow v. Murat*, 304 AD2d 633, 758 N.Y.S.2d 160, 161 [2d Dept 2003]; *Frier v. Teague*, 288 AD2d 177, 732 N.Y.S.2d 428 [2d Dept 2001].

It is true that when a Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion. See *Master v.*

Boiakhtchion, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In the instant proceeding, the Plaintiff sets forth in her verified Bill of Particulars that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The Plaintiff's BP also indicates that "Plaintiff was confined to her bed for five days immediately following the accident and further confined to her home from the time of the accident through the present and continuing, except while seeking intermittent medical care, and in any event for no less than 90 of the first 180 days following the accident." (See Defendants' Motion, NYSCEF Doc. 46, Paragraph 12). The Plaintiff also claims in Paragraph 13 that she has not been able to work since the accident. When asked during her deposition whether she worked prior to the accident, the Plaintiff stated "I was a nanny." When asked whether she worked for the same family after the accident, the Plaintiff stated "[o]ff and on with them, but I was in too much pain, so I had to stop." (See Defendants' Motion, NYSCEF Doc. 49, Pages 8-9). Plaintiff also states that after the accident, in April of 2020, she returned to work, however, she could not continue because of the pain in her shoulder. (Page 35). As a result, the Defendants have failed to meet their *prima facie* burden regarding the Plaintiff's claim of serious injury. See *Owens-Stephens v. PTM Mgmt. Corp.*, 137 N.Y.S.3d 734, 735 [2d Dept 2021]; *Hall v. Stargot*, 187 AD3d 996, 996, 131 N.Y.S.3d 250, 251 [2d Dept 2020]; *Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011].

Since the Defendants failed to meet their *prima facie* burden, there is no need to consider the sufficiency of the Plaintiff's opposition papers. See *Winegrad v. New York Univ. Med. Ctr.*, 64

N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 A.D.3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

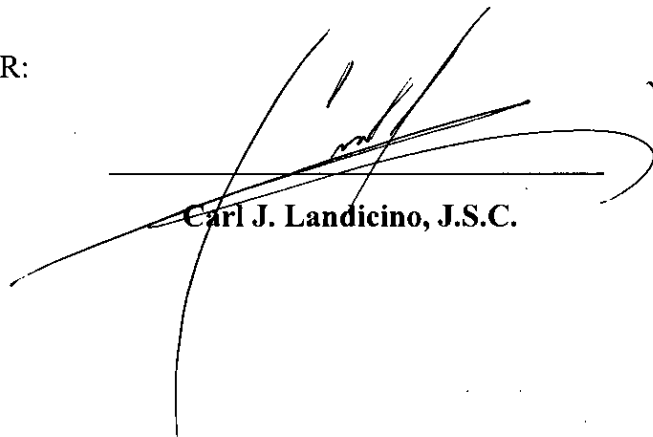
Notwithstanding this, a review of the Plaintiff's opposition reflects that had the Defendants made their *prima facie* showing, the Plaintiff raised issues of fact as to the Plaintiff having suffered a serious injury including the issue of gap in treatment. Accordingly, the motion (motion sequence #2) is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' summary judgment motion (motions sequence #2) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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 KINGS COUNTY CLERK
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