Lefkowitz-Kerner v Palmer
2023 NY Slip Op 35055(U)
June 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 711050/2019
Judge: Mojgan C. Lancman
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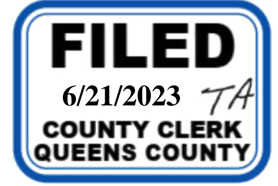
Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

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AUDREY LEFKOWITZ-KERNER,

Plaintiff,

-against-

PHILLIP MICHAEL PALMER a/k/a PHILLIP M. PALMER,

Defendant.

Index No.: 711050/2019

Motion Seq. No.: 1

Motion Date: 2.15.2023

Motion Cal. No.: 16

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The papers bearing NYSCEF Doc. Nos. 11-32 were read on the motion made by the defendant, Phillip Michael Palmer a/k/a Phillip M. Palmer (the "Defendant"), for summary judgment dismissing the complaint.

The plaintiff, Audrey Lefkowitz-Kerner (the "Plaintiff"), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the "Accident"). Presently before the Court is the Defendant's motion for summary disposition, which is predicated on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motion is granted in part and denied in part.

I. Background

The Accident occurred on July 19, 2018 at the intersection of Brower Avenue and Lakeview Avenue in Rockville Centre, New York. Two vehicles were involved in the Accident. The Plaintiff was the operator and owner of one of the vehicles. The Defendant was the owner and operator of the other vehicle.

The Plaintiff alleges that she suffered injuries to the cervical spine and left knee. It is further alleged that she meets the serious injury threshold under the permanent loss of use, significant limitation, permanent consequential limitation and 90/180-day categories.

A. The Defendant's Submissions in Support

In support of his motion, the Defendant submits, *inter alia*, the affirmed report of Dr. William Walsh and the Plaintiff's deposition transcript.

Dr. Walsh, an orthopedist, conducted the independent medical examination of the Plaintiff on February 15, 2022. The physician performed range of motion testing with respect to the cervical spine and left knee. Dr. Walsh found that range of motion was normal.

Dr. Walsh arrived at the following "diagnoses/impression": "1. [c]ervical spine sprain/strain – resolved. 2. [l]eft knee sprain/strain – resolved."

The Defendant also relies upon the Plaintiff's deposition testimony. In relevant part to the consideration of this motion, the Plaintiff testified that she missed four to six weeks of work following the Accident. The Plaintiff also stated that she did not recall whether a physician advised her or gave her a note directing her to stay out of work for said period.

B. The Plaintiff's Opposition

The Plaintiff submits various manner of medical documents in opposition, which are analyzed below.

The records from South Nassau Hospital undermine the Plaintiff's cervical spine claims. Here a CT of the cervical spine was interpreted as revealing degenerative changes and arthritis:

> Findings: There is reversal of cervical lordosis. Degenerative disc disease and osteophytosis are present. Disc osteophyte complexes cause multilevel mild to moderate central canal stenosis. Facet arthritic changes are seen. Likely facet arthritic related slight anterolisthesis of C3 on C4 is seen. Otherwise, no evidence of acute fracture or subluxation is identified.

The Plaintiff also relies on the reports and records of Dr. Sunil Butani. The Plaintiff treated with this physician from July 20, 2018, the day after the Accident, to January 28, 2019. In response to the Defendant's summary judgment motion, Dr. Butani examined the Plaintiff on November 8, 2022.

In an affirmed report issued after the examination of November 8, 2022, Dr. Butani found, with respect to the cervical spine, the following: spasms; tenderness; a 50% loss of range in motion on rotation to right; and a 44% loss of range of motion on side bending to the right. Dr. Butani does not address the degenerative conditions and arthritis that were found in the diagnostic studies conducted at South Nassau Hospital. The physician also fails to address the Plaintiff's prior injury to the cervical spine.

Dr. Butani relied on a number of MRI reports, issued as the result of studies conducted at Action Open MRI in 2018, of the left knee and the cervical spine. These reports reveal abnormalities with respect to said body parts. However, the reports do not address causality.

Dr. Butani found a loss of range of motion in the left knee on flexion of 40 degrees, a 28.5% loss, buckling and locking.

The Plaintiff also submits records and reports from a chiropractor, Dr. Brenner. These documents cannot be considered because the records are not certified and the reports are not sworn to. The records of Dynamic Core Physical Therapy cannot be considered because they are not certified.

Lastly, the Plaintiff relies upon the affirmed report of Dr. Joseph C. Elfenbein, who conducted a no-fault independent medical examination on February 25, 2019. The physician concluded, as is relevant to the present motion, that the Plaintiff had "cervical spine sprain/strain - resolving."

II. Discussion

A. Applicable Law

The familiar principles applicable to summary judgment motions are set forth below.

"Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law" (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The "function of summary judgment is issue finding, not issue determination" (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the "drastic" remedy of summary judgment, the movant "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 from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686, 688 [1984]).

Insurance Law § 5102 [d] states:

> 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; 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.

The Court now turns to the four categories of serious injury that the Plaintiff alleges.

B. The Permanent Loss of Use Category

The law is settled that "… to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total" (*Oberly v Bangs Ambulance Inc*., 96 NY2d 457, 460 [2001]; *Gjoleka v Caban*, 188 AD3d 458 [1st Dept 2020]). The Defendant establishes that there is no permanent loss of use with respect to the cervical spine and the left knee because range of motion testing was normal. In opposition, the Plaintiff fails to raise a triable issue of fact. Here, she presents absolutely no evidence of permanent loss of use relative to the subject body parts (*see Oberly v Bangs Ambulance Inc*., 96 NY2d 457; *Gjoleka v Caban*, 188 AD3d 458).

C. The 90/180 Day Category

"A claim under [the 90/180] category must be supported by objective medical evidence of an injury or impairment of a nonpermanent nature which would have caused the alleged limitations on [the] plaintiff's daily activities. Further, there must be proof that the injured party was curtailed from performing [his or her] usual activities to a great extent rather than some slight curtailment" (*Sul-Low v Hunter*, 148 AD3d 1326, 1327 [3d Dept 2017]) [internal quotation marks and citations omitted]).

The 90/180-day claim is dismissed on two grounds. First, the Plaintiff admitted at her deposition that she missed only four to six weeks from work because of the Accident (*see Murphy v Arrington*, 295 AD2d 865 [3d Dept 2002]). Second, there is no objective medical evidence to support this claim. Here, the Plaintiff testified as follows:

> Q. Was there a doctor that told you to miss that four to six weeks?
> A. I don't remember. I think so.
> Q. Did the doctor ever give you a note that you should remain out of work for that four to six weeks?
> A. That I don't remember either.
> Q. Let me ask you this: Do you ever recall handing a letter from a doctor to your employer?
> A. I don't remember that.

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Q. When you returned to work, did they make any accommodations for you or did you return to your normal job duties?
A. I returned to normal job duties.

D. The Significant Limitation and Permanent Consequential Limitation Categories

The Defendant establishes *prima facie* entailment to summary judgment dismissing the cervical and left knee injury claims under the significant limitation and permanent consequential categories through Dr. Walsh's affirmed report (*see Heesook Choi v Mendez*, 161 AD3d 1054 [2d Dept 2016]).

In opposition, the Plaintiff fails to raise a triable issue of fact with respect to the cervical spine for numerous reasons.

First, although the unaffirmed MRI report relative to the cervical spine is properly before the Court because Dr. Walsh sets forth the results thereof in his IME report, the MRI report, which indicates that the Plaintiff has disc bulges at various levels, has no probative value because it neither addresses nor renders an opinion as to causation (*see Scheker v Brown*, 91 AD3d 751 [2d Dept 2012]; *Sorto v Morales*, 55 AD3d 718 [2d Dept 2008]; *Collins v Stone*, 8 AD3d 321 [2d Dept 2004]).

Second, the opposition fails to acknowledge the injuries sustained to the Plaintiff's neck in a prior motor vehicle accident. Thus, Dr. Butani's conclusion that the Accident caused injuries to the cervical spine is speculative (*see Joseph v A and H Livery*, 58 AD3d 688 [2d Dept 2009]; *Rabolt v Park*, 50 AD3d 995 [2d Dept 2008]; *Penaloza v Chavez*, 48 AD3d 654 [2d Dept 2008]).

Third, the opposition does not address or explain why findings of degenerative changes, including osteophytes, that are contained in a CT scan report from South Nassau Hospital are not the cause of the Plaintiff's injuries (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014] *affd* 25 NY3d 1222 [2015]; *Auquilla v Singh*, 162 AD3d 463 [1st Dept 2018]). Thus, Dr. Butani's conclusion that the Accident caused the injuries to the cervical spine fails to raise a triable issue of fact (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014] *affd* 25 NY3d 1222 [2015]; *Auquilla v Singh*, 162 AD3d 463 [1st Dept 2018]).

Fourth, the opposition fails to address or explain why the finding made at South Nassau Hospital upon a CT scan that the Plaintiff has arthritis in her cervical spine was not the cause of her cervical injuries. Consequently, the Plaintiff fails to raise an issue of fact as to causation of her cervical injuries (*see Auquilla v Singh*, 162 AD3d 463; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014] *affd* 24 NY3d 1191[2015]).

The Plaintiff's cervical spine injury claims are thus dismissed.

The Plaintiff fares better on her left knee injury claims. Here, the record reveals: (1) that an MRI study from Action Open MRI revealed abnormalities; (2) that Dr. Butani found a loss of range of motion in the left knee on flexion of 40 degrees, a 28.5% loss; buckling and locking; (3) that there is no evidence of prior injury or conditions to the left knee; and (4) that Dr. Butani

causally relates the left knee injuries to the Accident. As the opposition raises triable issues of fact as to the left knee, summary judgment dismissing the injury claims relative thereto is denied (*see Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Collazo v Anderson*, 103 AD3d 527 [1st Dept 2013]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendant's summary judgment motion is granted in part and denied in part; and it is further,

ORDERED, that Plaintiff's permanent loss of use, 90/180-day and cervical spine injury claims are dismissed; and it is further,

ORDERED, that the motion is denied as to the Plaintiff's left knee injury claims; and it is further,

ORDERED, that the Defendant shall serve a copy of this Order with Notice of Entry upon the Plaintiff by August 15, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
June 20, 2023

MOJGAN C. LANCMAN, J.S.C.