

Alhiwaity v MTA Bus Co.
2023 NY Slip Op 35244(U)
August 30, 2023
Supreme Court, Queens County
Docket Number: Index No. 714717/2019
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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HOWAIDA ALHIWAITY,

Index No. 714717/2019

Plaintiff,

Part 6

Motion Date: August 7, 2023

-against-

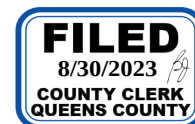
Calendar No. 1

Sequence No. 2

MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY a/k/a MTA,
CITY OF NEW YORK, and "JOHN DOE",

Defendants.

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The following papers numbered EF68 to EF84 read on this motion by defendants MTA BUS COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY a/k/a MTA, and CITY OF NEW YORK for summary judgment pursuant to CPLR §3212 and Insurance Law §5102(d) and §5104(a).

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF68-EF84

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants MTA Bus Company, Metropolitan Transportation Authority a/k/a MTA, and City of New York's motion for summary judgment pursuant to CPLR §3212 and Insurance Law §5102(d) and §5104(a) is granted without opposition, as defendants demonstrated prima facie that plaintiff did not suffer a serious injury. (*See Staff v. Yshua*, 59 A.D.3d 614 [2d Dept. 2009].) Plaintiff commenced this action for personal injuries sustained on November 20, 2018 when plaintiff was a passenger on the Q66 bus that suddenly stopped, causing her to fall, while in the vicinity of 35th Avenue and Steinway Street in Queens, New York. Plaintiff filed the Summons and Complaint on August 26, 2019, and issue was subsequently joined on November 25, 2019.

Defendants argue that summary judgment is warranted because plaintiff failed to sustain a serious injury pursuant to Insurance Law §5102(d). Defendants presented the pleadings, plaintiff's Bill of Particulars and Supplemental Bill of Particulars, the deposition testimony of the parties, the orthopedic examination report of Dr. Gregory Chiamonte, and the neurological examination

report of Dr. Marianna Golden in support of the motion. Plaintiff's Bill of Particulars states that she suffered a left knee abrasion, bilateral lumbar and cervical radiculopathy, bilateral motor/sensory median nerve entrapment, cervical and lumbar limitations, disc herniations, broad based herniations, and numbness and nerve damage to her arms and hands. Plaintiff's Bill of Particulars further states that the injuries were a result of the subject accident, and that the accident also caused, initiated, precipitated, and/or aggravated plaintiff's injuries including but not limited to internal and external scarring causing plaintiff to suffer pain, tenderness, discomfort, and disability. Plaintiff's Bill of Particulars further states that she is suffering and/or will suffer from the injuries' consequences including psychological overlay, anxiety, and mental suffering. Plaintiff's Bill of Particulars further states the injuries are permanent and prevent her from engaging in physical activity for health, pleasure, sports, or business. Plaintiff's Bill of Particulars further states that she was confined to her home and bed for several weeks. Plaintiff's Supplemental Bill of Particulars states that she received a left knee cortisone injection on January 5, 2021, and a right knee cortisone injection on January 14, 2021.

Defendants also argue that plaintiff's deposition testimony did not establish she sustained a serious injury as a result of her fall on the bus. Plaintiff testified that when the bus suddenly stopped, she landed on her back with the back of her head hitting the front of the bus and the stroller she was carrying fell on her right leg. She testified that as she fell, she felt pain in her head, back, neck, right shoulder, and right knee, but got up unassisted and exited the bus at her usual stop. Plaintiff testified she was later transported to the emergency room at Mt. Sinai Queens Hospital where she complained of nausea, a leg abrasion, and pain to her neck, right shoulder, and back. Plaintiff further testified that she did not suffer any fractures and was given ibuprofen for pain management. Plaintiff testified that two days later she sought treatment from her primary care physician and was referred to an orthopedist, Dr. Harash, who referred her to physical therapy. Plaintiff further testified that she received physical therapy and bilateral knee injections. Plaintiff was also advised by Dr. Harash that she had herniated discs in her neck and back, as well as nerve damage. Plaintiff further testified that she felt pain in her back and neck, experienced dizziness approximately once per month, and experienced nerve pain.

Defendants also presented Dr. Chiaramonte's independent medical examination report in support of their motion. Dr. Chiaramonte examined plaintiff and found that based upon the examination and a review of the medical records and documentation, within a reasonable degree of medical certainty, there was no objective evidence of an orthopedic disability for the subject incident or any objective findings to support plaintiff's complaints of pain. Dr. Chiaramonte performed a range of motion exam on plaintiff using objective tests and a goniometer and found that plaintiff demonstrated full range of motion in all areas measured when compared to normal.

Defendants also presented Dr. Golden's independent medical examination report in support of their motion. Dr. Golden examined plaintiff and found that based upon the examination

and a review of the medical records and documentation, there was no objective clinical evidence of a disability from the subject incident. Dr. Golden performed a range of motion exam on plaintiff using objective tests and a goniometer and found that plaintiff demonstrated full range of motion in all areas measured when compared to normal. Defendants argue that based upon the foregoing, plaintiff has not sustained a serious injury.

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

Under the No Fault law, in order to maintain an action for personal injury, a plaintiff must establish that a serious injury has been sustained. (See *Degachi v. Faridi*, 2023 N.Y. Slip Op. 01887 [2d Dept. 4/12/2023][holding that plaintiff must establish that he or she sustained a serious injury within the meaning of Insurance Law §5102(d) and that the serious injury was causally related to the accident]; see also *Licari v. Elliot*, 57 N.Y.2d 230 [1982].) In moving for summary judgment, the proponent must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (See *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; see also *Winegrad v. New York Univ. v. Medical Center*, 64 N.Y.2d 851 [1985].) In the present matter, defendant has the burden of proving, by submitting competent evidence in admissible form, that plaintiff has not suffered a serious injury. (See *Lowe v. Bennett*, 122 A.D.2d 728 [1st Dept. 1986], *affirmed*, 69 N.Y.2d 701 [1986].) If a defendant’s motion is sufficient to raise the issue of whether a serious injury has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (See *Licari, supra*; see also *Lopez v. Senatore*, 65 N.Y.2d 1017 [1985].)

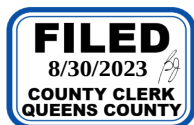
Defendants demonstrated a prima facie entitlement to summary judgment based upon the pleadings, deposition testimony and medical evidence that plaintiff did not sustain a serious injury. (See *Isidor v. Banks*, 208 A.D.3d 462 [2d Dept. 2022].) Plaintiff’s testimony demonstrated that she was not unable to perform her daily life activities for 90 out of the first 180 days after the accident. Additionally, plaintiff failed to demonstrate she sustained a significant limitation or permanent consequential use of a body organ or member. Dr. Chiaramonte and Dr. Golden

examined plaintiff and found she had resolved cervical, lumbar and left knee strain/sprain full range of motion based upon objective tests, and was able to resume her normal daily activities. Dr. Chiaramonte and Dr. Golden further found that plaintiff had no objective evidence to support her subjective complaints of pain. Based upon the evidence presented, defendants established prima facie that plaintiff did not sustain a serious injury. As plaintiff failed to oppose the motion, plaintiff failed to demonstrate a material issue of fact in dispute.

Accordingly, defendants MTA Bus Company, Metropolitan Transportation Authority a/k/a MTA, and City of New York's motion for summary judgment pursuant to CPLR §3212 and Insurance Law §5102(d) and §5104(a) is granted without opposition. Plaintiff's Complaint is hereby dismissed.

This constitutes the decision and Order of the Court.

Dated: August 30, 2023





Hon. Tracy Catapano-Fox, J.S.C.