

Seaton v Mohammed
2023 NY Slip Op 35293(U)
November 6, 2023
Supreme Court, Queens County
Docket Number: Index No. 712467/21
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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KARLEEN E. SEATON,

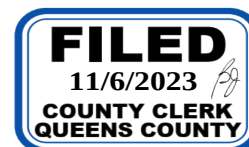
Plaintiff,

-against-

Index No.: 712467/21

Mot. Date: 10/24/23

Mot. Seq. 1

OSAMA H. MOHAMMED and MOHAMED M.
MAIHIMID.Defendants.
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The following papers were read on this motion by defendants for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102(d).

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 13-21
Answering Affidavits-Exhibits.....	EF 23-34
Replying Affidavit.....	EF 35

Upon the foregoing papers, it is ordered that the motion by defendants is granted.

This action arises out of a motor vehicle accident, that occurred on April 18, 2020. In her Verified Bill of Particulars, the plaintiff, who was 56 years old at the time of the accident, alleges, *inter alia*: tears to the labrum of the right shoulder; a TFCC tear of the right wrist; herniated and bulging discs in the cervical spine; and, herniated discs in the lumbar spine.

Defendants move for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that the plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.

(see *Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]).

The defendant's motion papers must demonstrate, that the plaintiff did not sustain either a permanent consequential limitation of use of a body organ or member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept. 2011]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Reed v Righton Limo, Inc.*, 82 AD3d 1070 [2d Dept. 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept. 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept. 2011]; *Pero v Transservice Logistics*, 83 AD3d 681 [2d Dept. 2011]). However, if the defendant meets this burden, the burden shifts to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she/he sustained a "serious injury" (see *Pommels v Perez*, 4 NY3d 566 [2005]; *Gaddy v Eyler, supra*).

Here, the defendants have established a *prima facie* entitlement to summary judgment, by submitting, *inter alia*, the affirmed medical report of Dr. Pierce Ferriter, a board certified orthopedic surgeon, who examined the plaintiff on August 22, 2022. Dr. Ferriter performed range of motion testing to the cervical spine, lumbar spine, right shoulder and right wrist with the use of a goniometer, finding completely full, normal ranges of motion at all levels. There was no evidence of muscle spasm in either the cervical or lumbar spine. All clinical tests were negative. The doctor found no evidence of an orthopedic disability, permanency or residuals. He opined that the plaintiff is able to work without limitations and perform normal activities of daily living without limitations.

Defendants also submit the affirmed report of Dr. Darren Fitzpatrick, a board certified radiologist, who reviewed the MRI films of the plaintiff's cervical spine, lumbar

spine, right shoulder, and right wrist. In regards to the cervical spine, his impression was mild cervical degenerative disc disease. He opined that there was no traumatic injury to the cervical spine and that the MRI findings were due to degenerative disc disease and not traumatically caused. Dr. Fitzpatrick expressed a similar opinion regarding the lumbar spine MRI findings in that there was no traumatic injury and the MRI findings were due to degeneration. Finally, Dr. Fitzpatrick affirmed that in his opinion, there were no tears to the right shoulder and no traumatic injury to the shoulder. His impression of the right wrist MRI was that it was normal, with no ligament or tendon tears and no evidence of traumatic injury.

Defendants met their burden on the “90/180” category of the Insurance Law by submitting the plaintiff’s deposition transcript where she testified that she did not miss any time from work as a result of the accident (see *Strenk v Rodas*, 111 AD3d 920 [2d Dept. 2013]; *Bucci v Kempinski*, 273 AD2d 333 [2d Dept. 2000]).

Defendants having established their *prima facie* entitlement to summary judgment, the burden has shifted to the plaintiff to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial (see *Franchini v Palmieri*, 1 NY3d 536 [2003]). Plaintiff must submit competent objective medical evidence based on both a contemporaneous physical examination and a recent physical examination. (see *Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345 [2002]).

Here, the plaintiff relies on the report of Dr. Andrew Robert Miller (see NYSCEF Doc. No. 34), who examined the plaintiff, on July 3, 2023, to satisfy the “recent physical examination” requirement. Plaintiff does not submit any other medical records and/or reports showing a recent physical examination. However, Dr. Miller’s report is not admissible because it is not affirmed (see *Grasso v Angerami*, 79 NY2d 813, 814 [1991]; *Chanda v Varughese*, 67 AD3d 947, 948 [2d Dept. 2009]; *Magid v Lincoln Services Corp.*, 60 AD3d 1008, 1008 [2d Dept. 2009]; *Bruce v New York City Transit Authority*, 16 AD3d 608, 609 [2d Dept. 2005]).

Even if the Court were to consider the untimely submitted “certification page” for Dr. Miller’s report (see NYSCEF Doc. No. 40), it is still inadmissible. A physician’s office records, supported by the statutory foundations set forth in CPLR 4518(a), are

admissible in evidence as business records" (*see Wilson v Bodian*, 130 AD2d 221 [2d Dept. 1987]). However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain *the doctor's opinion or expert proof* (*Matter of Bronstein-Becher v. Becher*, 25 AD3d 796, 797 [1st Dept. 2006] [emphasis added]; *see Komar v Showers*, 227 AD2d 135, 136 [1st Dept. 1996]; *Hefte v Bellin*, 137 AD2d 406, 408 [1st Dept. 1988]; *Wilson v Bodian*, *supra* 130 AD2d at 229-230). Reports that contain medical opinions and diagnosis cannot be admitted as business records (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept. 2013]).

Finally, even if Dr. Milers's report was in admissible form, it is still insufficient to raise an issue of fact. Dr. Miller only examined the plaintiff's right shoulder, and not her cervical spine, lumbar spine or right wrist. His report fails to address the findings of the defendants' radiologist that the plaintiff's alleged injuries to the cervical and lumbar spine were degenerative in nature, and fails to adequately address the findings of the defendant's radiologist that there was traumatic injury to the right shoulder (*see Barnes v Paukar*, 215 AD3d 615 [2d Dept. 2023]; *Amirova v. JND Trans, Inc.*; 206 AD3d 601 [2d Dept. 2021]; *Mnatcakanova v Elliot*, 174 AD3d 798 [2d Dept. 2019]; *Zavala v Zizzo*, 172 AD3d 793 [2d Dept. 2019]; *Cavitolo v Broser*, 163 AD3d 913 [2d Dept. 2018]).

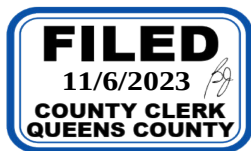
Since the defendants have established a *prima facie* entitlement to summary judgment and the plaintiff has failed to submit competent medical proof in admissible form sufficient to raise an issue of fact, the defendants' motion must be granted.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment on the issue of "serious injury" is granted, and it is further

ORDERED that the plaintiff's complaint is dismissed.

Dated: November 6, 2023




TIMOTHY J. DUFFICY, J.S.C.