

Lopez v New York City Tr. Auth.

2024 NY Slip Op 32780(U)

April 30, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31556/2018E

Judge: Patsy Gouldborne

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

E#001

PART 13

| | |
|---------------------|--------------------------|
| Case Disposed | <input type="checkbox"/> |
| Settle Order | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

-----X
Delila Lopez, Plaintiff

Index No. 31556/2018E

-against-

Hon. _____

New York City Transit Authority, et al

Justice.

-----X
Defendants

Seq No 1

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

| | PAPERS NUMBERED | |
|--------------------------------------------------------------------------|-----------------|---------|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | See | Annexed |
| Answering Affidavit and Exhibits | | |
| Replying Affidavit and Exhibits | | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers this

Motion sequence #1 is granted to the extent _____ in accordance with the Decision and Order dated April 30, 2024.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/30/2024

Hon. Patsy Bordol
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 13**

-----X

DELILA LOPEZ

Index No. 31556/2018E

Plaintiff,

-against-

Hon. PATSY GOULDBORNE

Justice Supreme Court

**NEW YORK CITY TRANSIT AUTHORITY,
MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, and JUAN
ARZU,**

Defendant(s).

-----X

The following papers were read on this motion (**Seq. No. 1**) for **Summary Judgment Threshold**, submitted on May 25, 2023.

| | |
|---------------------------------------------|---------------------|
| Notice of Motion – Affirmation and Exhibits | NYSCEF Doc. # 28-43 |
| Affirmation in Opposition and Exhibits | NYSCEF Doc. # 45-55 |
| Affirmation in Reply | NYSCEF Doc. # 58 |

Upon the foregoing papers, the Defendants move pursuant to CPLR 3212, for an Order granting summary judgment and dismissing Plaintiff’s Complaint on the grounds that Plaintiff, Delila Lopez, has not sustained a “serious injury” pursuant to the provisions of Insurance Law § 5102 (d).

This action arise out of a motor vehicle accident that occurred on July 13, 2017, wherein the Plaintiff alleges that she sustained injuries to, inter alia, her left ear, left shoulder, left knee, cervical spine, lumbar spine, and emotional distress (anxiety and post-traumatic stress disorder). Plaintiff alleges that she sustained a “serious injury” under the “permanent loss of use,” “permanent consequential limitation,” “significant limitation of use,” and/or “90/180-day” categories of injury as defined by the Insurance Law.

In support of the motion, Defendant submits, inter alia, Counsel’s affirmation in support; Plaintiff’s deposition transcript; MRI reports; the affirmed orthopedic report of Stuart J. Herson, M.D., dated December 12, 2019; and the affirmed neurological report of Warren E. Cohen, M.D., dated December 27, 2019.

Dr. Hershon conducted an orthopedic examination on September 18, 2019, finding normal range of motion of the Plaintiff’s left shoulder, cervical spine, lumbar spine, and left knee. Dr. Hershon reviewed, inter alia, the MRI reports of the left knee performed at Lenox Hill Radiology on October 21, 2017; a MRI report of the cervical spine and lumbar performed at Stand-Up MRI of Manhattan on August 18, 2017; a MRI report of the left shoulder performed at Stand-Up MRI of Manhattan on November 28, 2017; physical therapy notes from August 18, 2017 to June 20, 2018; and a Clinical neuropsychological evaluation report dated November 2, 2017. Dr. Hershon determined that the Plaintiff’s claimed injuries to the left shoulder, left knee, cervical spine, and lumbar spine had resolved. Dr. Hershon determined that there is no evidence of an orthopedic disability or permanent injury, and Plaintiff can perform activities of daily living and work duties without restrictions or limitations.

Dr. Cohen, M.D., conducted a neurological examination of the Plaintiff on December 20, 2019, finding normal range of motion of Plaintiff’s cervical spine and lumbar spine, and negative neurological testing of Plaintiff’s head. Dr. Cohen determined that the cervical sprain and lumbosacral sprain have resolved. Dr. Cohen opines that there is no permanent impairment of neurologic function.

Defendants' submissions establish, *prima facie*, that Plaintiff did not sustain a "significant" or "permanent consequential limitation" of her cervical spine, lumbar spine, left knee, and left shoulder (*Velazquez v City of New York*, 200 AD3d 547, 548 [1st Dept 2021]). However, Defendants have failed to meet their initial burden with respect to Plaintiff's claims of injury to the left ear, emotional distress, anxiety, and post-traumatic stress disorder. While Plaintiff testified that she was treated by a psychiatrist after the accident, Plaintiff's deposition testimony provides no further detail, and Defendants' experts offer no opinion regarding these claimed injuries. Accordingly, Defendants failed to meet their *prima facie* burden as to such claims, and the burden does not shift to Plaintiff on this issue (*see Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]). It is noted that, if a jury determines that Plaintiff sustained a "serious injury," Plaintiff may recover for all injuries causally related to the accident, even those not meeting the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

In opposition to the motion, Plaintiff submits, *inter alia*, the affirmed reports and MRI of Mark J. Decker, and M.D.. David R. Payne, M.D.; the affirmed report of Thomas S. Matthew, M.D.; medical records, and Plaintiff's affidavit.

Dr. Decker affirms the findings of his November 30, 2017, left shoulder MRI report, which revealed posterior and anterior capsular, and no tears. Dr. Payne affirms the findings of his August 18, 2017, cervical and lumbar spine MRI reports, which revealed disc herniations at L4-L5, L5-S1, C3-C4, and a disc bulge at C5-C6.

Dr. Matthew initially evaluated Plaintiff on August 7, 2017, at which time Plaintiff complained of pain in her neck and back, and discomfort in her left knee and left shoulder. The MRI finding of the left knee, revealed, *inter alia*, a small peripheral undersurface tear of the medial meniscus. Range of motion testing revealed range of motion loss of the cervical spine, lumbar spine, left shoulder, and left knee, which Dr. Matthew causally relates to the subject accident. Dr. Matthew found the following decreased ranges of motion of the cervical spine, lumbar spine, left shoulder, and left knee. Dr. Matthew recently evaluated the Plaintiff on January 20, 2023, finding that Plaintiff had "some tenderness to palpation in the cervical paraspinal musculature and upper trapezius musculature with a couple myofascial trigger points on palpation."

Plaintiff's submissions are sufficient to raise an issue of fact as to whether Plaintiff sustained causally related "significant" and "permanent consequential limitation" to her left shoulder, left knee, cervical spine, and lumbar spine by submitting Dr. Matthew's affirmed report which documented Plaintiff's continuing limitations in range of motion and objective indications of injury (*see Encarnacion v Castillo*, 146 D3d 600, 601 [1st Dept 2017]).

With respect to Plaintiff's claim under the "90/180-day" category of injury, this claim must be dismissed. Plaintiff's bill of particulars does not allege that Plaintiff was disabled for the minimum duration necessary to state such a claim (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437-438 [1st Dept 2018]). Further, Plaintiff's deposition testimony establishes that she was, at most, somewhat restricted in her daily activities, which is fatal to a 90/180-day injury claim (*see Anderson v Pena*, 122 AD3d 484 [1st Dept 2014]).

With respect to Plaintiff's claim of a "permanent loss of use," there is no evidence that Plaintiff suffered a "total loss of use" of any body part. Therefore, Plaintiff's claims under the "permanent loss of use" category are dismissed (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019], citing *Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]).

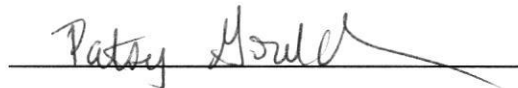
Accordingly, it is hereby

ORDERED that Defendant's motion (**Seq. No. 1**) seeking summary judgment is **granted to the extent** that Plaintiff's under the "permanent loss of use" and "90/180 day" categories of injury are dismissed and the motion is otherwise **denied**; and it is further

ORDERED, that Defendant shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This decision constitutes the Decision and Order of the Court.

Dated: April 30, 2024



Hon. PATSY GOULDBORNE, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT