Zhen Yun Zhang v Mejia
2024 NY Slip Op 32911(U)
July 18, 2024
Supreme Court, Kings County
Docket Number: Index No. 8748/2015
Judge: Wavny Toussaint

At an IAS Term, Part 70 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 18th day of July, 2024.

P R E S E N T :
HON. WAVNY TOUSSAINT
Justice.

ZHEN YUN ZHANG,

Plaintiff,

-against-

JOSE MIGUEL MEJIA and JOSE ZORRILLA,

Defendants.

Index No.: 8748/2015

DECISION AND ORDER

The following papers numbered 1 to read herein	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	55-62
Cross Motion and Affidavits (Affirmation) Annexed	
Answers/Opposing Affidavits (Affirmations)	64-70
Reply Affidavits (Affirmations)	72
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants move (Seq.04) for an order, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint. Plaintiff opposes.

This action arises from an accident which occurred on July 19, 2012 at the location of 5th Avenue and 40th Street in Brooklyn, New York. Plaintiff alleges she sustained serious injuries when, as a pedestrian, she was struck by the vehicle driven by defendant Jose Miguel Mejia. As a result of the accident, plaintiff was taken by ambulance to the

emergency room at Lutheran Medical Center, where she was treated and released that same day. The action was commenced by service of a summons and complaint on July 31, 2015. Defendants served an answer on August 12, 2015.

In the Bill of Particulars, plaintiff's alleged injuries include a possible nondisplaced right patellar fracture with right anterior soft tissue swelling; bruises, contusions, sprains, with severe tenderness around the bilateral knee joints; and other related lower back injuries, resulting from the accident (NYSCEF Doc. No. 32/65 at par. 7). Plaintiff further alleges her injuries qualify as serious injuries under: (1) the significant limitation of use of a body function or system, (2) the permanent consequential limitation of use of a body organ member and (3) the 90/180-day categories of §5102[d] of the Insurance Law (*id.* at par. 21; *see also* NYSCEF Doc. No. 64 at par. 22).

Defendants move (Seq. 04) to dismiss the complaint asserting plaintiff did not sustain a serious injury, as defined under § 5102[d] of the Insurance Law. Defendants' proof consists of plaintiff's emergency room records from Lutheran Medical Center;[1] the affirmed reports of orthopedic surgeon Dr. Thomas P. Nipper, neurologist Dr. Warren E. Cohen and radiologist Dr. Jeffrey Warhit; in addition to various portions of plaintiff's deposition. Defendants contend the competent medical evidence demonstrates plaintiff did not sustain a serious injury as a result of the accident, pointing to the findings of its IME doctors and the alleged superficial nature of plaintiff's injuries.

[1] Though uncertified, the Court considered these records as plaintiff also relied upon them in the opposition (*Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016] [admissibility of proof submitted in opposition].

The July 19, 2012 emergency room records from Lutheran Medical Center indicate that a fracture was never diagnosed for any part of plaintiff's body, including the right knee. The records state findings of "nonspecific R knee x-ray readings", "[n]o acute fracture in the tibia or fibula" and the "[k]nee and ankle joints are aligned without dislocation" (NYSCEF Doc. No. 58 at ps. 18 and 30). The records further show plaintiff was discharged from the emergency room the same day, having been diagnosed with "knee and toe abrasion", "knee contusion" and "forearm contusion" (*id.* at p. 15). A radiologic report of plaintiff's diagnostic exam conducted on August 12, 2012 at Pinnacle Diagnostic Radiology, one month after the accident, states plaintiff was "[n]egative for fracture, ligamentous, tendinous, muscular or meniscal tear [with] no evidence of a traumatic injury to the right knee" (NYSCEF Doc. No. 61 at p. 1).

At defendants' request, Dr. Nipper conducted an orthopedic evaluation of plaintiff on July 14, 2021 who, among other things, tested plaintiff's range of motion using a goniometer. The testing results for plaintiff's cervical thoracic and lumbar spines were normal and no lordosis, tenderness or spams were observed. Similar testing of plaintiff's elbows, wrists, hands, hips, knees, ankles and feet also were found to be within normal ranges. After examination, Dr. Nipper concluded plaintiff did not suffer any disability as a result of the accident and further notes plaintiff "is employed in a factory and lost one or two days from work" and "is able to perform her usual activities of daily living. She may work without restriction". Dr. Cohen, who performed a neurological evaluation of plaintiff on October 1, 2021, determined plaintiff did not suffer any "permanent impairment of neurologic function". Finally, plaintiff's deposition testimony indicates plaintiff did not

recall many of the details surrounding her emergency room treatment and discharge, and confirmed she received physical therapy for less than three months following the accident and could not recall whether any doctor told her she had a fracture to either knee (NYSCEF Doc. No. 33/66 at ps. 44-479; 53-56; 59).

Based on the foregoing proof, the Court finds defendants established *prime facie* that plaintiff did not suffer a serious injury as a result of the accident (*Wettstein v Tucker*, 178 AD3d 1121, 1121-1122 [2d Dept 2019]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]). Having met their burden, plaintiff was obligated to present admissible proof to raise a triable issue of fact in opposition to defendants' motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition, plaintiff submitted her Verified Bill of Particulars and deposition transcript; the medical records from Lutheran Medical Center, Jennan Comprehensive Medical, P.C. and Brooklyn Comprehensive Acupuncture Service, PC; and the MRI reports from radiologist Dr. Javier Beltran. The medical records and the MRI reports were uncertified and/or unaffirmed and therefore inadmissible (CPLR §4518[c]; *Vickers v Frances*, 63 AD3d 1150, 1151 [2d Dept 2009]) and insufficient to raise any triable issues of fact warranting jury determination (*Zuckerman*, 49 NY2d at 563).

Notably, plaintiff fails to proffer any competent medical evidence that the alleged injuries resulted in the significant limitation of use of a body function or system; the permanent consequential limitation of use of a body organ or member; or that for 90 out of 180 days following the accident, she was unable to perform substantially all of the material acts which constituted her usual and customary daily activities, as plaintiff alleges herein

(*Strenk v Rodas*, 111 AD3d 920, 921 [2d Dept 1013]). The supporting affirmation of plaintiff's counsel, purporting to address the significance of plaintiff's injuries, amounts to hearsay. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance, as it fails to provide proof in evidentiary form (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]; *Zuckerman,* 49 NY2d at 562; *Palo v Principio*, 303 AD2d 478, 478 [2d Dept 2003]). Plaintiff's deposition testimony that she was confined to her bed for two months, and to her home for "about a year" (NYSCEF Document No. 33/66 at p. 61), is self-serving (*Shvartsman v Vildman*, 47 AD3d 700, 701 [2d Dept 2008]; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 536 [2d Dept 2007] *citing Fisher v Williams*, 289 AD2d 288, 289 [2d Dept 2001]) and is not corroborated by any objective evidence sufficient to raise a triable issue of fact (*id.*).

Finally, plaintiff's challenge to the admissibility of defendants' proof based on the lack of a translator affidavit regarding the examinations of plaintiff by defendants' doctors is unsupported, and without merit. Each report states someone was present to interpret at the examinations were conducted. Further, plaintiff's reliance on CPLR §2101 is misguided. This statute requires all filed documents to be in English and states:

> (b) Language. Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008]; emphasis supplied)

Here, none of the examination reports filed are in a foreign language and therefore, neither an English translation nor an affidavit from a translator is required. Accordingly, plaintiff has failed to raise a triable issue of fact in opposition to defendants' *prima facie* showing.

All arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this Court, regardless of whether they are specifically discussed herein.

Accordingly, it is hereby

ORDERED, Defendants' motion (Seq.04) for an order, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint, is granted, and the complaint is hereby dismissed. The clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

For Clerks use only
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Motion Seq. 4

E N T E R

JSC

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
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