Flynn v Cabreramontano
2024 NY Slip Op 33131(U)
September 5, 2024
Supreme Court, New York County
Docket Number: Index No. 161953/2019
Judge: James G. Clynes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** *Justice* **PART** **22M**

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LORRAINE FLYNN,

Plaintiff,

- v -

HILYOBEL CABRERAMONTANO, FENIX TAXI LLC, VIA TRANSPORTATION, INC., AHMED BOUTAHAR

Defendants.

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INDEX NO. 161953/2019

MOTION DATE 08/09/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, it is ordered that the motion by defendants, Bhupinder Singh and Ben Bella Transportation Corp (Defendants), for summary judgment dismissing Plaintiff's complaint on the grounds that Plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law 5102 (d) is denied, except as to the 90/180 days category.

Plaintiff commenced this action alleging that she sustained serious injuries within the meaning of Insurance Law 5102 (d), as a result of a March 5, 2019, motor vehicle accident between Plaintiff's vehicle and a vehicle owned by Defendant Fenix Taxi LLC and operated by Defendant Ahmed Boutahar. This matter has been discontinued as to Defendant Hilyobel Carberamontano pursuant to the Stipulation of Discontinuance dated April 16, 2024 (NYSCEF DOC NO 82) and as to Defendant Via Transport Inc pursuant to the Stipulation of Discontinuance dated April 24, 2024 (NYSCEF DOC NO 103).

According to the Bill of Particulars, Plaintiff allegedly suffered injuries to the cervical spine and right shoulder that meet the following serious injury categories under Insurance Law 5102 (d): permanent loss of use of a body organ, member, function, system; a scar; a fracture of a bone; a significant limitation of use of a body function or system; a permanent consequential limitation of use of a body function or system; and 90/180-days.

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Licari*, *supra*, and *Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of his motion, Defendant submits an independent medical examination report by orthopedic surgeon, Dr. Howard Kiernan, an MRI report by radiologist, Dr. Michael Setton, and Plaintiff's deposition transcript.

Dr. Kiernan examined Plaintiff on July 21, 2022. He measured Plaintiff's range of motion with a handheld goniometer and compared his findings to normal values in the "Guidelines to the Evaluation of Permanent Impairment," 5th edition, published by the American Medical Association. He found the range of motion in the cervical spine, lumbar spine, and right shoulder to be normal. In his report, Dr. Kiernan states that the strains/sprains in the cervical and lumbar spines are resolved, and the status right shoulder post-surgery is healed. Finally, he opines that Plaintiff is able to seek employment and suffers no limitations to normal living, and there is no evidence of permanency.

On March 31, 2019, Dr. Michael Setton performed an MRI review of Plaintiff's cervical spine. He found no soft tissue injuries, straightening of the cervical lordosis, mild disc bulge at C2-3 and C3-4, bulging discosteophyte complexes at C5-6, C6-7, and C7-T1, with central canal and foraminal stenosis and left ventral cord abutment at C5-6. On April 11, 2019, Dr. Setton performed an MRI review of Plaintiff's right shoulder. He concluded that there was moderate supraspinatus and anterior infraspinatus tendinosis, mild to moderate subacromial/subdeltoid bursitis, mild biceps tenosynovitis, mild hypertrophic acromioclavicular joint degeneration with lateral downsloping anterior acromion, and no rotator cuff or labral tear identified.

Plaintiff's deposition reveals that she has been out of work, on disability, since 2012. This came after getting ovarian cancer and developing fibromyalgia. Plaintiff's fibromyalgia has caused generalized pain throughout her body. The next day after the accident, she went to Urgent Care complaining of stiffness in her neck, back, and shoulder. She says that after the accident, she was confined to home for "a couple of days," and after the surgery in July 2019, she was "home confined for probably a week." As a result of the crash, Plaintiff received chiropractic care, massages, physical therapy, and acupuncture, but ended in 2019. Now, she does yoga and occasionally gets a massage.

In opposition to the motion, Plaintiff offers a narrative report by Dr. Mark McMahon, cervical MRI done by Dr. Thomas M. Kolb, a right shoulder MRI taken by Dr. Thomas M. Kolb, 45th Street Chiropractic medical records, Fifth Avenue Surgery Center Medical Records, Max-Health Chiropractic of NY medical records, New York Neurology Records, Mark McMahon, M.D. Records, Comprehensive Spine & Pain Center of New York Records, Arce Medical & Diagnostic Svc. P.C. Records, and Plaintiff's affirmation.

Dr. McMahon performed arthroscopic surgery on Plaintiff's right shoulder in July 2019. In his affirmed report Dr. McMahon relates all listed injuries to the subject car accident. Dr. McMahon measured Plaintiff's cervical spine and right shoulder range of motion with a goniometer and found limitations. Upon examination, Dr. McMahon found "partial tears of the supraspinatus and infraspinatus with synovitis, bursitis, and a torn labrum" in Plaintiff's right shoulder. In the cervical spine, he found herniations that impinged on the spinal cord, and a nerve root injury. Dr. McMahon reported that Plaintiff would benefit from a posterior C4-T1 decompression and fusion using segmental instrumentation and bone graft. He diagnoses her injuries as permanent, affecting her daily living, and quality of life. Dr. McMahon reported that as a result of the injuries she sustained and the surgery she underwent, she is at an increased risk of developing posttraumatic arthritis and requiring a total shoulder replacement.

Dr. Thomas M. Kolb, in his MRI reports, finds that Plaintiff's right shoulder experienced "a high-grade partial versus complete rotator cuff tear," and "a low-grade partial tear of the infraspinatus tendon," along with joint and bursal effusion. In the cervical spine, he observed "disc herniations at C4-5, C5-6, C6-7 and C7-T1 with central and foraminal narrowing, as well as herniations at C5-6 and C6-7 impinging upon the spinal cord.

In Plaintiff's records from Arce Medical & Diagnostic Svc. P.C. on July 29, 2019, the records state that imaging found high-grade partial versus complete rotator cuff tear at the anterior distal insertion of the supraspinatus tendon, a low-grade partial tear of the infraspinatus tendon, as well as joint and bursal effusion.

Plaintiff conducted a follow up appointment with Dr. Noel Fleischer at New York Neurology on March 13, 2020. Dr. Fleischer diagnosed Plaintiff with post-concussion syndrome with posttraumatic headaches, traumatic cervical radiculopathy, traumatic lumbar radiculopathy, myofascial pain syndrome, internal derangement of the right shoulder status post-surgery.

Plaintiff also treated with Dr. Tim Canty of Comprehensive Spine and Pain Center of New York, who performed epidural steroid injections on Plaintiff. At Plaintiff's visit on December 16, 2019, Dr. Canty, notes a decrease in Plaintiff's range of motion. Dr. Canty diagnoses Plaintiff with radiculopathy in the cervical and thoracic region, cervical disc displacement, cervical and thoracic facet arthropathy, and disorder of rotator cuff syndrome of shoulder and allied disorder.

Finally, Plaintiff submits an affidavit stating that she still experiences pain as a result of the accident. The treatments she has endured as a result of the incident included chiropractic care, massages, physical therapy, surgery on the arm/shoulder, epidural injection in the neck, and MRIs. The constant pain in her cervical spine and right shoulder still provides her with difficulty when performing daily tasks.

In reply, Defendant contends that Plaintiff does not meet the 90/180 days category, as she testified that she is not employed, and the last time she was employed was in 2012, she was not confined to bed after the accident but was confined to her home for a couple of days after the accident and for about one week after her surgery. Defendant further contends that as Plaintiff testified that she travelled to Ireland at least four (4) times and spends about two weeks' time each visit and that she also visited Aruba, she fails to raise an issue of fact in this category.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). In order to satisfy their burden under Insurance Law 5102 (d), plaintiffs must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems Inc,* 98 NY2d 345, 352 [2002] where the court found that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"). Insurance Law 5102 (d) outlines the serious injury threshold:

> a personal injury which results in … 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 nonpermanent 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

90 days during the 180 days immediately following the occurrence of the injury or impairment.

Under the no-fault law, a plaintiff can maintain an action for non-economic loss, including pain and suffering, arising from a motor vehicle accident only if the accident caused a serious injury (*Licari v Elliott*, 57 NY2d 230 [1982]). The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Licari*, *supra*, *see also Lopez v Senatore*, 65 NY2d 1017 [1985]).

In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]). By Dr. McMahon relating Plaintiff's injuries to the accident, and his conclusion that the injuries are permanent in nature, Plaintiff raises triable issues of fact as to the permanent loss of use of a body organ, member, function, system, a scar; a fracture of a bone, a significant limitation of use of a body function or system, and a permanent consequential limitation of use of a body function or system categories of Insurance Law 5102 (d) (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; *Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). A torn rotator cuff is considered a serious injury under Insurance Law 5102 (d) (*see Bennett v Cruz*, 168 AD2d 307 [1st Dept 1990] holding that the jury's determination that the torn rotator cuff was a serious injury was appropriate).

With regard to the final category claimed under Insurance Law 5102 (d), the 90/180 days category, a plaintiff must submit objective medical evidence to establish a claim, namely that s/he was prevented from performing substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). Here, Plaintiff did not submit any objective medical evidence of a substantial physical limitation during the requisite time period. Plaintiff, who was unemployed at the time of the accident, testified at her examination before trial that with the exception of approximately one week following her surgery, she was only confined to her home for a couple of days after the accident. Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendant's motion for summary judgment is DENIED except as to the 90/180 days category of Insurance Law 5102 (d); and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with Notice of Entry.

This constitutes the Decision and Order of the Court.

9/5/2024
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**