

Thomas v Janelle Car Serv. Corp.

2024 NY Slip Op 33755(U)

October 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 529591/2022

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
LAURIANA MILLIS THOMAS,

Plaintiff,

Index # 529591/2022

-against-

DECISION & ORDER

JANELLE CAR SERVICE CORP., AND JOHN DOE,
NAME BEING FICTITIOUS AND INTENDED TO BE THE
OPERATOR OF THE VEHICLE, OWNED BY JANELLE
CAR SERVICE CORP.,

Mot. Seq. #1

Defendants.
-----X

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on April 15, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. A-G]
Affirmation/Affidavit in Opposition.....	3[Exh. A-E]

Plaintiff commenced this action for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on February 5, 2021. Defendant, Janelle Car Service, Inc. (hereinafter "the defendant"), moves for summary judgment pursuant to CPLR § 3212 on the grounds that plaintiff did not sustain a serious injury under Insurance Law 5102(d). Plaintiff opposes the motion on the grounds that the defendant failed to establish its entitlement to summary judgment as a matter of law, as well as there being issues of fact, which preclude summary judgment from being granted.

Discussion

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." See also, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980].

The defendant argues that the plaintiff has failed to meet the serious injury threshold and the medical reports submitted in support of the motion for summary judgment, objectively demonstrate a lack of disability or impairment to establish proof of a serious injury, pursuant to CPLR Section 5102(d) of the New York State Insurance Law. Specifically, the defendant argues that the plaintiff's alleged injuries are not permanent, did not result in a significant limitation of use of a body part, and did not prevent the plaintiff from performing substantially all his customary daily activities for the 90 days following the accident in question. In support of defendant's motion for summary judgment, defendant submitted the independent medical findings of Dr. Pierce J. Ferriter, a board-certified orthopedic surgeon, who concluded upon objective tests and examination of the plaintiff that her cervical spine, thoracic spine, lumbar spine, right shoulder, and right knee have all been resolved, while her left knee and left shoulder have healed. Dr. Ferriter found that plaintiff had no disability, significant injury, or permanent injury, and exhibited full range of motion. Dr. Ferriter also opined that the plaintiff is able to perform activities of work and daily living without restrictions.

In addition, the defendant submitted the independent medical findings of Dr. Scott A. Springer, D.O., a board-certified orthopedic radiologist, who conducted a radiological evaluation of the MRI films of the plaintiff's cervical spine, lumbar spine, left knee, and left shoulder. Dr. Springer found that said MRIs reveal pre-existing degeneration with no posttraumatic changes causally related to the accident. Dr. Springer further found that there is no evidence to suggest any type of recent traumatic injury to the cervical spine, lumbar spine, left knee, and left shoulder. Lastly, as a showing that the plaintiff does not meet the 90/180-day category of CPLR Section 5102(d), the defendant offers the plaintiff's deposition testimony. Plaintiff testified that she worked a full day after the accident and missed two weeks of work shortly following the accident. Plaintiff testified that that she missed a week or a week and a half of work following surgery.

In opposition to the defendant's motion for summary judgment, plaintiff argues that the defendant failed to make out a *prima facie* case of entitlement to summary judgment, as well as there being issues of fact, which preclude summary judgment from being granted. Plaintiff argues that the defendant's experts and submissions failed to address the plaintiff's claim, set forth in the bill of particulars, of aggravation of asymptomatic degenerative changes. The plaintiff further argues that the report of the defendant's expert, Dr. Ferriter, raises triable issues of fact and credibility as to whether the plaintiff sustained a serious injury since Dr. Ferriter did not review any of the plaintiff's diagnostic tests or medical records and only performed a single examination prior to producing his report. The plaintiff also points out that the report of Dr. Ferriter erroneously states that the plaintiff was a pedestrian and went to the emergency room of Rochester General Hospital, when in fact, the plaintiff was a passenger in a vehicle and was not treated at a hospital. The plaintiff argues that Dr. Ferriter failed to indicate what constituted a normal straight leg raising test when he performed said test but merely stated the results were negative. The plaintiff argues that the defendant cannot make a *prima facie* showing that plaintiff did not sustain a "serious injury" under the 90/180-day category, where his doctor's findings are based upon an examination conducted years after the accident and he failed to relate his findings to the 180-day period following the accident. As such, Dr. Ferriter only addressed plaintiff's

condition as of the time of the examination and failed to establish that the plaintiff's usual activities were limited for 90 out of the first 180 days immediately following the accident.

The plaintiff argues that the report of the defendant's expert, Dr. Springer, raises triable issues of fact in that Dr. Springer's conclusions are inconsistent with the medical reports submitted by the plaintiff, which contain objective medical evidence of serious injury. Upon examination of plaintiff's cervical spine MRI, Dr. Springer found straightening of the normal cervical lordosis, moderated broad-based disc herniations at C3-4, C4-5, C5-6 and C6-7 levels, moderate resultant narrowing of the right neuroforamen and mild resultant narrowing of the left neuroforamen. Dr. Springer further stated that the most common cause for disc herniation is degenerative disc disease and did not relate the injuries to the subject accident. Upon examination of plaintiff's lumbar spine MRI, Dr. Springer found moderate broad-based disc bulge with moderate mass effect on the anterior thecal sac, mild resultant narrowing of the bilateral neuroforamen, mild broad based disc herniation with disc osteophyte complex at L3-4 levels, moderate broad-based disc bulge extending into the bilateral neuroforamen with resultant moderate narrowing of the bilateral neuroforamen and mass effect on the exiting bilateral L4 -5 nerve roots, mass effects on the anterior thecal sac, small central posterior disc herniation at L5-S1 levels with mass effect on the exiting right L5 nerve root. Dr. Springer considered all the above-mentioned injuries as degenerative changes. Upon examination of plaintiff's left knee MRI, Dr. Springer no posttraumatic changes causally related to the accident. Upon examination of plaintiff's left shoulder MRI, Dr. Springer found no posttraumatic changes causally related to the accident. Conversely, plaintiff's left shoulder post-operative diagnosis states that plaintiff had a SLAP tear, anterior labral tear, rotator cuff tear, and biceps tendon tear.

In further support of opposition, plaintiff submits medical findings from Dr. Alexander Bowen, Dr. Peter Tomasello, Dr. Azriel Benaroya, and Dr. Sudha P. Patel; a report from North Queens Surgical Center as to the left knee; a report from Fifth Ave. Surgical Centre Extension Surgical Center as to the left shoulder; and physical therapy records from Dr. Sudha P. Patel, which address the serious injuries sustained and restrictions and limitations to the plaintiff's cervical spine, lumbar spine, left knee, and left shoulder. According to Dr. Bowen's report, the plaintiff has sustained permanent impairment to her cervical and lumbar spine. Dr. Bowen concluded that based on the history as given by the plaintiff, the mechanism of injury, and the resulting injuries, the plaintiff's ongoing cervical and lumbar pain, including lumbar facet-related problems, with a degree of medical certainty, are causally related to the accident. According to Dr. Tomasello, who performed arthroscopy surgery on the plaintiff's left knee, the plaintiff's injuries, limitations, restrictions, disability, and impairment, to a reasonable degree of medical certainty, are causally related to the accident. According to Dr. Benaroya, who performed arthroscopy surgery on the plaintiff's left shoulder, the plaintiff had no complaints of right shoulder, left shoulder, and right knee pain prior to the accident, and the plaintiff's current pain symptoms are a direct result of the accident.

A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. See, Edwards v. Ali, 75 Misc.3d 1213(a), 168 N.Y.S.3d 676 (2nd Dept., 2022). Once established, the burden shifts to the plaintiff to come forward with evidence to negate the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See, Grossman v. Wright, 268 A.D.2d 79 (2nd Dept., 2000).

Pursuant to Insurance Law CPLR 5102(d), a serious injury is defined as follows:

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities or not less than ninety days during the one hundred eighty days immediately following the injury or impairment.

To recover under the permanent consequential loss category, the limitation of use or function needs to be significant or consequential as it relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. See, Como v. Tomasky, 64 Misc.3d 1224(A), 117 N.Y.S.3d 471 (2nd Dept., 2019) citing, (Dufel v. Green, 84 N.Y.2d 795, 622 N.Y.S.2d 900 [1995]). A minor, mild, or slight limitation of use cannot satisfy the meaning of serious injury as defined by 5102(d). To satisfy the definition of serious injury under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically determined injury of a non-permanent nature which prevented them from performing their usual and customary activities for no less than 90 out of 180 days following the subject accident. See, Sainte-Aime v. Suwai Ho, 274 A.D.2d 569, 712 N.Y.S.2d 133 (2nd Dept., 2000).

The court finds that the defendant, by submitting sworn reports from their examining doctors and using the plaintiffs' deposition testimony, has established a *prima facie* case that plaintiff did not sustain a serious injury under the categories claimed in plaintiffs' Bill of Particulars. The doctors' reports indicate no orthopedic disability with full range of motion, pre-existing degeneration with no posttraumatic changes causally related to the accident, and resolution or healing of plaintiff's injuries. In addition, the plaintiff testified during her deposition that she worked a full day after the accident, missed two weeks of work shortly following the accident, and missed a week or a week in a half of work following surgery, due to the accident.

It is well established that “[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).” See, (*Kearse v. New York City Transit Authority*, 16 A.D.3d 45, 789 N.Y.S.2d (2nd Dept., 2005)). Once the defendant established their *prima facie* case, the burden shifted to the plaintiff to come forward with evidence in admissible form to raise a triable issue of fact as to a serious injury as defined by Insurance Law §5102(d). See, *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992].

Here, plaintiff’s opposition consisted of evidentiary proof and objective findings to raise a triable issue of fact. Therefore, considering the conflicting expert opinions, the court finds that triable issues of fact have been raised, which preclude summary judgment from being granted. See, *Wilcoxon v Palladino*, 122 A.D.3d 727, 996 N.Y.S.2d 191 (2nd Dept., 2014).

Accordingly, it is hereby ORDERED, that the defendant’s motion for summary judgment dismissing plaintiff’s complaint is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
October 10, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
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