

**Richardson v Jem Leasing LLC**

2024 NY Slip Op 34933(U)

July 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 30713/2019E

Judge: Patsy Gouldborne

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 13

-----X  
KIZZY J. RICHARDSON,  
  
Plaintiff,  
  
-against-  
  
JEM LEASING LLC and REVOLTA A. JIMENEZ,  
  
Defendants.  
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Index No. 30713/2019E

Hon. PATSY GOULDBORNE  
Justice Supreme Court

The following papers were read on this motion (Seq. No. 2) for **summary judgment**, submitted on June 30, 2023.

Notice of Motion – Affirmation and Exhibits Annexed	NYSCEF Doc. # 37-46
Affirmation in Opposition and Exhibits Annexed	NYSCEF Doc. # 48-54
Reply Affirmation	NYSCEF Doc. # 55

Upon the foregoing papers, motion ( Seq. 2), Defendants seeks an Order, pursuant to CPLR 3212, granting summary judgment and dismissing the Complaint of plaintiff, KIZZY J. RICHARDSON, in as much as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d); and granting such other further relief as the Court deems just and proper.

Plaintiff’s complaint seeks compensation for alleged personal injuries arising out of a motor vehicle accident which occurred on October 12, 2018, New York County, New York. Plaintiff alleges that, as a result of a motor vehicle accident, she sustained injuries to, inter alia, her cervical spine, lumbar spine, and head. Plaintiff alleges that she sustained a “serious injury” under the “permanent loss of use,” “permanent consequential limitation,” “significant limitation,” and/or “90/180-day” categories of the Insurance Law.

**Discussion**

When a defendant seeks summary judgment alleging that a plaintiff does not meet the ‘serious injury’ threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Palmieri*, 1 NY3d 536 [2003]). “Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

In support of the motion Defendants submits the pleadings, the bill of particulars and its supplement, the affirmed reports of Dr. William Walsh, M.D., Dr. Audrey Eisenstadt, M.D., and Plaintiff’s deposition transcript.

Plaintiff's Bill of Particulars indicate the injuries as follows: **Cervical Spine**-Central disc bulge at C2/3 - Central disc herniation at C3/4 - Central disc bulge at C4/5 - Broad-based bulge at C5/6, effacing the anterior subarachnoid space. Central and right paracentral disc herniation at C6/7 - Cervical epidural injections - Radiculopathy - Muscular spasm - Sprain/strain with multiligamentous injury. **Lumbar Spine**-Lateral disc bulge at L3/4 - Broad-based disc herniation at L4/5 - Broad-based disc bulge at L5/S1 - Left transforaminal epidural injection at left L4/5, left L5/S1 - Bilateral facet joint injections at bilateral L3/4, bilateral L4/5 and bilateral L5/S1 - Radiculopathy - Sprain/strain with multiligamentous injuries. The Supplemental Bill of Particulars provides the dates of the epidural injections and additional surgical procedures of the cervical spine and lumbar spine.

Dr. Walsh reviewed the Verified Bill of Particulars. Dr. Walsh's evaluation of the plaintiff, on December 23, 2022, revealed decreased ranges of motion of the cervical spine, and healed anterior surgical scars; lumbar spine, and healed posterior midline surgical scars. Dr. Walsh opined that there is no orthopedic residual, disability or permanency and the decreased ranges of motion or subjective complaints of pain were not supported by any positive, objective, correlative findings. Dr. Walsh states the claimant is capable of seeking gainful employment without restrictions and is able to perform normal activities of daily living without limitations.

Dr. Eisenstadt evaluated the MRI films of the cervical spine and conclude the following: straightening of the cervical lordosis; multilevel disc degeneration, disc bulge at the C4-5, C5-6 and C6-7 intervertebral disc levels with a superimposed small right paracentral C6-7-disc herniation. No prevertebral swelling or posterior muscular abnormality is seen. These changes have no traumatic basis and could not have developed in nineteen-days. Dr. Eisenstadt evaluated the MRI films of the lumbar spine and conclude the following: disc degeneration, disc bulging and left greater than right facet joint hypertrophy L4-5 intervertebral disc level. Dr. Eisenstadt concludes that the findings, amongst other things, reveals degenerative disc disease at the two most common levels in the population for lumbar arthritis to occur, the L4-5 and L5-S1.

In opposition Plaintiff submits the certified police accident report, the IME report of Dr. William J. Walsh, M.D.<sup>1</sup>, MRI reports of the cervical and lumbar spine, the affirmed report of Dr. Sukdeb Datta, M.D. Dr. Datta evaluated the Plaintiff on April 12, 2023, and reviewed the MRI reports. The evaluation revealed, decreased ranges of motion of the cervical spine and lumbar spine, along with positive test findings. The 2018 MRI of the cervical spine reveals, amongst other things, disc bulges impressing on the thecal sac, and disc herniation. The 2020 MRI reveals cervical disc herniation, multiple levels status post anterior cervical

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<sup>1</sup> The plaintiff submits the same IME report of Dr. William J. Walsh, M.D. utilized by the Defendants.

discectomy and fusion at C5-C6 and C6-C7. The 2018 MRI of the lumbar spine reveals degeneration at multiple levels, disc bulge, and disc herniation.

Dr. Datta concludes that “the symptoms and clinical findings are consistent with the above diagnosis and were directly caused by the accident opinion. Dr. Datta states “[i]t is [his] professional opinion to a reasonable degree of medical certainty that the above-mentioned accident is the causative factor of the patient's symptomatology and pain, which are of a permanent nature”.

The Defendants have failed to establish, prima facie, that the plaintiff did not sustain “significant limitations” and “permanent consequential limitations” of her cervical spine and lumbar spine. (*Velazquez v City of New York*, 200 AD3d 547, 548 [1st Dept 2021]). Dr. Walsh's own orthopedic report have findings of restricted range of motion of the cervical spine and lumbar spine. Dr. Walsh did not review any medical records and provides no opinion as to the MRI findings, nor the Plaintiff's surgical procedures of the cervical spine and lumbar spine. Dr. Eisenstadt's opinions of the MRI films of plaintiff's cervical spine have no traumatic basis and could not have developed in nineteen-days. Dr. Eisenstadt's opinion of the MRI films of the lumbar spine concludes that the findings, amongst other things, reveals degenerative disc disease.

Here, the Plaintiff's submissions are sufficient to raise an issue of fact as to whether she sustained “significant limitations” and “permanent consequential limitations” of her cervical spine and lumbar spine, by submitting his physician's affirmations who documented continuing limitations in range of motion and objective indications of injury (*see Encarnacion v Castillo*, 146 AD3d 600, 601 [1st Dept 2017]). Plaintiff also raised an issue of fact as to whether her injuries were caused by the subject accident through submission of, inter alia, the affirmations and reports of Plaintiff's treating physician which are causally related to the subject accident (*Massillon v Regalado*, 176 AD3d 600, 601 [1st Dept 2019]).

With respect to Plaintiff's “90/180-day” injury claim, Plaintiff's Verified Bill of Particulars and its supplement demonstrate that the Plaintiff has been out of work for three years and six months as a result of the accident. Plaintiff was asked at her deposition, “Now, after this accident, did you ever return to you job at Sephora? Plaintiff's response was “no”. [Tr. at 80]. Plaintiff further testified that she was unable to return to her job with restrictions as recommended by her doctor, because of the nature of her employment. Plaintiff was disabled for the minimum duration necessary to state a 90/180-day” injury claim. (*Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437-438 [1st Dept 2018]; *See Streeter v Stanley*, 128 AD3d 477 [1st Dept 2015]).

With respect to Plaintiff claims under the “permanent loss of use” category of injury, there is no evidence that Plaintiff suffered a “total loss of use” of any body part. Therefore, any 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 the instant motion (Seq. 2) seeking summary judgment and dismissing Plaintiff’s complaint, on the grounds that Plaintiff has not sustained a “serious injury” pursuant to the provisions of Insurance Law § 5102 (d) is **GRANTED to the extent that** Plaintiff’s claims under the “permanent loss of use” category of injury is dismissed, and the motion is otherwise **DENIED**; and it is further

**ORDERED** that the Clerk shall mark motion Seq. 2 decided in all court records.

This constitutes the Order of this Court.

**Dated: July 8, 2024**

Hon.   
**PATSY GOULDBORNE, J.S.C.**

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE