Morales v Yaohua Chen
2024 NY Slip Op 35024(U)
October 7, 2024
Supreme Court, Queens County
Docket Number: Index No. 719287/2021
Judge: Mojgan C. Lancman
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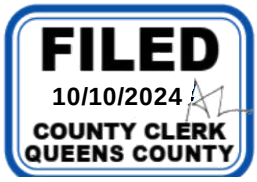
Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

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ASHLEY MORALES,

Plaintiff,

-against-

YAOHUA CHEN, ELI JOHN MORALES, JOHN MORALES, AND KESHAV SUKUL,

Defendants.

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IAS Part 20

Index No.: 719287/2021

Motion Seq. Nos: 2 and 3

Motion Date: 6.26.2024

Motion Cal. Nos.: 53 and 54

Presently before the Court are related motions (seq. nos. 2 and 3), which are consolidated for disposition.

The defendant Yaohua Chen ("Chen") filed motion seq. no. 2 seeking summary judgment dismissing this cause on the ground that the plaintiff, Ashley Morales (the "Plaintiff"), did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. The defendant Uber Technologies, Inc. ("Uber") cross-moves for summary judgment dismissing the complaint on the same ground. The papers bearing NYSCEF Doc. Nos. 50-58, 62-66, 88-98, 100, 102, 104-109 and 131 were read on said motion and cross-motion.

The defendants Eli John Morales ("Eli") and John Morales ("John") (collectively, the "Morales Defendants") filed motion seq. no. 3 seeking summary judgment on the ground that the Plaintiff did not sustain a serious injury with the meaning of Insurance Law § 5102 [d]. The papers bearing NYSCEF Doc. Nos. 59-61, 67-72, 99, 110 and 130 were read on said motion.

For the following reasons, the motions and the cross-motion are granted in part and denied in part.

I. Factual Background

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on November 2, 2019 in Queens County, New York (the "Accident").

The Plaintiff was a passenger in a vehicle operated by Chen. The Plaintiff alleges, *inter alia*, that Chen was operating the subject vehicle while utilizing the "Uber application." Two other vehicles were involved in the Accident, which were operated by the defendants Eli and Keshav Sukul ("Sukul"), respectively.

The bill of particulars alleges injuries to the cervical spine, the thoracic spine, the lumbar spine and the right knee. It is also alleged that the Plaintiff underwent right knee arthroscopic surgery on January 17, 2020 due to the Accident.

The bill of particulars asserts that the Plaintiff sustained a serious injury within the meaning of the following categories: significant disfigurement; significant limitation of use of a body function or system; permanent consequential limitation of use of a body function or system; and 90/180-day.

II. Discussion

The claim under the significant disfigurement category is dismissed because there is no evidence that the Plaintiff suffered an injury that a "reasonable person viewing the injury would have to regard it as unattractive or objectionable, or as the object of pity or scorn" (*Knight v M & M Sanitation Corp.*, 122 AD3d 683, 684 [2d Dept 2014] [internal quotation marks and citations omitted]).

The application for summary judgment dismissing the 90/180-day category claim is denied (*see generally Takaroff v A.M. USA, Inc.*, 63 AD3d 1142 [2d Dept 2009]). Here, the Plaintiff testified at her deposition that she was confined to bed for three months after the Accident:

> Q. I know you mentioned immediately following this accident you were confined to your bed for approximately three months; is that correct?
> A. Yes.

The Court now turns to the serious injury claims under the permanent consequential limitation and the significant limitation of use categories. The Court's function on a summary judgment motion "is not to resolve issues of fact or determine matters of credibility, but merely to determine if such issues exist" (*114 Woodbury Realty, LLC v 10 Bethpage Rd.*, LCC, 178 AD3d 757 [2d Dept 2019] [citations omitted]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

In support of the motion and cross-motion, Chen and Uber rely, *inter alia*, upon the reports of two experts, which are summarized below.

Dr. Pierce Ferriter, an orthopedist, concluded, among other things: that the injuries relative to the cervical spine and the lumbar spine consisted of "sprain/strain." With respect to the right knee, the physician found that the Plaintiff was status post-surgery and that range of motion was normal.

Dr. Scott Springer, a radiologist, concluded that imaging studies of the cervical spine, the thoracic spine, lumbar spine, the right knee, the left knee, the left hip and the right hip revealed no evidence of posttraumatic changes that are causally related to the Accident.

The Morales Defendants submit the affirmed report of Dr. Dana A. Mannor, an orthopedist, in support of their motion. The physician opines that the injuries to the thoracic spine, the lumbar spine and the left knee consist of resolved sprains and strains, and that the Plaintiff is "[s]tatus post

right knee arthroscopic surgery on 01/17/2020 – healed." The orthopedist also found that range of motion testing was normal and that the injuries are causally related to the Accident.

In opposition, the Plaintiff submits, *inter alia*, the affirmed report of Dr. Alexios Apazidis. The physician opines that the Plaintiff has losses in range of motion relative to the cervical spine, the lumbar spine, the left knee and the right knee; that the injuries to these body parts, as well as attendant restrictions in range of motion, are causally related to the Accident; and the right knee surgical intervention is causally related to the Accident.

The applications for summary judgment dismissing the permanent consequential limitation and the significant limitation of use categories are denied for two reasons.

First, competing evidence relative to causation and losses in range of motion "constitute the classic battle of the experts" (*Sason v Dykes Lumbar Company, Inc.*, 221 AD 3d 491, 492 [1st Dept 2023], which "[is] properly left to a jury for resolution" (*Thomas v Eckhert*, 229 AD3d 1237, 1239 [4th Dept 2024] [internal quotation marks and citations omitted]).

Second, and in any event, the record is clear that sharply disputed issues of fact exist with respect to the permanent consequential limitation and the significant limitation of use categories (*see Oputa v New York City Transit Authority,* 216 AD3d 461 [1st Dept 2023]*; Hobbs v MTA Bus Company*, 211 AD3d 471 [1st Dept 2022]).

The Court now turns to the causation and gap in treatment issues.

Dr. Ferriter fails to address the issue of causation. Since he does not assert that the injuries are unrelated to the Accident, the burden with respect to causation does not shift to the Plaintiff (*see Nwanji v City of New York*, 190 AD3d 650 [1st Dept 2021]; *Velazquez v City of New York*, 200 AD3d 547 [1st Dept 2021]). Put another way, since Dr. Ferriter did not opine that the claimed injuries "… could not have been caused by the [A]ccident … his opinion [is] insufficient to establish a lack of causation" (*Oputa v New York*, 216 AD3d 461, 461 [1st Dept 2023] [citation omitted]).

Moreover, and in any, Dr. Mannor, as discussed below, causally relates the Plaintiff's injuries to the Accident. The causation-related argument advanced in support of summary disposition fails for this additional reason.

The contention that this cause should be dismissed due to a gap in treatment is without merit. Dr. Mannor causally relates the claimed injuries to the Accident, stating as follows: "Ms. Ashley Morales presents today for an orthopedic examination due to injuries sustained as a result of a motor vehicle accident on 11/02/2019 … [t]here is no evidence of any contributing pre-existing condition." Thus, "… the burden never shifted to the [P]laintiff … to explain any gap in treatment" (*Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept 2019] [citation omitted]).

Dr. Ferriter's failure to establish that the alleged injuries were not caused by the Accident also means that "… the burden never shifted to the [P]laintiff to explain any gap in treatment" (*Wickman v Kastavis*, 217 AD3d 905, 907 [2d Dept 2023] [citations omitted]). As noted, Dr.

Ferriter did not comment on the issue of causation; thus, his report is of no assistance to the Defendants' gap in treatment argument (*see id.*; see *Zennia v Ramsey*, 208 AD3d 735, 735 [2022]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the motions and the cross-motion are granted in part and denied in part; and it is further,

ORDERED, that the motions and the cross-motion are granted to the extent that the Plaintiff's significant disfigurement claim is dismissed; and it is further,

ORDERED, that the motions and the cross-motion are denied as to the permanent consequential limitation, the significant limitation of use categories, and the 90/180-day category; and it is further,

ORDERED, that Chen shall serve a copy of this Order with Notice of Entry upon all other parties via NYSCEF by November 7, 2024; and it is further,

ORDERED, that the Clerk of the Court shall close motion seq. nos. 2 and 3.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
October 7, 2024

MOJGAN C. LANCMAN, J.S.C.