

Rios v New York City Tr. Auth.
2024 NY Slip Op 35431(U)
April 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 32947/2019E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3

ISABEL RIOS

Index №. 32947/2019E

-against-

Hon. Mitchell J. DanzigerNEW YORK CITY TRANSIT AUTHORITY,
TONYA THOMPSON, CITY CAR LIMOUSINE
SERVICES INCORPORATED and CARLOS
MARTINEZ

Justice Supreme Court

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The following papers were read on this motion (Seq. No. 2) for **summary judgment** noticed for September 28, 2023, and submitted on November 9, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 41-49
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 84-105
Reply Affirmation	NYSCEF Doc. # 107

The following papers were read on this motion (Seq. No. 3) for **summary judgment** noticed for September 28, 2023, and submitted on November 9, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 51-60
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 62-83
Reply Affirmation	NYSCEF Doc. # 110

Defendants, City Car Limousine Services Incorporated and Carlos Martinez, move (Seq. No. 2), for an order, pursuant to CPLR §3212, for summary judgment dismissing the complaint, on the ground that plaintiff has failed to satisfy the “serious injury” threshold as defined by New York Insurance Law §§5102 (d) and 5104 (a). Defendants, New York City Transit Authority and Tonya Thompson, move (Seq. No. 3), for an order, pursuant to CPLR §3212, for summary judgment dismissing the complaint, on the ground that plaintiff has failed to satisfy the “serious injury” threshold as defined by New York Insurance Law §§5102 (d). For purposes of judicial economy, these motions are resolved pursuant to this single decision and order.

Plaintiff alleges she sustained a “serious injury” from the accident pursuant to the New York Insurance Law. In order to recover, § 5102 (d) of the Insurance Law defines “serious injury” 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 for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“In order for a non-permanent injury to be considered ‘serious’, for a purpose of establishing a civil right of recovery, there must be a medical determination as to the extent of the injury and its adverse impact on the injured party’s ability to perform his usual and customary daily activities.” (*McLoyrd v Pennypacker*, 178 A.D.2d 227, 227 [1st Dept 1991]).

The Court notes that categories, one (death), two (dismemberment), three (significant disfigurement), four (fracture), five (loss of fetus), and six (permanent loss) of Insurance Law § 5102 (d) are not alleged in the bill of particulars. As such, at issue here, are categories seven (permanent consequential limitation), eight (significant limitation), and nine (90/180-day curtailment of usual activities). The movants of each motion (the movants are collectively referred to as “the moving defendants”) argue that plaintiff has not sustained a permanent consequential limitation, significant limitation, and was not unable to perform her usual activities for 90 of the first 180 days after the incident occurred.

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 not suffered a “serious injury.” (*Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept 2011] [citation omitted]). “Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim.” (*id.* [internal quotation marks and citations omitted]). A defendant may also meet their summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident. (*see Partington v Go On Time Car Service*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommels v Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met the burden shifts to the plaintiff to raise a material issue of fact using objective and admissible medical proof. (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In support of the motion, the moving Defendants submitted, among other things, counsel’s affirmation in support; Plaintiff’s examination before trial transcript; and the affirmed Independent Medical Exam (“IME”) report of Dr. John Buckner; and the IME report of Osteopath, Dr. David Manevitz.

Dr. Buckner determined with a reasonable degree of medical certainty that plaintiff’s cervical spine and lumbar spine showed no evidence of injury. Although Dr. Buckner did not compare plaintiff’s cervical spine and lumbar spine range of motion values to normal, he nevertheless examined plaintiff and opined that there was no objective evidence of injury after administering diagnostic tests throughout those body parts. (*Monahan v Reyes*, 184 A.D.3d 460 [1st Dept 2020], citing *Rodriguez v Konate*, 161 A.D.3d 565, 566 [1st Dept 2018]). On the issue of causation, Dr. Buckner concluded that there is no causally related pathology in Plaintiff’s cervical spine and

lumbar spine. (*Moore v Almanzar*, 103 A.D.3d 415, 416 [1st Dept 2013] [orthopedist opining as to causation]).

Dr. Manevitz's evaluation of plaintiff, however, revealed limited range of motion with respect to Plaintiff's cervical spine and lumbar spine. (see *Rosario v Cablevision Sys.*, 160 A.D.3d 545, 546 [1st Dept 2018], citing *Pineda v Moore*, 111 A.D.3d 577 [1st Dept 2013]; *Karounos v Doulalas*, 153 A.D.3d 1166, 1166-1167 [1st Dept 2017]), and Dr. Manevitz did not claim that those findings were subjective. (compare *Tusu v Leone*, 187 A.D.3d 655, 656 [1st Dept 2020]; *Alston v Elliott*, 159 A.D.3d 575 [1st Dept 2018]). Thus, Dr. Manevitz's evaluation and findings conflicts with Dr. Buckner's evaluation and findings (*Curet v Kuhlor*, 172 A.D.3d 634, 635 [1st Dept 2019]; *Herman v Moore*, 106 A.D.3d 666, 667 [1st Dept 2013]). As a result, the moving Defendants failed to establish that Plaintiff sustained no "permanent consequential" or "significant limitation" category of injury to her cervical spine and lumbar spine. (*Karounos v Doulalas*, 153 A.D.3d 1166, 1166-1167 [1st Dept 2017]).

Accordingly, the moving defendants have demonstrated, only, that plaintiff's alleged cervical spine and lumbar spine injuries are unrelated to this accident, thus, shifting the burden to Plaintiff to adequately address the issue of causation with respect to those body parts. (*Cabrera v Ahmed*, 189 A.D.3d 403, 403 [1st Dept 2020] [defendant established prima facie case by showing lack of causation only]).

In opposition to the motion, plaintiff submitted, among other things, counsel's affirmation in opposition; unsworn and unaffirmed medical records; and the affirmed reports and narratives of Dr. Herschel Kotkes.

Dr. Kotkes conducted an initial evaluation of plaintiff on February 21, 2019, for this accident that look place on January 11, 2019. Dr. Kotkes saw plaintiff on several more occasions throughout 2019. On February 29, 2019, Dr. Kotkes performed Plaintiff's lumbar discectomy. Dr. Kotkes most recently examined Plaintiff on September 14, 2023. As a result of Kotkes's examinations, the doctor causally related Plaintiff's cervical spine and lumbar spine injuries to the subject accident. Thus, Plaintiff has raised a triable issue of fact in opposition as to the issue of causation "by opining that the injuries were the direct result of the accident, and offering a different, yet equally plausible, explanation for them" (see *Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

The moving defendants did not argue that plaintiff had an unexplained gap or cessation in treatment in their moving papers, and therefore, they cannot raise this issue for the first time in reply papers. (*id.*; *Tadesse v Degnich*, 81 A.D.3d 570 [1st Dept 2011]).

With respect to Plaintiff's "90/180-day" injury claim, the moving Defendants sufficiently established their entitlement to dismissal of this claim by submitting Plaintiff's deposition transcript wherein Plaintiff admitted that "the month after the accident" he left his home to go "to the market to get chicken, eggs and bread" (Pl. EBT at 69). This demonstrates that Plaintiff has no viable "90/180 day" injury claim. (*Lee v Lippman*, 136 A.D.3d 411, 412 [1st Dept 2016] [plaintiffs "testimony that she was able to resume doing household chores within three

months, refute her 90/180-day claim”], and *Paduani v Rodriguez*, 101 A.D.3d 470, 471 [1st Dept 2012] [“Defendants disproved a 90/180-day injury by submitting plaintiff’s deposition testimony, wherein she stated that she was able to babysit her grandchildren after the accident, and was able to go to the store about a month after the accident, as well as her bill of particulars alleging that she was not confined to bed or home after the accident”]).

Accordingly, the moving defendants’ motions for summary judgment dismissing plaintiff’s complaint for failure to comply with the threshold requirements of Insurance Law §§ 5102 (d) and 5104 (a) are granted only to the extent that plaintiff’s claim of being unable to perform her usual and customary activities for 90/180-days, is dismissed. Plaintiff’s claims related to permanent consequential limitation and significant limitation of the Insurance Law remain. Plaintiff shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: 4/11/24

Hon. 

Mitchell J. Danziger, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION Seq. No. 2 IS..... | ☐ GRANTED | ☐ DENIED ☒ GRANTED IN PART ☐ OTHER |
| 3. MOTION Seq. No. 3 IS..... | ☐ GRANTED | ☐ DENIED ☒ GRANTED IN PART ☐ OTHER |
| 5. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |