

Rosero v New York City Tr. Auth.
2024 NY Slip Op 35434(U)
April 2, 2024
Supreme Court, Queens County
Docket Number: Index No. 700833/2021
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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RUTH ROSERO,

IAS Part 20

Plaintiff,

Index No.: 700833/2021

-against-

Motion Seq. No.: 2

NEW YORK CITY TRANSIT AUTHORITY, ACCESS A
RIDE, JOHN DOE, MIJANUR R. BHUIYA, AGAPE
LUXURY CORP. AND AGAPE TAXI CORP.,

Motion Date: 11.15.2023

Motion Cal. No.: 42

Defendants.
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The papers bearing NYSCEF Doc. Nos. 38-47 and 50-63 were read on the motion filed by the defendant Mijanur R. Bhuiya (the “Defendant”) for summary judgment.

I. Introduction

The plaintiff, Ruth Rosero (the “Plaintiff”), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the “Accident”). Presently before the Court is the Defendant’s motion for summary disposition, which is grounded on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motion is granted in part and denied in part.

II. Discussion

The Accident occurred on January 6, 2020 in Queens County, New York. The Plaintiff, a passenger in one of the vehicles involved in the Accident, alleges in her bill of particulars that she sustained a serious injury under the following categories: permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; significant limitation of use of a body function or system; and 90/180-day.

The Plaintiff’s bill of particulars alleges injuries to the right foot, right shoulder, cervical spine, lumbar spine, thoracic spine and right knee.

Preliminarily, the record discloses that the Plaintiff did not sustain a permanent loss of use of a body organ, member, function or system as a result of the Accident. This serious injury claim is therefore dismissed (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]).

The Plaintiff’s 90/180-day claim is also dismissed. Here, the Plaintiff’s affidavit in opposition states: “[d]uring the first six months after the accident, I was unable to perform the

following without pain: food shopping; carrying groceries; getting dressed, putting on socks exercising; participating in daily walks, enjoying social gatherings and parties with friends and family during long drives to visit family; take care of chores outside; and enjoying myself with friends and family. Further, I experienced difficulties climbing stairs and walking as every time my heel hit the ground or floor I would experience pain in my upper and lower back. Sitting and standing for extended periods would cause my back to tighten up. Turning my neck to the left or right caused intense pain.” These statements fail to establish that the Plaintiff was incapacitated for at least 90 of the first 180 days after the Accident. On the contrary, the foregoing statements reflect that the Plaintiff was able to perform, albeit allegedly with pain, the foregoing activities. The 90/180-day claim is therefore dismissed (*see Streeter v Stanley*, 128 AD3d 477 [1st Dept 2015]).

The Court notes that the Plaintiff’s affidavit at ¶ 14 lists activities that she is unable to perform. Preliminarily, said paragraph conflicts with ¶ 7 of her affidavit because in the latter paragraph, the Plaintiff averred that she *was able* to perform various activities with pain. In any event, ¶ 14 of the Plaintiff’s affidavit fails to specifically state her customary activities and that she was unable to perform same in the 90 out of the first 180 days after the Accident.

The next issue is whether the Defendant has met his burden of establishing that the Plaintiff did not sustain a serious injury with respect to the permanent consequential limitation of use of a body function or system and the significant limitation of use of a body function or system categories (*see Almadry v Martinez*, 208 AD3d 545 [2d Dept 2022]).

The Defendant establishes *prima facie* entitlement to summary judgment through the affirmed reports of his medical experts, Dr. Jeffrey Guttman, an orthopedist, and Dr. Jessica Berkowitz, a radiologist.

Dr. Guttman concluded that the Plaintiff’s alleged injuries to the cervical spine, the thoracic spine, the lumbar spine, the right shoulder and arm, the right knee and the right foot had “resolved.” The physician also opined that upon testing no losses in range of motion were attributable to or caused by the Accident.

Dr. Berkowitz concluded that MRI studies of the cervical spine, the lumbar spine, the right foot and right shoulder did not reveal any injuries that were causally related to the Accident.

In opposition, the Plaintiff submits, *inter alia*, the affirmed report of Dr. Jean Rhee, who opines that the Plaintiff’s injuries to the right shoulder, cervical spine, lumbar spine and shoulders are causally related to the Accident. Dr. Rhee also indicates that range of motion testing conducted on August 13, 2023 revealed losses in range of motion relative to the cervical spine, lumbar spine, right shoulder and left shoulder, and that these deficits are attributable to the Accident.

The “function of summary judgment is issue finding, not issue determination” (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). 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]).

To be entitled to the “drastic” remedy of summary judgment, the movant “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686, 688 [1984]).

Lastly, 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]).

Here, as explained, the Defendant establishes entitlement to summary judgment through the affirmed reports of Drs. Guttman and Berkowitz (*see Acevedo v Grayline N.Y. Tours, Inc.*, 204 AD3d 597 [1st Dept 2022]; *Marcelo v Fabius*, 195 AD3d 472 [1st Dept 2021]). However, as also explained, the Plaintiff raises triable issues of fact with respect to the permanent consequential limitation of use of a body function or system and the significant limitation of use of a body function or system categories through, *inter alia*, the affirmed report of Dr. Rhee, who concluded that the Plaintiff suffered injuries that are causally related to the Accident and that these injuries have resulted in losses of range of motion to various body parts (*see Hobbs v MTA Bus Company*, 211 AD3d 471 [1st Dept 2022]). In light of the foregoing triable issues of fact, the Defendant’s application to dismiss the subject categories of serious injury is denied (*see id.*).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendant’s summary judgment motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff’s permanent loss of use of body organ, member, function or system and 90/180-day claims are dismissed; and it is further,

ORDERED, that the Defendant’s motion is otherwise denied; and it is further,

ORDERED, that the Defendant shall serve a copy of this Order with Notice of Entry upon all parties via NYSCEF by May 3, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
April 2, 2024

A handwritten signature in black ink, consisting of a large loop and a vertical stroke, positioned above a horizontal line.

MOJGAN C. LANCMAN, J.S.C.