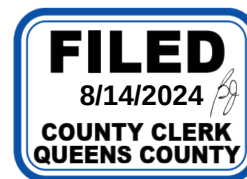


Gonzalez v Jawad
2024 NY Slip Op 35480(U)
August 12, 2024
Supreme Court, Queens County
Docket Number: Index No. 701415/2019
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN



-----x IAS PART 20

NUBE R. GONZALEZ,

Index No.: 701415/2019

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 3.6.2024

MOHAMMED JAWAD, KEFALONIA TAXI, LLC, NEW
YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY BUS COMPANY, and
JANE DOE or JOHN DOE,

Motion Cal. No.: 26

Defendants.

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The papers bearing NYSCEF Doc. Nos. 18-27 and 29-51 were read on: (1) the motion filed by the defendants Mohammed Jawad ("Jawad") and Kefalonia Taxi, LLC ("Kefalonia") (collectively, the "Taxi Defendants") for summary judgment; and (2) the cross-motion filed by the defendants New York City Transit Authority, MTA Bus Company i/s/h/a Metropolitan Transportation Authority Bus Company and Jane Doe or John Doe (collectively, the "Transit Defendants") for summary judgment (all defendants shall be collectively referred to as the "Defendants").

The plaintiff, Nube R. Gonzalez (the "Plaintiff"), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on December 9, 2017 (the "Accident"). Presently before the Court is the motion of the Taxi Defendants and the cross-motion of the Transit Defendants for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them. The applications are grounded upon the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motions are denied.

The Plaintiff alleges, *inter alia*, that she injured her cervical spine, left shoulder, left elbow and left wrist in the Accident. She also alleges that she underwent two surgical interventions as the result of the Accident. Specifically, on April 13, 2018, Dr. Sean Thompson performed arthroscopic left shoulder surgery and, on May 18, 2018, left wrist arthroscopic surgery.

The Defendants bear the initial burden of establishing, through evidence in admissible form, a *prima facie* case that the Plaintiff did not suffer a serious injury as the result of the Accident (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). The failure to meet this burden requires denial of the motion, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]).

In seeking summary disposition, the Taxi Defendants rely on the affirmed reports of an expert orthopedist, Dr. Pierce Ferriter, who opined therein as follows:

IMPRESSION:

1. Cervical spine sprain/strain -resolved.
2. Left shoulder status post surgery - healed
3. Left elbow sprain/strain -resolved.
4. Left Wrist status post surgery healed

OPINION:

The examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined.

The Taxi Defendants also rely upon the affirmed reports of an expert radiologist, Dr. Audrey L. Eisenstadt, who opined that: (1) an MRI of the left wrist did not reveal any “acute or recent posttraumatic changes”; and (2) an MRI of the left elbow revealed no “permanent sequela causally related to the Accident.”

In their cross-motion, the Transit Defendants also rely upon the affirmed reports of Drs. Ferriter and Eisenstadt. They also rely upon and submit the affirmed report of another expert orthopedist, Dr. Barbara Freeman. In relevant part, Dr. Freeman opined as follows:

DIAGNOSES:

1. Status-post arthroscopy left shoulder
2. Status-post arthroscopy left wrist

Claimant is a left hand dominant female, who reports she was a driver involved in a motor vehicle collision ... She hurt primarily her left shoulder and left wrist.

She underwent surgery to the left shoulder and left wrist ... *She has decreased but functional range of motion to her left shoulder and left wrist* without complaints of pain at the time of my exam (emphasis added).

With respect to testing, Dr. Freeman found the following losses of range of motion with respect to the left shoulder: abduction to 145 degrees (normal 170 degrees), a limitation of 15%; forward flexion to 145 degrees (normal 180 degrees), a limitation of 19.5%; and internal rotation to 60 degrees (normal 80 degrees), a limitation of 25%. With respect to the left wrist, Dr. Freeman found loss of range of motion on dorsiflexion (50 degrees measured, 60 degrees normal).

The case of *Raguso v Ubriaco*, 97 AD3d 560 [2d Dept 2012], is both instructive and controlling:

The defendant contended that the alleged injuries to the lumbar region of the plaintiff's spine did not constitute serious injuries within the meaning of Insurance Law § 5102 [d]. However, the defendant's examining orthopedic surgeon recounted, in an affirmed report submitted in support of the defendant's motion for summary judgment dismissing the complaint, that range-of-motion testing performed during the examination revealed significant limitations of motion in the lumbar region of the plaintiff's spine. Further, the defendant's orthopedic surgeon failed to adequately explain and substantiate with any objective medical evidence his belief that the limitations of motion in the lumbar region of the plaintiff's spine were self-imposed.

Here, Dr. Freeman found that the Plaintiff had losses in range of motion with respect to the left shoulder and left wrist. The physician did not render an opinion as to whether these losses were causally related to the Accident, stating only that the Plaintiff's subjective complaints "are not pathologic in nature and does not reflect residual injury."

In light of Dr. Freeman's findings that the Plaintiff had losses in range of motion relative to the left shoulder and the left wrist, and that the physician does not adequately address the issue of causation relative to these findings, the Defendants fail meet their burden of demonstrating *prima facie* entitlement to summary disposition (*see id.*; *Augustus v Negron*, 210 AD3d 735 [2d Dept 2022]; *Bouzas v Schroeder*, 205 AD3d 993 [2d Dept 2022]; *Kumar v Water Auth. of Nassau*, 200 AD3d 668 [2d Dept 2021]; *McGee v Bronner*, 188 AD3d 1033 [2d Dept 2020]). Since the Defendants fail to meet their *prima facie* burden, the motion and cross-motion are denied irrespective of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851).

Parenthetically, even if the Defendants established *prima facie* entitlement to summary disposition, which they did not, the Plaintiff's opposition raises triable issues of fact (*see Brooks v Muessing*, 227 AD3d 856 [2d Dept 2024]). Here, among other things, Dr. Thompson, the physician who operated on the Plaintiff's left wrist and left shoulder, opined as follows in an affirmed report:

[t]he patient incurred significant and permanent injuries to her left shoulder and left wrist as a result of the motor vehicle accident that occurred on 12/9/2017. She sustained left shoulder labral tear 10:00 position; synovitis two compartments; impingement subacromial space; and rotator cuff tear. She also sustained left wrist TFCC tear; synovitis; and scapholunate tear. She underwent formal supervised physical therapy and left shoulder arthroscopy and left wrist arthroscopy as a result of the injuries sustained as a result of the 12/9/2017 motor vehicle accident ... Physical examination of her left shoulder is significant for a decreased range of motion and examination of her left wrist is also significant for a

decreased range of motion. Based upon the history given by the patient and the above objective findings, it can be stated with a reasonable degree of medical certainty that the motor vehicle accident that occurred on 12/9/2017 was the competent producing cause of the above-noted injuries and surgery. It must be noted that the patient was asymptomatic prior to the accident with regards to the left shoulder and left wrist. She had no complaints of left shoulder or left wrist pain or dysfunction prior to this traumatic event. It is my opinion with a reasonable degree of medical certainty, that the 12/9/2017 accident required treatment and ultimately operative intervention to the left shoulder and left wrist.

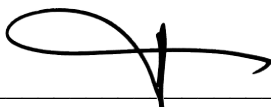
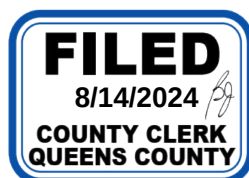
For the reasons stated above, it is hereby:

ORDERED, that the motion for summary judgment filed by the Taxi Defendants and the cross-motion for summary judgment filed by the Transit Defendants are denied; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendants via NYSCEF by September 13, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
August 12, 2024



MOJGAN C. LANCMAN, J.S.C.