

Johnson v Serrano
2024 NY Slip Op 35558(U)
February 5, 2024
Supreme Court, Bronx County
Docket Number: Index No. 29125/2019E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-15

-----X
TAMIKA S. JOHNSON,

Index No.: 29125/2019E

Plaintiff,

-against-

Hon. Ben R. Barbato

HECTOR SERRANO and EAN HOLDINGS,
LLC,

Justice Supreme Court

Defendants.

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The following papers numbered 1 to _____ were read on this motion (**Mot. Seq. No. 1**) for **SUMMARY JUDGMENT THRESHOLD** submitted on August 31, 2023.

Notice of Motion – Affirmation and Exhibits	NYSCEF No(s). 22 – 33
Affirmation in Opposition and Exhibits	NYSCEF No(s). 37 – 43
Affirmation in Reply	NYSCEF No(s). 45

Upon the foregoing papers, it is ordered that this motion by defendant HECTOR SERRANO (“Defendant”) 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) and 5102 (a) is **GRANTED in part** upon review of the moving papers together with opposition submitted thereto.

Plaintiff alleges that, as a result of a motor vehicle accident which occurred on August 8, 2017, she sustained injuries to, inter alia, her left knee, cervical spine, lumbar spine, and left shoulder. Plaintiff alleges that she sustained a “serious injury” under the “permanent loss of use,” “significant disfigurement,” “fracture,” “significant limitation of use,” “permanent consequential limitation,” and “90/180-day” categories of injury as defined by Insurance Law § 5102 (d).

In support of the motion, Defendant submits, inter alia, counsel’s affirmations in support; Plaintiff’s bill of particulars; Plaintiff’s deposition transcript; treatment records from a prior accident; the affirmed orthopedic report and addendum of Jonathan Glassman, M.D.; the affirmed neurological report of Warren Cohen, M.D.; and the affirmed radiological reports of Jeffrey Warhit, M.D.

As an initial matter, notwithstanding Defendant’s submission of Plaintiff’s deposition testimony and prior treatment records, Defendant does not advance any arguments regarding any prior injuries in the attorney affirmation or memorandum of law submitted in the moving papers. As these arguments are raised for the first time in reply, they are not properly before the Court (*see generally Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]; *McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992] [“...the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion”]).

Dr. Warhit reviewed and interpreted, inter alia, Plaintiff’s cervical spine, lumbar spine, left knee, and left shoulder MRI films. With respect to the cervical spine, review of a December 2, 2016 MRI, revealed mild degenerative disc bulging at C4-C5, and no evidence of traumatic injury. Upon review of an October 28, 2017 cervical spine MRI, no significant interval change in comparison to the prior MRI performed on December 2, 2016 was found. With respect to the lumbar spine, review of a December 2, 2016 MRI, revealed a mild degenerative disc bulge at the L4-S1, and no evidence of traumatic injury. Upon review of a March 9, 2018 lumbar spine MRI, degenerative changes were found at the L3-S1 level, and no evidence of a traumatic injury was present. With respect to the left knee, review of an August 23, 2017 MRI revealed a degenerative tear of the posterior horn of the medial meniscus, and no evidence of traumatic injury. With respect to the left shoulder, review of an October 28, 2017 MRI revealed supraspinous tendinosis secondary to an impingement syndrome, and no evidence of traumatic injury.

Dr. Cohen performed a neurological evaluation of Plaintiff on May 10, 2021, at which time range of motion testing of the cervical spine and lumbar spine revealed full range of motion, with negative neurological testing. Dr. Cohen found that Plaintiff's cervical spine and lumbosacral spine sprains/strains have resolved, and Plaintiff demonstrates no impairment of neurological function that would impair her ability to participate in activities of daily living and all usual activities.

Dr. Glassman conducted an orthopedic evaluation of Plaintiff on June 11, 2021, at which time range of motion testing was performed. With respect to the cervical spine, range of motion loss was revealed upon flexion to 35 degrees (50 degrees normal), extension to 40 degrees (50 degrees normal), right rotation to 39 degrees (80 degrees normal), left rotation to 38 degrees (80 degrees normal), right lateral flexion to 35 degrees (45 degrees normal), and left lateral flexion to 32 degrees (45 degrees normal). With respect to the lumbar spine, range of motion loss was revealed upon flexion to 60 degrees (90 degrees normal), extension to 26 degrees (30 degrees normal), right lateral flexion to 40 degrees (45 degrees normal), and bilateral lateral rotation to 35 degrees (40 degrees normal). With respect to the left shoulder, a minor range of motion restriction was revealed upon anterior flexion, and Dr. Glassman also found that Plaintiff's left shoulder sprain/strain has resolved. With respect to the left knee, orthopedic testing was negative, and Dr. Glassman found that, based upon his review of intraoperative photographs taken during Plaintiff's January 11, 2018, left knee surgery, Plaintiff's left knee condition is consistent with chronic degenerative changes in a 40-year-old individual who is morbidly obese. Dr. Glassman found that "it is possible that [the subject accident] could have made all of this pre-existing prior posttraumatic and degenerative changes more symptomatic without changing the actual underlying degenerative disease process already present."

Defendant's submission of Dr. Glassman's report establishes, *prima facie*, that Plaintiff did not sustain a "significant" or "permanent consequential limitation" of her left shoulder or left knee (*Velazquez v City of New York*, 200 AD3d 547, 548 [1st Dept 2021]). While Dr. Glassman did not perform range of motion testing of Plaintiff's left knee, he performed diagnostic testing and found no objective evidence of injury upon examination (see *Monahan v Reyes*, 184 AD3d 460 [1st Dept 2020]; *Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]). Further, Dr. Glassman's finding of a minor limitation in Plaintiff's left shoulder is insufficient to defeat Defendant's initial showing (see *Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020]; *Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Mendoza v L. Two Go, Inc.*, 171 AD3d 462 [1st Dept 2019]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]).

However, Defendant's submissions fail to establish, *prima facie*, that Plaintiff did not sustain a "significant" or "permanent consequential limitation" of her cervical spine or lumbar spine as a result of the accident, as Defendant's own expert found significant range of motion restrictions in Plaintiff's cervical spine and lumbar spine upon examination (see *Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]).

Defendant's submissions also establish, *prima facie*, that Plaintiff's claimed left shoulder, cervical spine, and lumbar spine injuries were not causally related to the accident by submitting Dr. Warhit's radiological report who, upon a review of Plaintiff's MRIs, observed conditions which he opined were degenerative in nature, and not the result of traumatic injury (see *Ledesma v Rodriguez*, 217 AD3d 453 [1st Dept 2023]). However, Defendant's submissions are insufficient to meet their burden as to causation of Plaintiff's claimed left knee injury, as Dr. Glassman's finding that the subject accident could have made prior posttraumatic and degenerative changes more symptomatic conflicts with Dr. Warhit's report in which he found no evidence of traumatic injury to Plaintiff's left knee (see *Curet v Kuhlör*, 172 AD3d 634, 635 [1st Dept 2019]).

In opposition, Plaintiff submits, inter alia, counsel's affirmation; the affirmation of Regina Moshe, M.D. and appended records; the affirmation of Alexander Zhuravkov, M.D. and appended records; and the affirmation of Imran Ashraf, M.D. and appended records.

Dr. Moshe performed range of motion testing on December 15, 2017, which revealed range of motion loss of the cervical and lumbar spine. Appended to Dr. Moshe's affirmation is the affirmed report of Anam Azeem, M.D., which indicates that, upon examination performed on June 26, 2018, range of motion testing revealed near normal range of motion in Plaintiff's left shoulder and left knee. Dr. Azeem causally relates Plaintiff's cervical spine, lumbar spine, left shoulder, and left knee injuries to the subject accident.

Dr. Ashraf performed Plaintiff's left knee surgery on January 11, 2018, during which Dr. Ashraf observed that Plaintiff sustained a traumatic medial and lateral meniscal tear and a Grade 2 chondral injury, which he causally relates to the subject accident. Dr. Ashraf opines that degenerative changes and Plaintiff's obesity were not the reason Plaintiff needed surgery, and Plaintiff's injuries affected the function of her body to walk, sit, bear weight, bend, reach overhead and affect every aspect of daily living where she needs the use of her left knee or shoulder, and left her with range of motion deficits. With respect to the left shoulder, while Dr. Ashraf contends that Plaintiff still had decreased range of motion in her left shoulder at her January 29, 2018, visit, there is no indication that range of motion testing was performed on her January 29, 2018, visit, or the specific range of motion restrictions that were found.

Dr. Zhuravkov initially evaluated Plaintiff on September 19, 2018. Dr. Zhuravkov reviewed Plaintiff's cervical and lumbar spine MRI studies and concurs with the findings of bulging discs at C4-C5, L4-L5, and L5-S1, and causally relates Plaintiff's cervical and lumbar spine injuries to the subject accident. Dr. Zhuravkov performed a percutaneous discectomy at L4-L5 and tissue removal on October 22, 2018, during which Dr. Zhuravkov visually confirmed L4-L5 and L5-S1 disc injuries. Dr. Zhuravkov opines that Plaintiff suffered a medically determined injury or impairment which prevented her from performing substantially all the material activities of daily living for a minimum of 14 months, due to severe posttraumatic lumbar pain caused by the mechanics of her automobile accident.

With respect to the left shoulder, while Plaintiff raises an issue of fact as to causation, Plaintiff has failed to submit evidence that her left shoulder limitations persisted for a sufficient duration of time to constitute a "significant limitation" or "permanent consequential limitation" (*Lamar-Vanterpool v Devora*, 2021 WL 2175971 [Sup Ct, Bronx County 2021]) [3 ½ months of documented range of motion restrictions insufficient to constitute "significant limitation"], *affd Lamar-Vanterpool v Devora*, 200 AD3d 421 [1st Dept 2021]; *cf. Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437 [1st Dept 2018] [evidence of significant limitations in lumbar spine shortly after the accident and nine months later sufficient to raise a triable issue of fact]). Significantly, the minor range of motion restrictions found in Plaintiff's left shoulder at Dr. Azeem's June 26, 2018 examination are insufficient to defeat Defendants' *prima facie* showing (*see Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020], citing *Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Mendoza v L. Two Go, Inc.*, 171 AD3d 462 [1st Dept 2019]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]; *Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]).

With respect to the left knee, Plaintiff has raised an issue of fact through submission of Dr. Ashraf's affirmation and report, who found objective medical evidence that she suffered a traumatic medial and lateral meniscal tear and a Grade 2 chondral injury which he causally relates to the subject accident (*see Rosado v Wadolowski*, 128 AD3d 454, 455 [1st Dept 2015]). Although Dr. Ashraf found no range of motion restrictions upon a recent examination, his findings of qualitative limitations that persisted despite conservative treatment and required surgical treatment raise an issue of fact as to whether Plaintiff sustained a significant, but not permanent, limitation of use (*id.*, *see also Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]).

With respect to the cervical and lumbar spine, Plaintiff has raised an issue of fact as to causation through submission of her treating physicians' reports and affirmations, who reviewed Plaintiff's MRI films and concluded, based on examinations and observations during surgery, that Plaintiff's injuries were causally related to the subject accident (*see generally Marcelo v Fabius*, 195 AD3d 472 [1st Dept 2021]; *Rabb v Mohammed*, 132 AD3d 527, 528 [1st Dept 2015]).

With respect to Plaintiff's claim under the "90/180-day" category of injury, this claim must be dismissed. Plaintiff's bill of particulars indicates that Plaintiff was "intermittently confined" after the accident (bill of particulars ¶ 9), and therefore does not allege that she was disabled for the minimum duration necessary to state such a claim (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437-438 [1st Dept 2018]; *Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013]; *Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]). Furthermore, Plaintiff's own deposition testimony establishes that she returned to work "a couple of weeks" after the accident (Tamika Johnson deposition tr at 236-238), which demonstrates that she was, at most, somewhat restricted in her activities of daily living, which is fatal to a 90/180-day injury claim (*see Anderson v Pena*, 122 AD3d 484 [1st Dept 2014]; *Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st

Dept 2008]).

With respect to Plaintiff's claim of a "permanent loss of use," there is no evidence that Plaintiff suffered a "total loss of use" of any body part. Therefore, Plaintiff's 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]). Further, as there is no evidence supporting a claim under the "significant disfigurement" (*see Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]) or "fracture" categories of injury, these claims are dismissed.

ACCORDINGLY

Defendant's motion seeking an Order granting summary judgment and dismissing Plaintiff's complaint on the grounds that Plaintiff has not sustained a "serious injury" as defined by Insurance Law § 5102 (d) is **GRANTED to the extent** that Plaintiff's claims relating to her left shoulder, as well as claims under the "permanent loss of use," "significant disfigurement," "fracture," and "90/180-day" categories of injury are dismissed, and the motion is otherwise **DENIED**.

This decision constitutes the Order of the Court.

Dated: _____

FEB 05 2024

Hon. _____



BEN R. BARBATO, 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