

Crisostomo v Zaidi

2025 NY Slip Op 30556(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 152348/2022

Judge: James G. Clynnes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

INDEX NO. 152348/2022
MOTION DATE 10/20/2024
MOTION SEQ. NO. 001

ROSMELFI CRISOSTOMO,
Plaintiff,

- v -

SYED ZAIDI, LYFT, INC., JOHN DOE
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendant Zaidi for summary judgment and dismissal of Plaintiff's complaint on the grounds that Plaintiff cannot meet the serious injury threshold under Insurance Law 5104 (a) and 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a May 10, 2021 motor vehicle accident between a vehicle within which Plaintiff was a passenger and a vehicle owned by Defendant Zaidi.

Plaintiff's Bill of Particulars alleges that she sustained injuries to her left shoulder, for which Plaintiff underwent surgery on October 22, 2021, cervical spine, and lumbar spine, as a result of which Plaintiff underwent trigger point injections to four sites and alleges that Plaintiff was confined to her bed for approximately two weeks and to her home for approximately three months.

This matter has been discontinued against Defendant Lyft, Inc. via stipulation dated February 13, 2023 (NYSCEF DOC NO 18).

Defendant relies on the independent medical examination reports by Dr. Pierce J. Ferriter, orthopedic surgeon and Dr. Scott A. Spriner, radiologist, records from the emergency room at Mount Sinai Hospital, and Plaintiff's examination before trial testimony.

Dr. Ferriter examined Plaintiff on February 13, 2024. Dr. Ferriter measured Plaintiff's range of motion with a goniometer and compared normal active range of motion values according to AMA Guidelines. He noted a normal range of motion and negative orthopedic tests as to Plaintiff's cervical spine, lumbar spine, and left shoulder. Dr. Ferriter determined that Plaintiff's cervical spine sprain/strain and lumbar spine sprain/strain had resolved, and the status post left shoulder surgery was healed. Dr. Ferriter concluded that Plaintiff did not sustain any significant or permanent injury as a result of the subject motor vehicle accident. He reported that there are no objective clinical findings indicative of a present disability, and functional impairment, which prevents Plaintiff from engaging in activities of daily living, and usual activities including work, school, and hobbies, and that Plaintiff is able to return to full duty work without restrictions.

Dr. Springer reviewed the MRIs of Plaintiff's cervical spine, lumbar spine, and left shoulder. The cervical spine MRI was taken on June 18, 2021. Dr. Springer found a disc bulge but noted that it is most often degenerative in origin. He also noted disc desiccation, disc space loss, and straightening of the normal cervical lordosis. Dr. Springer recorded no fracture, subluxation, or disc hernia, and no posttraumatic changes causally related to the subject accident.

The lumbar spine MRI was also taken on June 18, 2021. Dr. Springer reported straightening of the normal lumbar lordosis, which he noted is likely positional and related to Plaintiff's comfort level during the examination. He found no fracture, subluxation or paravertebral soft tissue swelling, but did report disc desiccation with mild loss of disc space height. Dr. Springer noted that the disc desiccation could not have developed in the 29-day interval between the examination and the subject accident and is indicative of degenerative disc disease. Dr. Springer also reported disc bulges but noted that disc bulging is often degenerative in origin. Dr. Springer concluded that there were no post traumatic changes causally related to the subject accident.

The left shoulder MRI was taken on June 25, 2021. Dr. Springer found no fracture, dislocation, or acromioclavicular joint separation, but did find a small os acromiale, which he attributed to a developmental abnormality involving failure of fusion of the acromial process. He reported small joint effusion that decompresses into the subscapularis recess but noted that it is a nonspecific transient process that will resolve without sequelae. Dr. Springer concluded that there are no posttraumatic changes causally related to the subject incident.

Plaintiff testified that she was not employed at the time of the accident but did gain employment after the accident. However, Plaintiff testified that she was not able to continue working because of the pain in her arm, back, and neck. Plaintiff further testified that there are not things she could do before the accident that she absolutely cannot do at all, but that there are things that she can still do but only with pain or discomfort, such as working out, running, cleaning, standing, heavy lifting, etc. She testified that the doctor told her that her left arm would never be the same meaning it would hurt “here and there.”

In opposition, Plaintiff contends that she has suffered a serious injury under Insurance Law 5102 (d). Plaintiff contends that after the subject accident, she was taken to Mount Sinai Hospital, following her treatment at the hospital, she sought further treatment including physical therapy and chiropractic care, and was referred to Medaid Radiology and Stand-Up MRI of Manhattan to undergo MRI testing of her left shoulder, cervical, thoracic, and lumbar spine. Plaintiff further contends that as a result of her injuries, she underwent arthroscopic surgery to her left shoulder on October 22, 2021. Plaintiff relies on certified medical records, the radiological review reports of Plaintiff's cervical spine, lumbar spine, thoracic spine, and left shoulder by Dr. Feng Tao, radiologist, and Dr. Mark J. Decker, radiologist, the affirmation and operative report by Dr. Andrew Miller, and Plaintiff's affirmation.

Dr. Luba Karlin evaluated Plaintiff on July 20, 2021 and measured Plaintiff's range of motion with a goniometer with normal ranges according to AMA Guidelines. As to Plaintiff's cervical spine, Dr. Karlin noted a limitation in Plaintiff's range of motion and reported a positive Spurling Maneuver, and a positive distraction test for cervical radiculopathy. As to Plaintiff's lumbar spine, Dr. Karlin noted a limitation in Plaintiff's range of motion and reported a positive left and right straight leg raise tests both at 45 degrees, a positive Patrick's maneuver, and a positive left sacroiliac compression test. As to Plaintiff's shoulders, Dr. Karlin reported normal range of motion as to Plaintiff's right shoulder but limitation in the range of motion of Plaintiff's left shoulder. According to Dr. Karlin's report, Plaintiff's right shoulder had no apparent swelling or tenderness, but the left shoulder had tenderness and positive tests, such as Neer sign and Hawkins, as evidence of impingement.

Dr. Tao reviewed Plaintiff's cervical spine MRI and reported loss and straightening of the normal cervical lordosis indicating neck muscular spasm/strain and mild to moderate loss of disc height and posterior bulging. Dr. Tao reported Plaintiff's thoracic spine MRI to reveal loss and straightening of the normal thoracic kyphosis indicating paraspinal muscular spasm/strain but otherwise no posttraumatic injury discernable at the thoracic disc levels. The lumbar spine report by Dr. Tao revealed loss and flattening of the normal lumbar lordosis indicating paraspinal muscular spasm/strain, posterior disc bulging, impinges ventral thecal sac, and central canal stenosis. The left shoulder MRI report by Dr. Decker revealed fraying and tear of the superior labrum, capsular thickening anteriorly, which he reported to be seen with adhesive capsulitis, and glenohumeral joint effusion.

Dr. Miller affirms that he recommended Plaintiff for arthroscopic surgery of the left shoulder, and he performed the surgery on October 22, 2021. In the operative report, Dr. Miller noted his postoperative diagnosis as a partial rupture of the subscapularis and a partial articular supraspinatus tendon avulsion lesion of the supraspinatus and subacromial hypertrophic synovitis.

Dr. Miller affirms that he re-examined Plaintiff on August 6, 2024, measured the range of motion of Plaintiff's left shoulder using a goniometer with normal values based on AMA Guidelines, and found limitation in Plaintiff's range of motion as to her left shoulder flexion, extension, abduction, adduction, internal rotation, and external rotation. Dr. Miller further affirms that he reviewed the independent medical evaluation reports of Dr. Ferriter and Dr. Springer and contends that he disagrees with their findings, specifically as to causation, range of motion, and MRI interpretations. Dr. Miller affirms that unlike Dr. Ferriter, he finds a direct causal relationship between the subject accident and Plaintiff's injuries, as well as Plaintiff's loss of range of motion. Further, Dr. Miller affirms that he disagrees with Dr. Springer's MRI interpretation regarding the left shoulder and Dr. Springer's assertion that the labrum and rotator cuff are intact, which contradicts the findings of Dr. Mark Decker, and his own observations, which he affirms, he subsequently confirmed during surgery on October 22, 2021.

In her affirmation, Plaintiff outlines the medical treatment she sought after the subject accident and affirms that despite extensive treatment, she continues to suffer from pain in her left shoulder, neck, and back every day and that she is unable to enjoy her daily activities to date.

In reply, Defendant contends that Plaintiff's doctor affirmation is insufficient. Specifically, Defendant contends that the affirmation by Anthony Siano, D.C. is insufficient to certify the medical records from three different facilities in Exhibit 3.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Only if movant satisfies this standard does the burden shift to the non-moving party to rebut movant's prima facie showing, by producing admissible evidence sufficient to require a trial of material issues of fact as to whether a serious injury was sustained as a result of the subject accident (*Knoll v Seafood Express*, 5 NY3d 817 [2005]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]).

Here, Defendant established prima facie entitlement to summary judgment. In opposition, Plaintiff raises triable issues of fact as to the existence of serious injury.

As an initial matter, uncertified records and unsworn physician reports submitted in opposition are insufficient to raise a triable issue of fact, as they are not in admissible form (*Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; (*Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [1st Dept 2009])). Thus, the Court will not consider the records from Macintosh Medical PC, as they were not in admissible form. The certification of Dr. Siano is insufficient to affirm the contents of any of the reports or records that are annexed thereto, since said reports were drafted by other individuals and not affirmed by those individuals. Dr. Siano's certification did not cure the defect, despite having the same address as Macintosh Medical PC, the records signed by Dr. Siano are under APS Chiropractic Services, P.C.

With respect to the 90/180 days category of serious injury, Plaintiff supplies the Court with no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009])). In her testimony, Plaintiff did note difficulty with general heavy lifting, and sitting and standing for long periods of time, however, these are

insufficient to create an issue of fact (*Reyes v Park*, 127 AD3d 459, 461 [1st Dept 2015] [holding in part that plaintiff’s “claimed limitations were not “substantially all” of his usual and customary daily activities”]). Plaintiff’s subjective complaints of pain and limitation, without more, do not rise to the level of a “serious injury” within this category of Insurance Law 5102 (d).

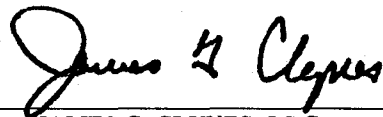
Nonetheless, by relating Plaintiff’s injuries to the accident, Plaintiff’s expert reports and affirmations raise triable issues of fact as to whether Plaintiff sustained a serious injury under Insurance Law 5102 (d) (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; (*Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Thus, the motion by Defendant Zaidi is denied except as to the 90/180 days claim.

Accordingly, it is

ORDERED that the motion by Defendant Zaidi for summary judgment and dismissal of Plaintiff’s complaint on the grounds that Plaintiff cannot meet the serious injury threshold under Insurance Law 5104 (a) and 5102 (d) is denied except as to the 90/180 days category; and it is further

ORDERED that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon Defendant with Notice of Entry.

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

1/21/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: