Cromwell v Choumaher

2017 NY Slip Op 32047(U)

September 29, 2017

Supreme Court, Kings County

Docket Number: 506325/15

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of September, 2017

P R E S E N T :

HON. DEBRA SILBER

Justice.

LINDA F. CROMWELL,

Plaintiff,

-against-

HIAM CHOUMAHER,

Defendant.

DECISION / ORDER

Index No. 506325/15
Mot. Seq. # 2
Submitted: 9/14/17

Papers numbered 1 to 23 were read on this motion:	Papers Numbered:
Notice of Motion/Order to Show Cause/Exhibits	1-10
Affirmation in Opposition/Exhibits	11-21
Reply Affirmation/Exhibits	22-23

Defendant Hiam Choumaher moves for summary judgment dismissing plaintiff Linda Cromwell's action, pursuant to CPLR 3212, in that plaintiff has failed to sustain "serious injuries," as defined by Insurance Law § 5102(d). The case concerns a motor

vehicle accident which occurred on September 21, 2013. For the reasons which follow the motion is denied.

Plaintiff's bill of particulars claims she sustained injuries to her cervical and lumbar spine, to her right shoulder, to her right knee, and to her right and left wrists.

Movant has made a *prima facie* case with objective medical findings with regard to the following applicable categories of injury:

- ☒ a permanent consequential limitation of use of a body organ or member.
- ☒ a significant limitation of use of a body function or system.
- ☒ a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The court notes, in finding that movant made a *prima facie* showing with regard to "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident," that plaintiff stated in her Bill of Particulars that she was confined to her bed for more than four weeks and intermittently to date. However, at her EBT she admitted to that she was never confined to her bed or home as a result of the injuries she sustained in the accident (Page 30). Plaintiff stated she was retired at the time of her accident and her testimony establishes that she was not restricted in her activities in the 180 days following the accident such that she was prevented from performing substantially all of her usual and customary activities for 90 days during this period. The

court further notes that, in her opposition, plaintiff has expressly abandoned any claim that she sustained an injury which qualifies under this category.

Movant has also made a *prima facie* showing with regard to "a permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system." Defendant's independent neurologist, Dr. Richard Lechtenberg, and defendant's independent orthopaedist, Dr. Richard Weiss, both noted restrictions in plaintiff's range of motion, but both doctors also offered adequate explanations for their conclusions that plaintiff had intentionally and voluntarily restricted her movements.

Dr. Lechtenberg notes "she voluntarily restricted excursions of the cervical spine because of complaints of pain. Incidental movements revealed a largely normal range of motion of the cervical spine," and "she voluntarily restricted excursions of the arms at the shoulders because of complaints of pain," and "she reported decreased sensitivity to pin (sic) on the right arm and decreased sensitivity to vibration on the left side of her body. These deficits did not correspond to any specific peripheral nerve or dermatomal pattern." Dr. Lechtenberg diagnosed plaintiff as "status post cervical and lumbar spine sprain, per history, resolved," noting "my impression is that this woman had no objective, clinical, neurologic deficits on my examination . . . from a neurologic standpoint, she is not disabled and can work at any job for which she is qualified. There are no pre-existing conditions that would affect her recovery from the accident of 9/21/13. Her neurological prognosis is good." He goes on to note that there were no objective, clinical, neurologic deficits noted in his examinations which correlate to any findings in the plaintiff's MRI reports, noting that the report of plaintiff's cervical spine

MRI noted no bulging or herniations, while the report of plaintiff's lumbar spine MRI describes a disc herniation at L5-S1 and disc bulging at L3-L4 and L4-L5.

Similarly, Dr. Weiss notes that plaintiff's "subjective complaints and MRI findings were not correlated by clinical findings on the examination. Objectively she has normal sensations, reflexes and muscle strength and all orthopedic testing was negative. There were no positive objective physical findings on this examination to confirm any of the claimant's subjective complaints."

Plaintiff, in opposition, has presented objective medical findings which demonstrate that she has sustained a "serious injury" pursuant to Insurance Law § 5102(d) with regard to the following categories of injury:

- ☒ a permanent consequential limitation of use of a body organ or member
- ☒ a significant limitation of use of a body function or system
- ☐ a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

Plaintiff has thus overcome the defendants' prima facie case and raised triable issues of fact as to whether or not she sustained a serious injury in the accident. The affirmations of Dr. Nunzio Saulle, plaintiff's physiatrist, and Dr. Barry Katzman, her orthopedic surgeon, which both incorporate by reference their earlier medical reports, provide sufficient evidence of significant restrictions in the range of motion in her cervical and lumbar spine, right shoulder, right knee and right and left wrists, both from a recent examination and from tests which were contemporaneous with the subject

accident. These are further amplified by the affirmed medical reports of Dr. Stella Mansukhami and Dr. Howard Baum. (See, *Levin v Khan*, *supra*; *Morris v Edmond*, 48 AD3d 432, 433 [2d Dept 2008]; *McIntosh v O'Brien*, 69 AD3d 585 [2d Dept 2010]; *Yunatanov v Stein*, 69 Ad3d 708 [2d Dept 2010]).

The evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. (See, *Dietrich v Puff Cab Corp. 63 AD3d 778* [2d Dept 2009]; *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1st Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3rd Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2d Dept 1980]).

It must be noted that if a plaintiff overcomes the motion with regard to one or more applicable categories of injury in Insurance Law 5102(d), the court is not permitted to dismiss the plaintiff's claims with regard to any other categories. (See *Baulete v L&N Car Serv., Inc.*, 153 AD3d 896 [2d Dept 2017]).

Therefore, as plaintiff has overcome the motion and raised triable issues of fact, the motion is denied.

This constitutes the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court