

Munoz v Robinson

2017 NY Slip Op 32738(U)

December 26, 2017

Supreme Court, New York County

Docket Number: 152701/2015

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C. Justice

PART 22

MUNOZ, SABRINA

INDEX NO. 152701/2015

-v-

MOTION DATE

ROBINSON, RICKEY R.

MOTION SEQ. NO. 062

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2 + 3

Answering Affidavits — Exhibits No(s). 4

Replying Affidavits No(s). 5 + 6

Defendants' SJ Motion
Upon the foregoing papers, it is ordered that this motion is

Defendants Rickey R. Robinson and Denise L. Robinson's motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff as a result of the November 21, 2013, accident fail to establish a serious injury threshold as defined by Insurance Law § 5102 (d), Defendant William Paulino's cross-motion seeking the same relief and adopting the arguments and evidence submitted by the Robinson Defendants, and Plaintiff's cross-motion for summary judgment on liability and on threshold are decided as follows:

Plaintiff's bill of particulars alleges injuries to her left knee, head (post-concussion syndrome with post-traumatic headaches and photophobia) and cervical and lumbar spine. Although Plaintiff does not explicitly state the Insurance Law § 5102 (d) criteria her alleged injuries meet in her bill of particulars, Plaintiff's cross motion suggests she is proceeding under the following criteria: permanent loss of use; permanent consequential limitation; significant limitation of use; and 90/180-day.

Defendants' orthopedist, Dr. Arnold T. Berman, conducted an IME of Plaintiff on June 9, 2016, and reviewed her medical records pertaining to the treatment of her injuries. During his examination of Plaintiff, Dr. Berman found normal ranges of motion of and negative/normal objective tests for her cervical and lumbar spine and left knee. Dr. Berman diagnosed Plaintiff as having resolved, with no residuals, cervical and lumbar spine strain/sprain and "left knee contusion/strain associated with moderate degenerative joint disease." Dr. Berman opines that Plaintiff's "left knee arthroscopy surgery was for a pre-existing condition of moderate degenerative joint disease . . . [because] [t]he radiological findings of the left knee were of a chronic degenerative nature and not the result of a single traumatic event."

Dated: DEC 26 2017

1076

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ J.S.C. Justice

PART 22

MUNOZ
-v-
ROBINSON

INDEX NO. 152701/2015
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Defendants' neurologist, Dr. Robert S. April performed a neurological examination of Plaintiff on March 1, 2016. Dr. April's objective cranial nerves (including visual acuity and ocular movements) and motor tests/examinations were negative/normal. Dr. April performed a "mechanical exam" of Plaintiff and found normal ranges of motion for straight leg raising with a normal range provided and normal range of motion for upper limbs and lower back but did not provide the normal ranges of motion for each movement for those body parts. Dr. April concludes that Plaintiff had a normal neurological examination and that she is neurologically intact.

Defendants' radiologist, Dr. Melissa Sapan Cohn, reviewed MRI's of Plaintiff's left knee (taken on March 26, 2014), and cervical and lumbar spine (both taken on January 14, 2014). Dr. Cohn's report on Plaintiff's left knee concludes that Plaintiff "... has severe osteoarthritis predominantly of the medial compartment of the joint space with associated tearing of the underlying meniscus ... [and explains that] [m]eniscal pathology is frequently seen in advanced osteoarthritis." Dr. Cohn found no evidence of an acute traumatic related injury to Plaintiff's left knee. Dr. Cohn's report on the MRI of Plaintiff's cervical spine found "straightening of the normal cervical lordosis. This may reflect muscular spasm. ... [or] the result of the positioning of the [Plaintiff's] neck within the cervical coil necessary to perform the examination." Dr. Cohn observed disc bulging unrelated to trauma that "is within the spectrum of degenerative disc disease ... [and] ... no evidence [of] disc herniation or acute traumatic related injury. ..." Regarding the MRI of Plaintiff's lumbar spine, Dr. Cohn found "a normal examination. ... [and] ... no evidence for pathology or acute traumatic related injury ..."

Finally, Defendants offer an affirmed March 21, 2016, report from Dr. Howard Levin, an orthopedic surgeon who reviewed 10 operative photos of Plaintiff's left knee arthroscopy surgery performed on January 16, 2015, by Dr. Emmanuel Hostin. Dr. Levin concludes that the "[p]hotos show a Dated: , J.S.C.

2016

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

MUNOZ
-v-
ROBINSON

INDEX NO. 152701/2015
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

degenerative tibial plateau . . . , [that] [t]he meniscus is degenerative [sic], [t]here are no post traumatic findings, [and] [t]he surgery was not causal [sic] to the motor vehicle accident of record.”

Concerning 90/180-day, Defendants refer to Plaintiff’s deposition testimony wherein she testified that after the accident she was confined to her bed/home for two weeks and she missed a couple of weeks of school.

Plaintiff’s Cross Motion for SJ

In opposition, to Defendants’ summary judgment motion and in support of her cross motion for summary judgment Plaintiff submitted various unaffirmed medical reports that are not competent evidence and therefore were not considered by the Court (CPLR 2106 [a]; *Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]; *Freeman v Volare Cab Corp.*, 1024 NY Misc LEXIS 727, 2014 NY Slip Op 30418 [U] [SC NY Co 2014]). Likewise, the Court did not consider Plaintiff’s medical records and bills since no foundation was laid for their admissibility (CPLR 4518 [a]) and in any event medical records containing medical opinions cannot be admitted as business records under CPLR 4518 (*Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]).

The only admissible medical evidence submitted by Plaintiff is the affirmed report of her orthopaedic surgeon, Dr. Emmanuel Hostin. Dr. Hostin first saw Plaintiff on December 11, 2014, and examined her again on August 10, 2016. Dr. Hostin notes that Plaintiff underwent “left knee arthroscopy on January 16, 2015 with a partial medical meniscectomy, a synovectomy and a revision arthroplasty of the medial femoral condyle.” At his August 10, 2016, examination, Dr. Hostin found positive objective tests and decreased range of motion for Plaintiff’s left knee. Dr. Hostin reviewed Plaintiff’s medical
Dated: _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ
PRESENT: J.S.C.
Justice

PART 22

MUNOZ
-v-
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INDEX NO. 152701/2015
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records and acknowledges that "[t]here is radiographic evidence of pre-existing patellofemoral degenerative changes of the affected knee document in June of 2012 . . . however, there is no evidence of significant symptoms associated with these radiographic changes. The patient received only minimal conservative treatment at the time of that 2012 presentation as her symptoms were short-lived and minimal. This injury represents an acute meniscus tear with severe exacerbation of pre-existing, asymptomatic degenerative changes in this [Plaintiff's] left knee. Her left knee became significantly painful only after the accident. The left knee injury and the subsequently required surgical intervention are both causally related to the motor vehicle accident . . ." Dr. Hostin does not address Plaintiff's alleged injuries to her head and cervical and lumbar spine and Plaintiff submits no other admissible evidence to support these alleged injuries.

Discussion

Defendants met their prima facie burden that Plaintiff did not sustain a serious injury to her cervical and lumbar spine through the affirmation of Dr. Berman who upon examination found normal ranges of motion and negative/normal objective tests and resolved sprains/strains for those body parts (Fernandez v Hernandez, 151 AD3d 581 [1st Dept June 20, 2017] [holding "[d]efendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident" through orthopedic surgeon's report "who found normal ranges of motion, negative objective test results, and resolved sprains, strains and contusions . . ."]). Plaintiff failed to raise and issue of fact as to her injury to her cervical and lumbar spine because the only admissible medical evidence, Dr. Hostin's report, does not address those body parts.

Defendants also met their prima facie burden as to Plaintiff's alleged head injury through Dr. J.S.C.
Dated: 4/9/6

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ
PRESENT: J.S.C. Justice

PART 22

MUNOZ
-v-
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Upon the foregoing papers, it is ordered that this motion is

April's affirmation who found negative/normal objective cranial nerve tests /examinations and concluded that Plaintiff had a normal neurological examination and is neurologically intact. Plaintiff offered no admissible medical evidence to create an issue of fact and in any event, Plaintiff's subjective complaints of headaches is insufficient to raise an issue of fact (Solarzano v Power Test Petro, Inc., 181 AD2d 631 [1st Dept 1992] [observing "[p]laintiff's medical expert's conclusory opinion that plaintiff was suffering from 'post concussion syndrome ...' was based upon subjective complaints ... not upon objective medical findings ..."]; Downie v McDonough, 117 AD3d 1401 [4th Dept 2014] [observing "the record contains no objective basis for plaintiff's headache complaints"]).

Regarding Plaintiff's left knee injury, Defendants met their prima facie burden through the affirmations of Dr. Berman, Dr. Cohn and Dr. Levin who all found that Plaintiff's injury and surgery were the result of degeneration and osteoarthritis thereby establishing an absence of causation (Rickert v Diaz, 112 AD3d 451 [1st Dept 2013] [noting defendant's radiologist established left knee preexisting degenerative changes thereby establishing prima facie absence of causation]). Plaintiff failed to raise an issue of fact. Dr. Hostin did not offer a factually based medical opinion ruling out degenerative conditions to Plaintiff's left knee (Ortiz v Ash Leasing, Inc., 63 AD3d 556 [1st Dept 2009] [determining plaintiffs' doctor did not offer a "factually based medical opinion[] ruling out ... degenerative conditions as the cause of plaintiffs limitations" [internal quotation marks omitted] "or provide any objective basis to support a finding of aggravation of such preexisting conditions" (Cattouse v Smith, 146 AD3d 670, 671 [1st Dept 2017]) and Plaintiff's subjective complaints of pain are insufficient to raise a triable issue of fact (Arenas v Guaman, 98 Ad3d 461 [1st Dept 2012] [holding in part that plaintiff's "physician's findings with respect to her restrictions do not raise a triable issue of fact, since they are based on plaintiff's subjective complaints of pain"]; Calabro v Petersen, 82 AD3d 1030, 1031 [2nd Dept 2011] [holding in part that "plaintiff's complaint of subjective pain are insufficient to raise a triable issue of fact]).

Dated: J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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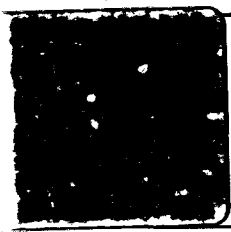
SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

PRESENT: _____

Index Number : 152701/2015
MUNOZ, SABRINA
vs.
ROBINSON, RICKEY R.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT



INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

fact regarding serious injury”).

Defendants also met their prima facie burden regarding Plaintiff’s 90/180-day claim by submitting Plaintiff’s deposition testimony that she was confined to home for two weeks and missed a couple of weeks of school (*Cf Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]). Plaintiff’s opposition, cross motion does not raise a triable issue of fact.

In light of the foregoing, the Court need not determine that portion of Plaintiff’s cross motion seeking summary judgment on liability.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants’ summary judgment motion and cross motion are **GRANTED** in their entirety and Plaintiff’s cross motion is **DENIED** in its entirety; and it is further

ORDERED that Plaintiff’s complaint is **DISMISSED** with prejudice.

This constitutes the Decision and Order of the Court.

Dated: 12/26/17

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_____, J.S.C.

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