

Stallings v Shahabuddin

2018 NY Slip Op 30041(U)

January 10, 2018

Supreme Court, New York County

Docket Number: 155664/14

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

STALLINGS, JEANNETTE
-v-
SHAHABUDDIN

INDEX NO. 155664/14
MOTION DATE
MOTION SEQ. NO. 001

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
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

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

Defendants Shahauddin and Behira Yaroa's ("Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Jeanette Stallings as a result of the January 22, 2014, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges she sustained injuries to cervical and lumbar spine both knees, both shoulders, right wrist and hand. Plaintiff avers that her injuries meet the following Insurance Law § 5102 (d) criteria: significant disfigurement; permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day.

Defendants' neurologist, Dr. Naunihal Sachdev Singh examined Plaintiff on January 4, 2016, and found normal ranges of motion for Plaintiff's cervical, thoracic and lumbar spine, and conducted other objective tests that were negative/normal. Dr Singh concludes that Plaintiff's alleged injuries to her cervical (thoracic) and lumbar spine are resolved.

Defendants' orthopedist, Dr. Arnold T. Berman, examined Plaintiff on June 7, 2016, and found normal ranges of motion for Plaintiff's cervical, thoracic and lumbar spine and left shoulder and conducted other objective tests that were negative/normal. Dr. Berman found some decreases in range of motion for Plaintiff's right shoulder (forward elevation to 140 [N = 180], abduction to 90 [N = 180]), right wrist (wrist flexion 50 [N = 60], extension 40 [N = 60]), right knee (flexion to 130 [N = 150]) and left knee (flexion to 100 [N = 150]). The other objective tests performed on Plaintiff's right shoulder, right wrist and both knees were otherwise negative/normal. Dr. Berman concludes that Plaintiff's alleged injuries to her cervical, thoracic and lumbar spine, right and left shoulders, and right wrist and

Dated: 1/9/18, J.S.C.

JAN 10 2018

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

HON. PAUL A. GOETZ

PRESENT: J.S.C. Justice

PART 22

INDEX NO.
MOTION DATE
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-v-

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hand are all resolved with no residuals and the alleged injuries to her right and left knees are resolved with no aggravation of prior total knee replacements (in 2000 for the right knee and in 2011 for the left knee). Regarding the decreased ranges of motion of Plaintiff's right shoulder, Dr. Berman is of the opinion that they are "clinically insignificant in light of the remainder of the examination findings [and] [t]he decreased knee ranges of motion are related to the preexisting and unrelated bilateral total knee replacements."

Defendants' radiologist, Dr. Audrey Eisenstadt, reviewed an MRI of Plaintiff's right shoulder (taken on February 6, 2014) on January 6, 2016. Dr. Eisenstadt opens her report with the observation that "[t]he examination is degraded by patient motion on all sequences." Dr. Eisenstadt found inter alia degenerative changes at the acromioclavicular joint and glenohumeral joint and subarticular signal change along the greater tuberosity of the humerus, creating bony productive changes that could not have developed in less than six month. Dr. Eisenstadt concludes that these impingements caused by degenerative changes are the likely cause of Plaintiff's chronic rotator cuff tears.

Defendants' submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained serious injuries to her right shoulder and right wrist. While Dr. Berman dismisses the decreased range of motion in Plaintiff's right shoulder as clinically insignificant; a 33% decrease is not insignificant (Cf O'Sullivan v Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]) and he does not even address the 34% decrease in Plaintiff's right wrist. Moreover, these decreases in ranges of motion in Plaintiff's right shoulder and right wrist contradict Dr. Berman's own findings that Plaintiff's injury to her shoulder was resolved (Karounos v Doulalas, 153 AD3d 1166 [1st Dept 2017]). Indeed, Dr. Berman's conclusion that Plaintiff's right shoulder injury is resolved further conflicts with Dr. Eisenstadt's conclusion that the

Dated: JAN 10 2018 2015 J.S.C.

MOTION/CASE IS RESPECTFULLY RETURNED 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

INDEX NO.
MOTION DATE
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-v-

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injury is degenerative (Johnson v Salaj, 130 AD3d 502 [1st Dept 2015]). These contradictory findings concerning Plaintiff's right shoulder and right wrist raise triable issues of fact for the jury to resolve (Karounos, 153 AD3d at 1166; Johnson, 130 AD3d at 502; Martinez v Pioneer Transp. Corp., 48 AD3d 306 [1st Dept 2008]) and therefore, the burden does not shift to Plaintiff to submit evidence sufficient to raise an issue of fact as to her right shoulder and right wrist (Jackson v Leung, 99 AD3d 489 [1st Dept 2012]).

Defendants argue that Plaintiff must address the lack of treatment after her eight weeks of physical therapy. Plaintiff's deposition testimony that her doctor discussed shoulder surgery with her and explained that at her age (82) it would be "tough" and would entail a two years of recovery, is a sufficient explanation.(Cf Acosta v Ramos, 144 AD3d 441 [1st Dept 2016]).

Defendants met their prima facie burden that Plaintiff did not sustain a serious injury to her cervical and lumbar spine through the affirmed reports of Dr. Singh and Dr. Berman who both found normal ranges of motion and negative/normal test results for those body parts and concluded that her alleged injuries to her cervical and lumbar spine were resolved (Cattouse v Smith, 146 AD3d 670 [1st Dept 2017]). Defendants also met their prima facie burden as to Plaintiff's left shoulder, right hand and both knees through the affirmed report of Dr. Berman who found normal ranges of motion and negative/normal test results for those body parts and concluded that the alleged injuries to Plaintiff's left shoulder, right hand and both knees were resolved and the decreased ranges of motion in Plaintiff's knees are related to the pre-accident total knee replacements (Id.).

In opposition Plaintiff fails to raise and issue of fact as to whether she suffered a serious injury to

Dated: JAN 10 2018 395 J.S.C.

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

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2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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

PART 22

PRESENT: _____
Justice

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

-v-

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

cervical and lumbar spine, left shoulder, right hand and both knees. The only admissible evidence is the affirmation of an orthopedic surgeon, Dr. Raz Winiarsky who only addressed the injuries to Plaintiff right shoulder and left knee. As noted above the burden did not shift to Plaintiff regarding her right shoulder injury. Regarding Plaintiff's left knee, Dr. Winiarsky is not Plaintiff's treating doctor; he examined Plaintiff nearly two years after the accident; and he largely recites the findings of the unaffirmed reports of Plaintiff's treating doctors in an improper attempt to bootstrap them into consideration (*Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]).

Nevertheless, if Plaintiff establishes she sustained a serious injury to either her right shoulder or her right wrist, she will be entitled to recover for all her injuries, including to her cervical and lumbar spine, left shoulder, right hand and both knees (*Karounos v Doulalas*, 2017 NY Slip Op 06602 [1st Dept Sept. 26, 2017] [holding "[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold."]).

Defendants also met their prima facie burden as to Plaintiff's 90/180-day claim by relying on her bill of particulars wherein she states that she was only confined to her bed for approximately one week and her home for approximately three weeks following the accident (*Cf Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]). In opposition, Plaintiff failed to raise an issue of fact.

Finally, nothing in Plaintiff's bill of particulars or the parties' submissions suggests that Plaintiff suffered a disfigurement that "a reasonable person would view as unattractive, objectionable, or as the subject of pity or scorn" (*Sidibe v Cordero*, 79 AD3d 536 [1st Dept 2010]), therefore, Plaintiff may proceed under the permanent loss of use; permanent consequential limitation of use; and significant

Dated: _____, J.S.C.

JAN 10 2018

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- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 22

PRESENT: Justice

Index Number : 155664/2014
STALLINGS, JEANNETTE
vs
SHAHABUDDIN
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

limitation of use categories to establish she suffered a serious injury under Insurance Law 5102 (d) to her right shoulder and right wrist.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury to her cervical and lumbar spine, left shoulder, right hand and both knees and claims under the significant disfigurement and 90/180-day categories; and it is further

ORDERED that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury to her right shoulder and right wrist under permanent loss of use; permanent consequential limitation of use; and significant limitation of use categories; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22, 80 Centre Street, Room 136 on February 20, 2018 at 9:30 AM.

This constitutes the Decision and Order of the Court.

Dated: 1/10/18

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[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):