Woney v Nekere
2018 NY Slip Op 31329(U)
May 11, 2018
Supreme Court, Bronx County
Docket Number: 303343/2015
Judge: Julia I. Rodriguez
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 27

INDEX # 303343/2015

WENNETTE WONEY,

Plaintiff,

-against-

DECISION and ORDER

MAMADOU NEKERE, PEDRO J. PENA,
J&B LUXURY CORP. and LEO H. PEREZ,

Defendants.

Present: Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion for summary judgment dismissing Plaintiff's complaint for failure to establish serious injury:

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	1
Notice of Cross-motion & Affirmation	2[1]
Plaintiff's Affirmation in Opposition & Exhibits	3
Reply Affirmation	4

This action arises as a result of a two-vehicle accident which occurred on December 12, 2014; Plaintiff was a rear-seat passenger in one of the vehicles. In her Bill of Particulars Plaintiff alleged she sustained injury to her neck, back, right knee, left shoulder and dental and psychological trauma.

After discovery Defendants J&B Luxury Corp. and Leo H. Perez move for summary judgment dismissing the complaint on the ground that Plaintiff cannot meet the serious injury threshold required by Insurance Law §5104(a) and §5102(d). In support of summary judgment Defendants submitted the affirmations of doctors: (1) **Timothy G. Haydock**, Board Certified Physician in Emergency Medicine; (2) **William Walsh**, Board Certified Orthopedic Surgeon; (3) **Chandra M. Sharma,** Board Certified Neurologist; (4) **Issac Seinuk**, Board Certified Dentist; and (5) **Michael Setton**, Board Certified Radiologist.

As an initial matter, the court did not entertain Dr. Haydock's report, as he did not examine Plaintiff, and therefore, his opinion, premised upon other doctors' evaluations, is not probative for purposes of summary judgment and is better suited for trial.

[1] Cross-motion by defendant MAMADOU NEKERE is denied as moot in light of Stipulation dated April 17, 2018 discontinuing action against this defendant.

However, Dr. Walsh performed an orthopedic evaluation on February 15, 2017. Walsh conducted range of motion testing of the cervical and lumbar spines, and right shoulder; he reported no restrictions in ranges of the cervical spine and right shoulder, and restrictions of 5 to 10 degrees in the lumbar spine. Walsh found normal muscle strength and reflexes of the bilateral upper and lower extremities, and reported that all orthopedic and neurological maneuvers, such as Compression, Soto Hall, Fabere and Lesegue's, were negative. Walsh opined that Plaintiff was "capable of performing all usual activities," and that any positive findings were "mild on ADL's and have only mild impairment on usual 'use' of the examined body parts."

Dr. Sharma conducted a neurological examination on June 20, 2017 and did not list any medical records he reviewed.[2] Sharma conducted motor, muscle and sensory testing of the upper and lower extremities; he reported normal findings in these body parts. Sharma also performed range of motion testing of the cervical and lumbar spines and reported restrictions of movement in all ranges, which he opined were "subjective mechanical limitations due to perception of pain not confirmed on examination and do not represent neurological problems... ranges of motion are normal during spontaneous activities." Sharma's impression was that "despite Ms. Woney's subjective complaints, there were no objective findings to support them." Sharma concluded that Plaintiff is "capable of working and performing her activities of daily living without any restrictions or limitations."

Dr. Seinuk examined Plaintiff's jaw and teeth on November 29, 2017; he reported that Plaintiff had "no current dental or temporomandibular joint conditions."

Dr. Setton reviewed the MRIs of the cervical spine dated 1/24/2015, six weeks post-accident, and of the right shoulder dated 2/15/2015, nine-to-ten weeks post accident. With respect to the cervical spine, he opined that there was "no abnormality of the paraspinal ligaments or soft tissues to suggest any type of recent traumatic injury to the cervical spine." He found "mild bulging of the C3-4, C4-5 and C5-6 intervertebral discs which relate to degeneration . . . unrelated to trauma." Regarding the right shoulder, he found no evidence of osseous or soft tissue injury, rotator cuff tear, labral tear, acute tear or

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[2] The Bill of Particulars he reviewed is not a document prepared by a medical provider.

joint effusion "which may have resulted from the accident 9-10 weeks prior." He found "mild to moderate hypertrophic acromioclavicular joint degeneration," among other conditions, which he opined predated and were unrelated to the accident.

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The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff did not sustain a "serious injury." Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys.*, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubensccastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep't 2006).

In opposition to summary judgment, Plaintiff submitted, *inter alia*, progress notes indicating she commenced physical therapy on 12/18/2014 at Central Park Physical Medicine & Rehabilitation, P.C. and treated with **Dr. Joyce Goldenberg;** in her affidavit Goldenberg describes the various treatment modalities she prescribed for Plaintiff commencing immediately after the accident. Goldenberg recently examined Plaintiff on March 20, 2018 and conducted range of motion testing of the cervical and lumbar spines, both shoulders, right hip and right knee; she reported restrictions and limitations in all of these body parts. Goldenberg opines that Plaintiff sustained injuries and functional limitations of use as a result of the motor vehicle accident on Dec. 12, 2014, and disagrees that Plaintiff's pain is caused by degenerative changes in her cervical spine and right shoulder.

Plaintiff also submitted treatment records from physicians **Bradley Wasserman** and **Srino Bharam.**

After consideration of Plaintiff's submission, the Court finds that the differing and/or contradictory medical opinions expressed by the parties' respective doctors, raise issues of fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, plaintiff's submission raised material issues of fact and credibility as

to whether she sustained a "significant limitation of use of a body function or system" and/or "permanent consequential limitation of use of a body organ or member." Any deficiencies in Plaintiff's claims go to the weight of her evidence rather than its admissibility, and consequently at this juncture the court declines to dismiss these claims as a matter of law. *Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005). And see *Castillo v. Abreu*, 132 A.D.3d 520, 18 N.Y.S.3d 378 (1st Dept. 2015); *Boateng v. Ye Yiyan*, 119 A.D.3d 424, 990 N.Y.S.2d 17 (1st Dept. 2014); *Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 (1st Dept. 2014); *Clementson v. Price*, 107 A.D.3d 533, 967 N.Y.S.2d 357 (1st Dept. 2013); *Angeles v. American United Transportation, Inc.*, 110 A.D.3d 639, 973 N.Y.S.2d 644 (1st Dept. 2013); *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010).

However, the Court finds that Plaintiff failed to meet her burden of rebuttal regarding the 90/180 claim, i.e., that she suffered "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." In her Bill of Particulars Plaintiff alleged she was confined to her home up to seven weeks after the accident; at her deposition she testified she stayed in bed for 30 days afer the accident.

For the foregoing reasons, Defendants' motion for summary judgment dismissing the complaint for Plaintiff's failure to meet the "serious injury" threshold of Insurance Law §5102(d) is **granted** solely to the extent that her 90/180 claim is **dismissed,** as that claim was not medically substantiated; Defendants' motion is otherwise **denied.**

Dated: May 11, 2018

Hon. Julia I Rodriguez, J.S.C.