

Mirza v New York City Tr. Auth.

2018 NY Slip Op 32450(U)

September 26, 2018

Supreme Court, New York County

Docket Number: 158347/2014

Judge: Lisa A. Sokoloff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____ X

BENAZIR MIRZA,

Index No. 158347/2014

Plaintiff,

Motion Seq. 001

-against-

DECISION AND ORDER

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY, MTA
BUS COMPANY and MIGUEL A. MENDEZ,

Defendants.

_____ X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Summary Judgment Motion/Affirmation	<u>1</u>	20-37
Plaintiff's Opposition to Motion/Exhibits	<u>2</u>	42-48
Defendant's Reply Affirmation	<u>3</u>	49

LISA A. SOKOLOFF, J.

On October 18, 2013 at 9:50 a.m., Plaintiff Benazir Mirza was operating her Honda Ridgeline pickup truck on the Avenue of the Americas at its intersection with 11th street when it was struck by a bus owned by Defendant New York City Transit Authority (s/h/a Metropolitan Transit Authority) and operated by Miguel A. Mendez. She brings an action for personal injuries arising from the incident.

Defendants New York City Transit Authority, MTA Bus Company and Mr. Mendez (collectively, "Defendants") move for an order pursuant to CPLR § 3212 and Article 51 of the New York State Insurance Law granting summary judgment and dismissing Plaintiff's complaint on the ground that Plaintiff has not met the "serious injury" threshold within the meaning of Insurance Law § 5102(d). Defendants claim that there is no objective medical evidence that establishes Plaintiff has suffered more than a minor limitation to her cervical or lumbar spine or

that Plaintiff was more than slightly curtailed from performing her usual activities after the accident.

Plaintiff was a student at Queens College at the time of the accident, returned to school the next day, completed the semester and continues to be a student at the same institution. At the time of her accident, she was driving a Honda Ridgeline pickup truck heading north on Sixth Avenue. She testified at her statutory hearing that she was in the right lane and Defendant's bus was in a bus stop to her right. Her truck was "a couple feet" behind the bus. Without signaling, the bus moved into her lane. Plaintiff moved into the left lane and proceeded driving when she felt the left front side of the bus make contact with the back right side of the truck. The truck shook and her shoulder hit the door, but no other part of her body came into contact with anything in the interior of the truck. The two vehicles were moving slowly, approximately 5-10 mph. Plaintiff reported to EMS personnel and to Bellevue Hospital ER pain in her left shoulder, right neck and lower back. She was released the same day and advised to follow up with her doctor who had recently performed gall bladder surgery. Two weeks later, Plaintiff went to her primary care doctor Syed Hassan who referred her to chiropractor Dr. Mahmood who treated her for eight months. Plaintiff testified that she has difficulty driving, sleeping, showering and lifting.

At the time of her deposition, May 26, 2016, Plaintiff had not experienced pain in her neck and back for a year and reported pain only in her left shoulder, weekly, which "comes and goes." However, in her affidavit submitted with the opposition papers, she stated that she has restrictions of movement in her back and neck as she "cannot turn it fully in every direction," cannot lift anything heavy, cannot clean the house or do my chores without help, "due to the pain in my neck, back and left shoulder," "cannot reach high to grab something from the kitchen cabinets" without experiencing pain and has difficulty bending.

In New York, a party alleging negligence in a motor vehicle accident may only recover damages for pain and suffering if they have suffered a “serious injury” pursuant to Insurance Law § 5102(d) (Ins. Law § 5104[a]; *Pommells v Perez*, 4 NY3d 566 [2005]). A serious injury is defined as follows:

a personal injury which results in ... permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 90 days during the 1800 days immediately following the occurrence of the injury or impairment.

Ins. Law § 5102[d].

The issue of whether a claimed injury falls within the statutory definition of “serious injury” is a question of law for the courts which may decide the issue on a motion for summary judgment (*Licari v Elliott*, 57 NY2d 230 [1982]; *Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). A party moving for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039 [2016]).

To prevail on a motion for summary judgment, the defendant has the initial burden to present evidence in admissible form establishing that the plaintiff did not suffer a serious injury as a result of the accident (*Gaddy v Eyles*, 79 NY2d 955, 956–57 [1992]; *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]). “[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim” (*Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003] citing *Grossman v Wright*, 268 AD2d 79, 83–84 [2nd Dept 2000]). If this initial burden is met, the burden shifts to the plaintiff to demonstrate a triable issue of fact that a serious injury was sustained (*Id.* at 84). The evidence the plaintiff presents must be objective and must be based on

a recent examination of the plaintiff (*Id*). If a defendant fails to make the *prima facie* showing, summary judgment may be denied without considering the sufficiency of plaintiff's evidence to raise a triable issue of fact (*Vishevnik v Bouna*, 147 AD3d 657 [1st Dept 2017]).

In support of their motion, Defendants submitted medical reports by Dr. Jeffrey Passick, an orthopedic surgeon, and Dr. Naunihal Singh, M.D., a neurologist. Dr. Passick's report, which consisted of a complete physical examination and review of all medical records, reflected that Plaintiff had a normal range of motion in the cervical spine, lumbar spine, right and left shoulder with no objective evidence of any limitation resulting from the accident. In his report, however, Dr. Passick described claimant Mirza Benazir as a 23-year-old male, 5 feet 2 inches tall, weighing 147 pounds, with brown eyes and black hair. Throughout the report, Plaintiff is referred to as "Mr." or "he." In fact, Plaintiff is a woman. It is not up to this Court to assume that Dr. Passick's misidentification of Plaintiff's gender is simply a typographical or scrivener's error as it is just as likely that the range-of-motion measurements are also in error (*MTI/The Image Group, Inc. v Morning Studios, Inc.*, 248 AD2d 315 [1st Dept 1998]). As such, this court declines to consider Dr. Passick's report in determining this motion.

Additionally, Plaintiff was examined on July 11, 2016 by neurologist Dr. Singh whose sworn report also reflects that Plaintiff had full range of motion in her cervical and lumbar spine and shoulder joints, measured using a goniometer. According to Dr. Singh's report, Plaintiff states that she has occasional neck pain at night, radiating to her shoulders that is aggravated by sleeping, upper and lower back pain, left shoulder pain, left leg numbness, anxiety, depression and difficulty sleeping. Plaintiff had no cervical spine tenderness, paravertebral tenderness on the right or left side, no tenderness or spasm of the lumbar spine and no paraspinal tenderness on the right or left side. Dr. Singh further opined that Plaintiff had a normal neurological examination

with no need for further treatment. According to Dr. Singh, Plaintiff exhibited no neurological disability from the motor vehicle accident.

The findings of Dr. Singh establish *prima facie* that Plaintiff did not suffer serious injury within the meaning of Insurance Law §5102(d) as she has no significant limitation of a body function (*Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [2010]).

Thus, the burden shifts to Plaintiff to offer proof, in admissible form, that creates a material issue of fact requiring a trial (*Shaw v Looking Glass Associates, LP*, 8 AD3d 100 [1st Dept 2004]). The evidence plaintiff presents must be objective and based on a recent examination of the plaintiff (*Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011]) citing *Grossman v Wright*, 268 AD2d 79, 83–84 [2nd Dept 2000]).

To support her claim that she suffered a significant limitation, Plaintiff submitted the sworn report of radiologist Dr. Allen Rothpearl who supervised the taking of an MRI of Plaintiff's lumbar spine on December 22, 2013. Dr. Rothpearl found that the normal lordotic curvature of the lumbar spine is well maintained, and notes that in all spinal segments but one, no evidence of fracture, normal hydration, normal sagittal alignment and vertical disc height and no significant central or foraminal stenosis. Although a disc bulge was noted at the L4-5 level, Dr. Rothpearl failed to opine that the bulge was causally related to the accident.

Plaintiff also submitted an affidavit by her chiropractor, Mark S. Snyder, D.C, who evaluated Plaintiff on January 17, 2018. During his examination, Dr. Snyder noted spasm of the cervical and lumbar spine musculatures, positive foraminal compression, Kemp's test positive on the right and decreased sensation in the extremities based on the Pinwheel test. Range-of-motion (ROM) testing was performed through the use of a goniometer revealing up to a 33% ROM limitation in Plaintiff's cervical spine and up to a 30% ROM limitation in Plaintiff's lumbar spine. Dr. Snyder concluded that the October 18, 2013 motor vehicle accident was the cause of

Plaintiff's injuries and that limitation of motion of the cervical and lumbar spines was significant and permanent in nature.

Although bulging or herniated discs, standing alone, do not constitute a serious injury (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353, n. 4 [2002]), Plaintiff's proffered evidence as to her loss of ROM in her spine raises issues of material fact as to whether she sustained a permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system."

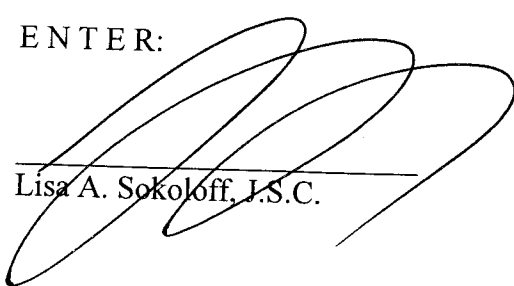
Accordingly, it is

ORDERED, that Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

Dated: September 26, 2018
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE