

Bazile v Abdushukurov
2018 NY Slip Op 32864(U)
November 13, 2018
Supreme Court, Kings County
Docket Number: 519684/2016
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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RACHELLE BAZILE,

Plaintiff,

-against-

**JAVOKHIR ABDUSHUKUROV and
AZAMAT ABDUSHUKUROV,**

Defendants.

DECISION / ORDER

Index No. 519684/2016

Motion Seq. No. 3

Date Submitted: 9/27/18

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>14-21</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>28-33, 36</u>
Reply Affirmation.....	<u>34,35</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident.

Defendants move for summary judgment dismissing the plaintiff's claims, pursuant to CPLR Rule 3212, on the ground that she failed to sustain a "serious injury" under Insurance Law §.5102(d).

On November 26, 2013, plaintiff was rear-ended while traveling on Emmons Avenue near the intersection of East 15th Street in Brooklyn, NY. Plaintiff, who was 28 years of old at the time, claims to have suffered injuries to her cervical spine and both shoulders as a result.

Defendants support their motion with an affirmation of counsel, the pleadings,

plaintiff's bill of particulars, plaintiff's EBT and an affirmed IME report from Dr. Andrew R. Miller, an orthopedist. Defendants have made a prima facie showing of their entitlement to summary judgment, based upon the affirmed report of the examining orthopedist, combined with plaintiff's EBT testimony.

Dr. Miller examined plaintiff on December 14, 2017, four years after the accident. He states that plaintiff informed him that she had physical therapy for a while, three times per week and that it was of no benefit. She reported continuing pain in her neck and shoulders, radiating to the upper extremities, and pain in her left arm and left hand. At the time of the exam, plaintiff had returned to work full time as a nurse. Dr. Miller examined and tested plaintiff's spine and shoulders, as well as her left hand. He found no swelling, tenderness or muscle spasm. Her range of motion was normal in all tests. His diagnosis is that plaintiff had resolved sprains to her cervical spine and shoulders, with no disability or need for further treatment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]).

With regard to the 90/180 day category of injury, plaintiff testified at her EBT, taken three years after the accident, that the accident took place on a Tuesday, she went to the emergency room and was discharged the same day, and her next work day, as a nurse in a hospital, was on Thursday, and she went to work [Page 54 Line 7]. When asked if she missed any time from work as a result of the accident, she responded "I don't remember" [Page 54 Line 13]. She testified that she went to physical therapy for five months, first three times a week, then fewer, then she stopped. She has not had any treatment since then, which was sometime in March of 2014.

Plaintiff opposes the motion with an attorney's affirmation, an affidavit from the

plaintiff, an affirmation from Dr. Yura Stoly, an uncertified police report and an MRI report of an MRI of her cervical spine on December 19, 2013, which is not in admissible form. After defendants e-filed their Reply affirmation, plaintiff e-filed an affirmation from the radiologist who read the MRI, with a cover letter asking the court to permit it to be deemed part of the opposition, as he did not receive it back from the doctor in time to include it, or if he could submit it as a sur-reply. Defendants then e-filed a Supplemental Reply to address it, which plaintiff did not object to, so it is deemed included in the plaintiff's papers in opposition. Plaintiff's counsel did not e-file the letter or the affirmation, which the court has now e-filed so the record is complete. Therein, he states that he is a board-certified radiologist and that he read the MRI. He does not state what his findings were, but he annexes a copy of the MRI report. It states that plaintiff's MRI showed a posterior disc bulge at C5-C6, indenting the ventral thecal sac.

The court notes that "a defendant who submits admissible proof that a plaintiff has a full range of motion and that he or she suffers from no disabilities has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), despite the existence of an MRI report which shows herniated or bulging discs" (*Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 30 [2d Dept 2005]; accord *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 50 [2d Dept 2005]; see also *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 1009 [2d Dept 2009] ["The mere existence of a herniated or bulging disc, or even a tear in a tendon, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration"]). Here, defendants' doctor found plaintiff's range of motion in the cervical spine, both shoulders and left hand to be

completely normal.

The affirmation from Dr. Yura Stoly states that plaintiff's treating doctor, Boris Kleyman, of Harden Street Medical, P.C. has passed away, and she has taken over his practice in the same location. She states that plaintiff first went to see Dr. Kleyman on December 5, 2013, and was under his care for approximately seven months. She examined plaintiff herself on June 19, 2018, and she reviewed the plaintiff's chart in the office. Dr. Stoly states that plaintiff reached maximum medical improvement when she stopped physical therapy. She states that the range of motion in plaintiff's cervical spine is still not normal, although it is better than it was in the weeks following the accident. Dr. Stoly indicates that plaintiff's cervical extension was 40 degrees, when 60 degrees is normal, and her rotation was 60 degrees when 80 degrees is normal. The other tests indicate similarly restricted range of motion findings in her cervical spine. Dr. Stoly did not test plaintiff's shoulders, but states that she observed that plaintiff moved with difficulty and plaintiff reported to her that her cervical spine "spasms" and the pain radiates into her left shoulder and left arm. She concludes that plaintiff's injuries are permanent, due to the length of time that has passed, and opines that plaintiff's condition will not improve but will probably worsen with time.

Plaintiff has overcome the motion and raised an issue of fact sufficient to defeat summary judgment. The affirmation of Dr. Stoly who examined plaintiff in June of 2018 indicates significant restrictions in the range of motion of her cervical spine. To the extent that defendants object that Dr. Stoly is "bootstrapping" Dr. Kleyman's findings improperly, as his findings need to also be in admissible form, the court finds that the death of a treating doctor is an acceptable excuse for the absence of an affirmation.

See *Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992] ["plaintiff's opposition, to the extent that it relies solely on the findings of the plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished"].

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: November 13, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court