

Fergus v Baldwin

2019 NY Slip Op 31612(U)

June 6, 2019

Supreme Court, Kings County

Docket Number: 517502/17

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

ERICKA FERGUS,

Plaintiff,

-against-

YOEL BALDWIN and TINA M. PEREZ,

Defendants.

DECISION / ORDER

Index No. 517502/17

Motion Seq. No. 1

Date Submitted: 4/4/19

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>8-13</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>19-26</u>
Reply Affirmation.....	<u>45</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. Plaintiff Ericka Fergus was hit by a motor vehicle registered to defendant Yoel Baldwin and operated by defendant Tina M. Perez on January 31, 2017, while she was crossing Blake Avenue at the intersection with Thomas S. Boyland Street in Brooklyn, New York. Plaintiff was removed from the scene in an ambulance and taken to the Brookdale Hospital emergency room, where she was evaluated and released. At the time of the accident, plaintiff was 49 years old.

In her bill of particulars, plaintiff alleges that as a result of the accident, she sustained a concussion with post-concussion syndrome, disc herniations in her cervical and lumbar spine, as well as injuries to many other parts of her body, including both of

her shoulders and to her left hip. The bill of particulars also claims that plaintiff was confined to bed and home for approximately two weeks and she missed one week of school.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff merely had sprains and strains, which have resolved with no continuing disability. Movants support their motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript and an affirmed IME report from their examining orthopedist, Willie E. Thompson M.D.

Dr. Thompson examined plaintiff on June 30, 2018, nineteen months after the accident. He also reviewed many of plaintiff's medical records. At the time of his exam, plaintiff had complaints of pain in her neck, mid back, low back, bilateral shoulders, left elbow, left wrist, left knee, left ankle, and left foot. Dr. Thompson's range of motion testing of plaintiff's neck, back and shoulders, left hip and left knee produced completely normal results, with no spasm or swelling. He concludes that plaintiff suffered sprains and strains as a result of the accident, which have all resolved and she is capable of working without any restrictions.

The court finds that the defendants have made out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a permanent loss of use, a permanent consequential limitation or a significant limitation of use within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Further, while plaintiff testified at her examination before trial that because of her injuries she could no longer braid hair, which she had been paid for, that she was forced to use a shower chair and to buy a

new mattress, the court must conclude, based upon her admission that as a result of her injuries, she was confined to her home for only three days and missed only a week of college (Pages 49-50, 67), that plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the accident (see *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

Plaintiff opposes the motion with an affirmation from counsel, an affidavit as well as records from her treating chiropractor Scott H. Leist, affirmed MRI reports, certified hospital records and certified records from other medical providers.

Scott H. Leist's affidavit, dated December 14, 2018, states that he is a chiropractor and first saw plaintiff on February 22, 2017 for the injuries she sustained in the subject accident, which took place three weeks earlier. On his initial exam, he found restrictions in plaintiff's range of motion in her cervical and lumbar spine as well as many positive test results as a result of his testing. After treating plaintiff for a few months, MRIs were ordered and revealed several disc herniations in plaintiff's cervical spine, as well as a bulging disc in her lumbar spine. Dr. Leist last examined plaintiff on November 14, 2018, when he noted that she had muscle spasms in her cervical and lumbar spine, tender trigger points along the Latissimus dorsi, the Jackson compression test was positive for neck pain in neutral and right lateral flexion, and the cervical distraction test was positive on the right side. The Soto Hall test was positive on the right side, Lindner's test was positive on the right side, the straight leg raise test was positive on the right side, the La Segue rebound test was positive on the right side, the Nachlas test was positive on the right side, the Kemps test was positive on the right

side and the Braggards test was positive on the right side. He also found plaintiff had a decreased range of motion in her cervical and lumbar spine. Dr. Leist opines, based upon the history of the patient and his examination of her medical records and diagnostic tests, including the MRIs, that plaintiff's injuries were caused by the motor vehicle accident on January 31, 2017. He points out that plaintiff had no prior history of any injury to her cervical or lumbosacral spine and that the MRIs taken of her cervical and lumbar spine showed no evidence of any pre-existing injury. Further, he opines that plaintiff has an unfavorable prognosis in light of her persistent complaints of pain almost two years after the accident, when combined with his findings on the diagnostic tests performed. He concludes that her injuries are permanent and progressive, that she will never regain full range of motion in her cervical or lumbar spine, and it is doubtful that her range of motion will improve further.

The court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether she has sustained a "serious injury" as a result of the accident. Plaintiff has raised a "battle of the experts" sufficient to overcome the motion (*see Burke v I Om Atif Hacking Corp.*, 146 AD3d 747 [2d Dept 2017]; *Hamdan v Taggart*, 154 AD3d 743 [2d Dept 2017]). While Dr. Leist has not cited the source of the normal ranges of motion he utilized, or the means he used to measure plaintiff's range of motion, the court finds that he has nevertheless set forth objective and quantified findings, with sufficient detail, to raise an issue of fact (*cf. Madatova v Madatov*, 27 AD3d 531 [2d Dept 2006] ["report of the defendant's examining orthopedist merely stated, concerning range of motion testing, that shoulder movements were "intact" when testing abduction, forward flexion, and internal and external rotation. The defendant's

examining orthopedist did not quantify these results or compare them to the normal range of motion"]; *McCauley v Vandina*, 21 AD3d 938 [2d Dept 2005] ["Dr. Miller nowhere defined or quantified the extent of the appellant's limitations, nor did he set forth the objective tests he used to arrive at this opinion. In light of this finding, the respondents did not meet their initial burden of showing an entitlement to summary judgment on the ground that the appellant did not sustain a serious injury"]; *Mastaccioula v Sciarra*, 11 AD3d 434, 435 [2d Dept 2004] ["While the physician concluded that the plaintiff had a "moderate disability," he failed to set forth the tests that he used to arrive at this conclusion, or to quantify the results of those tests"].

Accordingly it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: June 6, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**