Hernandez v Navarro
2019 NY Slip Op 32268(U)
June 6, 2019
Supreme Court, Bronx County
Docket Number: 301368/2016
Judge: Mary Ann Brigantti

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____
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CANDIDA HERNANDEZ — Index №. 301368/2016

-against- — **Hon. MARY ANN BRIGANTTI**

ANDRES NAVARRO and QLR EIGHT INC. — Justice Supreme Court

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The following papers numbered 1 to _____ were read on this motion (Seq. No. 2)
for __ **SUMMARY JUDGMENT** __ noticed on __ March 6, 2018 __.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits (Cross-Motions)	No(s).
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers and oral argument, the defendants Andres Navarro and QLR Eight Inc., (collectively, "Defendants"), move for summary judgment dismissing the complaint of the plaintiff Candida Hernandez ("Plaintiff") for her failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the motion. Separately, Plaintiff cross-moves for summary judgment on the issue of Defendants' liability. The cross-motion is unopposed.

Serious Injury

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v Go On Time Car Serv.*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommells v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this matter, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in a "permanent consequential" or a "significant" limitation, or a fracture, as a result of this accident. Defendants accomplished this by submitting the sworn

reports of radiologist Dr. Michael Setton, who reviewed Plaintiff's cervical and lumbar spine, right knee, and right shoulder MRIs, each taken approximately two to three (2-3) months after the subject accident, and opined that the MRIs showed non-traumatic degenerative changes unrelated to this accident (*see Lee v Lippman*, 136 A.D.3d 411, 412 [1st Dept 2016]; *Orellana v Roboris Cab Corp.*, 135 A.D.3d 607 [1st Dept 2016]). Defendants also submitted the IME report of neurologist Dr. Robert S. April, who found that Plaintiff had no neurological injury, disability, or permanency in her upper limbs (right shoulder) and lower back. While Dr. April did not compare Plaintiff's range of motion values to normal values for these body parts, he nevertheless examined Plaintiff and opined that there was no objective evidence of injury after administering diagnostic tests (*Rodriguez v Konate*, 161 A.D.3d 565, 566 [1st Dept 2018]; *Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]). With respect to Plaintiff's neck (cervical spine), Dr. April found that Plaintiff had a twenty (20) degree range of motion limitation. While such a finding would be considered a significant range of motion limitation, Dr. April concluded, just as Dr. Setton, that Plaintiff suffered no causally related cervical spine, right shoulder, and lower back injury as a result of this accident (*see Fathi v Sodhi*, 146 A.D.3d 445, 446 [1st Dept 2017]).

Defendants further submitted the IME report of orthopedist Dr. Edward A. Toriello, in which he identified and described the objective medical tests employed in measuring Plaintiff's ranges of motion. Dr. Toriello's report found that Plaintiff had normal ranges of motion in her thoracic spine, right elbow, right wrist, right hand, right ankle, right foot, and left knee upon a physical examination, and found negative clinical results (*Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]). The finding of one limitation in one plane of Plaintiff's lumbar spine does not defeat Defendants' prima facie showing (*see Alverio v Martinez*, 160 A.D.3d 454 [1st Dept 2018]). With respect to Plaintiff's cervical spine, right shoulder, and right knee, Dr. Toriello found multiple range of motion limitations. However, as previously noted, such findings of significant range of motion limitations do not defeat Defendants' prima facie showing as Plaintiff suffered no causally related cervical spine, right shoulder, and right knee injuries as a result of this accident (*see Fathi v Sodhi*, 146 A.D.3d 445, 446 [1st Dept 2017]). Furthermore, Dr. Toriello concluded that Plaintiff's alleged right shoulder and right knee injuries would not have required surgical intervention.

Therefore, Defendants have established that Plaintiff's lumbar and thoracic spine, right elbow, right wrist, right hand, right ankle, right foot, and left knee injuries have resolved, and therefore, do not constitute "permanent consequential" or "significant limitation" category of injuries (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436, 436-437 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendants have demonstrated that Plaintiff's alleged cervical and lumbar spine, right shoulder, and right knee injuries are unrelated to this accident, thus, shifting the burden to Plaintiff with respect to those body parts to adequately address the issue of causation (*Tejada*, 166 A.D.3d at 437; *Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

In opposition to the motion, Plaintiff has raised an issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation to her cervical and lumbar spine, right shoulder, and right knee as a result of this accident. Plaintiff accomplished this by submitting the report of radiologist Dr. Steve B. Losik Solomon who reviewed Plaintiff's cervical and lumbar spine, right shoulder, and right knee MRIs, each taken approximately two to three (2-3) months after the subject accident. Upon review, Dr. Losik found that the cervical and lumbar spine MRIs revealed multiple bulges, the right shoulder MRI revealed a partial tear, and the right knee MRI revealed a tear.

Plaintiff also submitted the affirmed report of surgeon Dr. Maxim Tyorkin, who first evaluated Plaintiff on September 24, 2015, approximately four (4) months after the subject accident, and several more times throughout 2015, and found, among other things, pain and range of motion limitations in Plaintiff's right shoulder and right knee, and directly related those injuries to the subject accident (*see Anthony P. v Abdou*, 140 A.D.3d 441, 442[1st Dept 2016]). Dr. Tyorkin eventually performed right shoulder and right knee arthroscopic surgery on October 27, 2015, and December 8, 2015, respectively (*see Neil v Tidani*, 126 A.D.3d 581, 581-582 [1st Dept 2015]; *Collazo v Anderson*, 103 A.D.3d 527, 528 [1st Dept 2013]). Finally, Plaintiff submitted the affirmed report of Dr. Gamil Kostandy, who first evaluated Plaintiff on June 1, 2015, approximately three (3) weeks after the subject accident, and most recently on June 2, 2018, and consistently found, among other things, pain and range of motion limitations in Plaintiff's cervical and lumbar spine, and right shoulder, and right knee, and directly related those injuries to the subject accident (*id.*).

Although Plaintiff's doctors did not directly address the issue of degeneration, by ascribing Plaintiff's injuries to a different, yet equally plausible, explanation — the accident — their opinions were sufficient to raise an issue of fact (*Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]). Furthermore, Plaintiff submitted an affidavit wherein she stated that prior to this accident she "never suffered" from any injury to her cervical and lumbar spine, right knee, and right shoulder (*Biascochea v Boves*, 93 A.D.3d 548 [1st Dept 2012]). Thus, the foregoing submissions sufficiently raise issues of fact as to whether Plaintiff's claimed cervical and lumbar spine, right knee, and right shoulder injuries are causally related to the subject accident, and whether they are "permanent" or "significant" in nature (*Hayes v Gaceur*, 162 A.D.3d 437, 438 [1st Dept 2018], citing *Perl v. Meher*, 17 N.Y.3d 208, 218 [2011]).

As there is no admissible objective, quantitative evidence, with respect to Plaintiff's thoracic spine, right elbow, right wrist, right hand, right ankle, right foot, and left knee (*see Gorden v. Tibulcio*, 50 A.D.3d 460, 463 [1st Dept 2008]), she has failed to refute the findings of Defendants' experts that these allegedly injured body parts have resolved (*see Vasquez v Almanzar*, 107 A.D.3d 538, 539-540 [1st Dept 2013]; *Townes v. Harlem Group, Inc.*, 82 A.D.3d 583, 583-584 [1st Dept 2011]; *compare Holmes v Brini Tr. Inc.*, 123 A.D.3d 628, 628-629 [1st Dept 2014]). Nevertheless, if the trier of fact determines that Plaintiff

sustained a serious injury to her cervical or lumbar spine, right knee, or right shoulder injuries at trial, Plaintiff may recover damages for her thoracic spine, right elbow, right wrist, right hand, right ankle, right foot, and left knee injuries even though they do not satisfy the serious injury threshold (*Bonilla v Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept 2017], citing *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 549-50 [1st Dept. 2010]).

The Court notes that Plaintiff's uncertified and unsworn hospital records, and unsworn medical report from Dr. Jean-Baptise Simeon will not be considered on this motion as they are not in admissible form (*see Ramirez v Elias-Tejada*, 168 A.D.3d 401, 405 [1st Dept 2019]; *Barner v Shahid*, 73 A.D.3d 593, 594 [1st Dept 2010]).

Turning to the alleged "90/180-day" injury, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Plaintiff's own deposition testimony wherein she admitted that she missed "three weeks" of work as a result of the subject accident (Pl. EBT at 67). This demonstrates that Plaintiff has no viable "90/180-day" injury claim (*see Lindo v. Brett*, 149 A.D.3d 459, 463 [1st Dept. 2017]; *Frias v. Son Tien Liu*, 107 A.D.3d 589 [1st Dept. 2013]).

Liability

Having found that Plaintiff raised issues of fact as to whether she met the threshold requirement of serious injury, the Court now turns to Plaintiff's cross-motion seeking summary judgment on the issue of Defendants' liability.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident" (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010], citing *Tutrani v County of Suffolk*, 10 N.Y.3d 906, 908 [2008]; *see also Bajrami v Twinkle Cab Corp.*, 147 A.D.3d 649 [1st Dept 2017]).

In this case, Plaintiff established her prima facie entitlement to summary judgment. In support of her motion, Plaintiff submitted an affidavit wherein she stated that as she was a "rear seat passenger" in a taxi traveling along the Cross Bronx Expressway, at or near its intersection with Arthur Avenue, in the Bronx, the driver of her vehicle — who "was on his cell phone" — struck the rear of another vehicle. Accordingly, Plaintiff has established her prima facie entitlement to summary judgment as the vehicle in which she was a passenger stuck another vehicle in the rear (*see Cabrera*, 72 A.D.3d 553 [1st Dept 2010]; *De La Cruz v.*

Ock Wee Leong, 16 A.D.3d 199, 200 [1st Dept 2005]). The burden therefore shifted to Defendants to provide evidence of a "nonnegligent explanation for the accident, or a nonnegligent reason for [their] failure to maintain a safe distance between [their] car and the lead car" (*Mullen v. Rigor*, 8 A.D. 3d. 104 [1st Dept. 2004], citing *Jean v. Xu*, 288 A.D.2d 62 [1st Dept. 2001], *and Mitchell v. Gonzalez*, 269 A.D.2d 250, 251 [1st Dept 2000]).

As Defendants have not opposed the motion, they have failed to raise any triable issue of fact. These conclusions are reached without considering the uncertified police accident report as "it recites hearsay and was prepared by an officer who had not observed the accident" (*Roman v Cabrera*, 113 A.D.3d 541, 542 [1st Dept 2014], citing *Singh v Stair*, 106 A.D.3d 632, 633 [1st Dept 2013]).

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted to the extent that Plaintiff's claim that she sustained a "90/180 day" injury as a result of this accident is dismissed, and it is further,

ORDERED, that Plaintiff's claim that she sustained a "serious injury" to her thoracic spine, right elbow, right wrist, right hand, right ankle, right foot, and left knee as a result of this accident is dismissed, and it is further,

ORDERED, that the remaining branches of Defendants' motion are denied, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendants' liability is granted on default.

This constitutes the decision and order of this Court.

Dated: 6/6/19

Hon. Mary Ann Brigantti **J.S.C.**

Hon. Mary Ann Brigantti

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE			
2. MOTION IS.....	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART	☒ OTHER	
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE		
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT			