

Wilson v New York City Tr. Auth.

2020 NY Slip Op 31902(U)

June 12, 2020

Supreme Court, New York County

Docket Number: 157811/2016

Judge: Lisa A. Sokoloff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

-----X
DENISE WILSON,

Index No. 157811/2016

Plaintiff,

Mot.Seq. 1

-against-

NEW YORK CITY TRANSIT AUTHORITY

DECISION & ORDER

Defendants.

-----X

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

Papers	Numbered
Defendant's Motion / Affirmation	<u>11-21</u>
Plaintiff's Opposition / Affirmation	<u>28-33</u>
Defendant's Affirmation in Reply	<u>37</u>

LISA SOKOLOFF, J.:

At oral argument, the parties agreed that plaintiff alleges to have sustained personal injuries on November 19, 2015 at 12:50pm, while a passenger on a Transit bus that attempted to make a right turn onto West 135th Street when it struck a parked Transit bus. She was intending to exit the bus at the stop and fell as the result of the collision.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain serious injuries as required under section 5102 (d) of the Insurance Law. Defendant submits a copy of the Bill of Particulars. In this document, plaintiff describes in detail her alleged injuries resulting from the accident which include: C 2-3 nonfocal annular bulge resulting in a minor epidural defect; C 3-4 broad annular bulge with superimposed focal central disc herniation, effacing the central cubarachnoid space; C 4-5, C 5-6 broad disc osteophyte, resulting in prominent epidural defects, bilateral foraminal narrowing both levels; right ankle injury, right knee injury, right foot injury and head injury. Elsewhere in the Bill of Particulars, plaintiff affirmed that it was impossible to

state with reasonable care an exact division of time as to when she was confined to bed and home except for her trips related to medical treatment and attention.

Defendant submits plaintiff's testimony at a General Municipal Law 50-1 (h) hearing. Plaintiff testified as to the effect of her injuries on her usual and customary daily activities. She stated that before the accident she would run and jog on a regular basis, and that after the accident she could no longer do that. Defendant also submits plaintiff's deposition testimony. While discussing her condition subsequent to her medical treatment, plaintiff complained of ankle pain on occasion and declared that she had difficulty bending down due to neck and back pain.

Defendant also submits the sworn report of Dr. Jeffrey Passak, an orthopedic surgeon, who examined plaintiff on behalf of defendant on November 15, 2017. He conducted range of motion tests on plaintiff's cervical spine, right knee, right ankle and foot, left knee and left ankle and foot. His report provides the results of his tests, which indicate overall normal ranges of motion. The report specifically states as follows: "cervical sprain strain, resolved; right knee contusion, resolved; right ankle /foot contusion, resolved." Dr. Passak concludes that plaintiff has overcome her injuries and needs no further therapy.

Defendants contends that the evidence conclusively establishes that plaintiff has not met the serious injury threshold in that she has not suffered from any permanent or significant limitation of a body part nor has she demonstrated any sufficient or specific proof that her accident-related injuries prevented her from performing her daily activities during the 90 to 180 days immediately following the date of the accident.

In opposition to this motion, plaintiff submits evidence which she claims presents an issue of fact sufficient to mandate denial of the motion. This evidence includes a copy

of the Police Accident Report, which states that plaintiff was taken by ambulance from the scene of the accident to Mount Sinai Hospital, where she registered complaints of head, neck, right leg and foot pain. Plaintiff submits testimony from her 50-1 (h) hearing, where she testified that she had an X ray of her right foot at Mount Sinai Hospital revealed a fracture. Plaintiff submits a copy of an MRI report on plaintiff's cervical spine, dated February 8, 2016, which reveals herniation and epidural defects.

Plaintiff also submits an affirmation from Dr. Aric Hausknecht, a neurologist who conducted a range of motion examination on plaintiff on June 5, 2019 and an EMG on plaintiff on June 6, 2019. In his affirmation, Dr. Hausknecht refers to a Dr. Silver, who Who treated plaintiff both pre and post-accident. Upon examining plaintiff, who complained of neck and right ankle pain, Dr. Silver opined that plaintiff had a cervical radiculopathy. Dr. Hausknecht states that plaintiff underwent some trigger point injections under Dr. Silver's supervision.

Dr. Hausknecht's range of motion tests were conducted on plaintiff's cervical spine. The results indicate limitation of motion in lateral flexion, rotation and extension. Dr. Hausknecht affirms that there is objective evidence of cervical spine impairment. He concludes that this impairment is of a permanent nature and causally connected to the accident.

Dr. Hausknecht's EMG report, the results of a procedure performed after the range of motion examination, reveals a right C 5-6 cervical radiculopathy.

Plaintiff argues that the objective findings of a qualified physician with respect to her cervical injuries prevent the granting of defendant's motion.

In reply, defendant argues that some of the evidence is not relevant, like the Police Accident Report. Defendant contends that the references to Dr. Silver should be

disregarded unless an affirmation from him is provided to attest to the validity of his assertions. Defendant also contends that the range of motion test submitted in opposition to their physician's test fails to demonstrate a serious injury. According to defendant, medical examination results that indicate a mild or minor limitation of motion do not constitute proof of a serious injury for 5102 (d) purposes. Defendant raises a point that plaintiff's physician mentioned her degenerative condition in his affirmation, which questions the extent of plaintiff's injuries as it relates to the accident.

Defendant argues that in her opposition papers, plaintiff failed to provide any further proof that her injuries prevented her from performing most of her customary daily activities within the allotted period of time provided by section 5102 (d). Defendant claims that plaintiff failed to offer any issue of fact regarding a serious injury in this case, and that summary judgment must be granted.

The issue for this court is to determine whether plaintiff, in a negligence action to recover damages for personal injuries sustained in a motor vehicle accident, has established a prima facie case of sustaining a "serious injury." If plaintiff suffered no serious injury as defined by section 5102 (d) of the Insurance Law, then plaintiff has no claim to assert (see *Licari v Elliott*, 57 NY2d 230, 234 [1982]).

"Serious injury" is clearly defined in section 5102 (d), in part, as that: which results in death; dismemberment; significant loss of use of a body; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a use of a body organ or member; significant limitation of use of a body function or system; 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 180 days immediately following the occurrence of the injury or impairment.

At oral argument plaintiff conceded that she was not prevented from her ordinary and customary activities for 90 out of the first 180 days after the accident. Accordingly, this basis for recovery under the statute is dismissed.

In order to prevail, the movant must establish plaintiff's injuries are not serious within the meaning of section 5102 (d) by submitting the affirmations or affidavits of medical experts who examined plaintiff and conclude that no objective medical findings support plaintiff's claims. If this burden is met, the burden shifts to plaintiff to demonstrate an issue of fact that a serious injury was sustained (see *Gaddy v Eyler*, 79 NY2d 955, 955 [1992]). In order to prove the extent or degree of physical limitation, an expert may designate a numerical percentage of plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compares plaintiff's limitations to the normal use of the affected body system or function (see *Toure v Avis Rent-a-Car Systems*, 98 NY2d 345, 346 [2002]).

Defendant relies upon Dr. Passak, who reports that while examining plaintiff, he found no spasms and no tenderness upon palpation. His range of motion report on her cervical spine is as follows: flexion: normal range 60 degrees, plaintiff's range 60 degrees; extension: normal range 60 degrees, plaintiff's range 60 degrees; rotation to right: normal range 80 degrees, plaintiff's range 80 degrees; rotation to left: normal range 80 degrees, plaintiff's range 80 degrees; lateral flexion-right: normal range 45 degrees, plaintiff's range 45 degrees; lateral flexion-left: normal range 45 degrees, plaintiff's range 45 degrees. The results indicate that, regarding her cervical spine, plaintiff's range of motion is normal, and there is no sign of a serious or even mild limitation.

In contrast, Dr. Hausknecht has examined the MRI report and conducted his own range of motion test on plaintiff's cervical spine about 18 months after Dr. Passak's

examination. The results are as follows: Left lateral flexion: normal range 50 degrees, plaintiff's range 25 degrees; right lateral flexion: normal range 50 degrees, plaintiff's range 30 degrees; left rotation: normal range 80 degrees, plaintiff's range 65 degrees; right rotation: normal range 80 degrees, plaintiff's range 70 degrees; forward flexion: normal range 60 degrees, plaintiff's range 60 degrees; extension: normal range 60 degrees, plaintiff's range 35 degrees. Dr. Hausknecht affirms that plaintiff suffered a permanent significant limitation as a result of the accident.

A minimal restriction of a range of motion is considered minor, not significant or serious (see *Licari v Elliott*, 57 NY2d at 236).

Dr. Hausknecht also affirms that upon examining plaintiff, he clearly found derangement on her C 2-3 disc bulge, C 3-4 disc herniation, C 4-5 hard disc complex and C 5-6 hard disc complex. He refers to an aggravation of an underlying degenerate joint disease. Dr. Hausknecht does not relate this degenerate condition to the cervical spine injuries in his affirmation, raising a question as to causation.

Upon analyzing the parties' evidence, the court finds that plaintiff's physician has identified limitations of motion pertaining to plaintiff's left lateral flexion and extension which could constitute a serious restriction. However, in his report, he failed to adequately make a distinction between plaintiff's alleged accident-related injuries and her underlying degenerative conditions of the spine. Thus, the matter of a pre-existing condition is not fully addressed by plaintiff and no effort was made to repudiate it as a factor of plaintiff's present condition (see, *Campbell v Drammeh*, 161 AD3d 584[1 Dept. 2018]). The report was also inadequate to raise a question of fact in that it failed to address the gap in treatment between plaintiff's final visit with Dr. Silver and her examination with Dr. Hausknecht (*Pommels v Perez*, 4 NY3d 566 [2005]). For those reasons, the court

concludes that plaintiff has not raised a sufficient issue of fact to preclude the granting of summary judgment with regard to plaintiff's alleged back injuries.

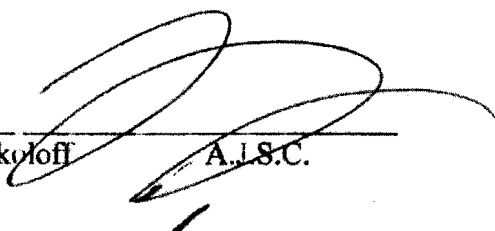
In opposition to defendant's motion, plaintiff points to her testimony that immediately post-accident she was diagnosed with a fracture of the right foot. The movant failed to address this issue in its reply. Facts in an adversary's papers which are not controverted may be deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539,543 [1975]). As such, this claim of a fracture, which is a serious injury, raises a question of fact sufficient to defeat in part defendant's motion and is preserved for trial.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent that all plaintiff's claims of injury except the fracture of the foot are dismissed with prejudice.

Dated: June 12, 2020

ENTER:



Lisa A. Sokoloff A.J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE