Lim v Baldeo
2020 NY Slip Op 32483(U)
June 16, 2020
Supreme Court, Bronx County
Docket Number: 23551/2017E
Judge: Mary Ann Brigantti

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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REBECCA LIM,

Plaintiff,

-against-

DEODATH BALDEO, ADI HACKING CORP., and "JOHN DOE,"

Defendants.
----------x

Index No. 23551/2017E
Motion Calendar No. 01
Motion Date: 10/03/19

Decision and Order
Present:
Hon. Brigantti

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion to dismiss the complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Exhibits Thereto	**1**
Affirmation in Opposition and Exhibits Thereto...	**2**
Reply Affirmation.....	**3**

Motion decided as follows: The defendants DEODATH BALDEO and ADI HACKING CORP. (collectively, "defendants") move for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint filed by the plaintiff REBECCA LIM ("plaintiff") against the defendants for the plaintiff's failure to meet the serious injury threshold requirement of section 5102 (d) of New York Insurance Law.

In this summary judgment motion, defendants argue that plaintiff did not sustain a serious injury within the meaning in New York Insurance Law section 5102 (d). In support of their contention, defendants submitted the affirmation of radiologist Dr. Michael Setton, who reviewed the February 7, 2017, pre-surgery MRI of plaintiff's right knee. According to Dr. Setton, other than minimal joint fluid with a miniscule cyst, the MRI reflected no abnormality in the knee. Dr. Setton opined that plaintiff's cruciate and collateral ligaments were intact and that there was no traumatic injury related to the subject accident.

In further support of the motion, defendants submitted an affirmation of orthopedist Dr. Thomas P. Nipper. On January 17, 2018, Dr. Nipper examined plaintiff, who complained only of pain to her right knee. Upon examination, Dr. Nipper found that plaintiff had normal range of motion in her right knee. Dr. Nipper also found that Plaintiff, who testified that she injured her neck and back as a result of this accident (Pl. EBT at 57), had normal range of motion in her cervical and lumbar spine. Although defendants did not submit any evidentiary proof with respect to plaintiff's alleged shoulder or left foot injuries, defendants were not required to present medical

evidence with respect to those body parts because plaintiff made no complaints about those body parts when Dr. Nipper examined her (*Fludd v Pena*, 122 A.D.3d 436 [1st Dept 2014]). Moreover, plaintiff testified at her deposition that she only injured her right knee, neck, and back as a result of the subject accident – which defeats her claims with respect to her shoulders and left foot (Pl. EBT at 57; *see also Fludd*, 122 A.D.3d 436, citing *Thomas v City of New York*, 99 A.D.3d 580 [1st Dept 2012], *lv denied* 22 N.Y.3d 857 [2013]). Accordingly, defendants' submissions established that plaintiff's injuries to her right knee, cervical, and lumbar spine, have resolved, and do not constitute either a "permanent consequential" or "significant limitation" category of injury (*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 demonstrated that plaintiff's alleged right knee injury is unrelated to this accident, thus, shifting the burden to plaintiff to adequately address the issue of causation (*see Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020], citing *Blake v Cadet*, 175 A.D.3d 1199, 1199-1200 [1st Dept 2019]).

The Court notes that while none of defendants' doctors examined plaintiff's head for her alleged headaches, both the Court of Appeals and First Department have held that headaches do not qualify as a "serious injury" (*see Licari v Elliott*, 57 N.Y.2d 230, 239 [1982] ["We do not believe the subjective quality of an ordinary headache falls within the objective verbal definition of serious injury"]; *Ceruti v Abernathy*, 285 A.D.2d 386 [1st Dept 2001] ["headaches--do not constitute 'permanent loss of use of a body organ, member, function or system' or 'significant limitation of use of a body function or system' under Insurance Law § 5102 (d)"]).

In opposition to the motion, plaintiff submitted the affirmed report of Dr. Fred Lee, who recently examined plaintiff on November 19, 2019. Dr. Lee reviewed plaintiff's medical records, including her right knee arthroscopic surgery which took place approximately two months after the subject accident on March 10, 2017. Dr. Lee concluded that plaintiff's right knee injury was causally related to the subject accident. However, Dr. Lee only found a minimal five-degree limitation in plaintiff's right knee, which is insufficient to meet the category of a "permanent consequential" or "significant limitation."

Nevertheless, plaintiff additionally submitted the affirmed no-fault IME of Dr. David Manevitz, who examined plaintiff within approximately three months of the subject accident. Upon examination, Dr. Manevitz found, among other things, pain and significant range of motion limitations in plaintiff's right knee, passively and actively. While Dr. Manevitz stated that these measurements were "self-limited," he further notes that he did not perform Lachman's anterior drawer test or McMurray's test, "due to pain," and he concluded that plaintiff was capable of performing only light duty with minimal standing or walking. He diagnosed Plaintiff with, among other things, "resolving" status post-right knee surgery, and he noted the necessity for further treatment. This report thus indicates that Plaintiff had continuing limitations in the knee following surgery, months after the accident, which raises an issue of fact as to whether she suffered a "significant limitation" as a result of the subject accident (*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]; *Salman*

v Rosario, 87 A.D.3d 482, 484 [1st Dept 2011]; *see also Vasquez v Almanzar*, 107 A.D.3d 538, 539-540 [1st Dept 2013]; *Holmes v Brini Tr. Inc.*, 123 A.D.3d 628, 628-629 [1st Dept 2014] [significant limitations found "six months following" accident]; *Bianchi*, 179 A.D.3d 567 [plaintiff raised issue of fact as to "significant limitation" but not "permanent consequential" limitation due to gap in treatment]; *compare Hayes v Gaceur*, 162 A.D.3d 437, 438 [1st Dept 2018], citing *Perl v Meher*, 17 N.Y.3d 208, 218 [2011]). If the trier of fact determines that Plaintiff sustained a serious injury to her right knee at trial, plaintiff may recover damages for her cervical and lumbar spine even though those body parts 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, 549-550 [1st Dept 2010]).

Although Dr. Lee did not directly address the issue of plaintiff's alleged right knee degeneration, by ascribing plaintiff's injuries to a different, yet equally plausible, explanation — the accident — Dr. Lee's opinion was sufficient to raise an issue of fact as to causation (*Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018] [citations omitted]).

Contrary to defendants' contention, plaintiff's so-called gap in treatment beginning approximately one year after the subject accident is not dispositive with respect to whether plaintiff suffered a "significant limitation" as a result of the subject accident (*see Morales v Cabral*, 177 A.D.3d 556, 557-558 [1st Dept 2019] [gap in treatment defeated permanent injury but not significant]; *Blake*, 175 A.D.3d at 1200 [same]).

With respect to plaintiff's "90/180-day" injury claim, defendants sufficiently established their entitlement to dismissal of this claim by submitting plaintiff's deposition transcript wherein plaintiff admitted that she was confined to bed and home for a total time of approximately two weeks (Pl. EBT at 59, 66). Accordingly, Plaintiff has no viable "90/180 day" injury claim (*see Ortiz v Boamah*, 169 A.D.3d 486, 489 [1st Dept 2019], citing *Mitrotti v Elia*, 91 A.D.3d 449, 450 [1st Dept 2012]).

Finally, there is no evidence on this record that plaintiff sustained a "total loss of use" of any body part, and therefore, the claim that she sustained a "permanent loss of use" of any body part is dismissed (*see Swift v New York Tr. Auth.*, 115 A.D.3d 507, 509 [1st Dept 2014]).

Accordingly, it is hereby,

ORDERED, that defendants' motion is granted to the extent that plaintiff's claim that she suffered 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 cervical and lumbar spine is dismissed, and it is further,

ORDERED, that plaintiff's claim that she sustained any injury to her shoulders or left foot is dismissed, and it is further,

ORDERED, that plaintiff's claim that she sustained a "permanent loss of use" of any body part is dismissed, and it is further,

ORDERED, that the remaining branches of defendants' motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 6/16/20
Bronx, New York

HON. MARY ANN BRIGANTTI
Justice of the Supreme Court

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