Dor v Dastine
2020 NY Slip Op 33080(U)
September 17, 2020
Supreme Court, Kings County
Docket Number: 516612/2018
Judge: Debra Silber

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

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KETURA DOR,

Plaintiff,

-against-

ROLF A. DASTINE,

Defendant.

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DECISION / ORDER

Index No. 516612/2018
Motion Seq. No. 2
Date Submitted: 9/17/20

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	22-28
Affirmation in Opposition and Exhibits Annexed.....	31-43
Reply Affirmation.....	45

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

This is a personal injury action arising out of a motor vehicle accident that took place on January 13, 2018, in Queens, NY. At the time of the accident, plaintiff was driving her car and defendant was driving his car, and the two vehicles collided at the intersection of Archer Avenue and Sutphin Boulevard. The police report states that the traffic light "was not functioning." In her bill of particulars, plaintiff alleges that as a result of the accident, she sustained injuries to her right shoulder and to her cervical and lumbar spine. Plaintiff had arthroscopic surgery to her right shoulder on June 6, 2018 and many months of physical therapy. At the time of the accident, she was twenty-four years old. She claims (in her EBT testimony) she was unable to return to work or college for approximately a year after the accident.

Defendant moves for summary judgment dismissing the complaint and contends that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

In support of the motion, defendant submits the pleadings, an attorney's affirmation, plaintiff's EBT transcript and affirmed reports from an orthopedist, Dana Mannor, M.D., and a radiologist, Dr. Mark J. Decker. Dr. Mannor examined plaintiff on July 19, 2019 so had no ability to evaluate plaintiff's condition in the six months after the accident. The radiologist did not examine plaintiff. He reviewed the cervical MRI and concludes that all of the positive findings are degenerative, longstanding and not causally related to the date of the accident. He did not review the MRIs done of plaintiff's right shoulder and of her lumbar spine.

With regard to the 90/180-day category of injury, defendant's attorney contends at Paragraph 8 of his affirmation that plaintiff's Bill of Particulars "only alleges that plaintiff was confined to her bed and home for 45 days." It is not clear to the court how this establishes that the plaintiff did not sustain an injury in this category. Counsel then discusses insurance fraud and cites the "Insurance Research Counsel's [sic]" report on this topic. This digression is irrelevant. At Paragraphs 21-22, counsel states "[p]utting aside, for the moment, that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiff can establish, the category requires proof that plaintiff was medically prevented from performing 'substantially all' of his/her usual and customary activities for the requisite period. We submit that, based on all of the above, the burden should shift to plaintiff to come forward with an offer of competent proofs demonstrating real issues of fact as to the alleged injuries being both causally related to the accident, as well as showing

impairments which could satisfying at least one definition in Ins. Law 5102(d). If plaintiff fails to present such proofs, the motion should be granted, and the action dismissed [emphasis added]."

Conclusions of Law

Defendants have failed to make a prima facie showing that plaintiff was not prevented from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days following the accident (*see Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately address the plaintiff's claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]). Plaintiff testified that she missed about a year of work and college as a result of the accident, and she was not asked at her EBT if a doctor had told her she could not return to work. She did testify that she received "lost wages" payments, but it was not established if they were from the auto insurance or were disability payments from her job or were from somewhere else.

As defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, it is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795

[2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]). Contrary to counsel's opinion, a defendant cannot win summary judgment dismissing an action by claiming the burden should shift to the plaintiff because the plaintiff probably cannot prove her case. The burden is on the movant to make a prima facie case for summary judgment solely within the confines of the papers submitted in support of his or her motion.

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

This constitutes the decision and order of the court.

Dated: September 17, 2020

ENTER:

Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER
JSC