

Roman v Rai

2020 NY Slip Op 33393(U)

September 28, 2020

Supreme Court, Kings County

Docket Number: 504955/2018

Judge: Reginald A. Boddie

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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 28th day of September 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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JENNY ROMAN,

Plaintiff,

Index No. 504955/2018
Cal. No. 30 MS 2

-against-

DECISION AND ORDER

MAN K. RAI,

Defendant.
-----x

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

Papers
MS 2

Numbered
Docs. # 18-28

Upon the foregoing cited papers, defendant's threshold motion for summary judgment, pursuant to CPLR 3212 and Insurance Law § 5102 (d), on the ground of failure to meet the serious injury threshold is decided as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained in an automobile accident on July 17, 2017, near 89 East Houston Street in the County, City and State of New York. Plaintiff alleged her car was struck in the middle on the right passenger side as the defendant was changing lanes. Plaintiff alleged as a result of the accident she suffered injuries to her cervical spine, right shoulder and right knee, including right shoulder rotator cuff tear, internal derangement of the shoulder, partial thickness tear of the supraspinatus and anterior labrum bursitis, right knee tear of the posterior horn medial meniscus and central bulge at C5/C6. Plaintiff continued to complain of pain in the right shoulder, right knee, neck and back.

Defendant moved for summary judgment, pursuant to CPLR 3212, and argued plaintiff did not suffer a serious injury within the meaning of Insurance Law Section 5102 (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Further, in a “serious injury” threshold motion for summary judgment, as here, defendants must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 AD3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). The issue is not whether plaintiff can ultimately establish a “serious injury,” but whether there exists an issue of fact in the case on such issue (*see Barr v Albany County*, 50 NY2d 247, 267 [1980]).

In support of its motion for summary judgment, defendant produced the affirmation of Dr. Scott Springer, a radiologist, to review the cervical spine MRI of the plaintiff taken on November 8, 2017. Dr. Springer opined there was a mild disc bulge at C5-C6, disc desiccation at C4/C5 and the film was otherwise unremarkable. Dr. Zimmerman also performed a series of orthopedic tests and concluded that plaintiff’s examination was normal in all aspects. He also opined that there was no adequate basis for the right shoulder surgery plaintiff had on December

28, 2017. Defendant's medical experts, however, failed to address plaintiff's 90/180 claim.

Defendant's attorney mentioned only in conclusory fashion, there was no basis for the claim.

Plaintiff, in opposition, argued Dr. Singer acknowledged plaintiff suffered a full thickness tear in the right shoulder but wrongfully concluded it was not related to the accident and degenerative in nature. Plaintiff presented the report of Dr. Salehin Sayeedus, internal medicine, which indicated plaintiff suffered a tear in the right knee, had a right shoulder arthroscopy and debridement, and has a central bulge of the C5-C6 disc in the cervical spine. He also indicated that even as of October 14, 2019, plaintiff had limited ranges of motion in the neck, shoulder and right knee and suffers a permanent impairment due to chronic pain and discomfort.

Plaintiff also presented the affirmation of Dr. Stan Avshalumov, a board certified orthopedic surgeon, who indicated he examined plaintiff on September 17, 2017, and several times after, and reviewed MRIs of her shoulder. Dr. Avshalumov stated plaintiff initially presented with right shoulder pain with weakness and stiffness associated with pain upon lifting the shoulder. Dr. Avshalumov performed the arthroscopic surgery on her right shoulder which revealed numerous conditions, including right shoulder derangement, tear of the rotator cuff, pathology of the labrum, and bursitis. Plaintiff continued to complain of pain and stiffness upon lifting the right shoulder at the October 14, 2019 examination and demonstrated limited range of motion in the shoulder. Dr. Avshalumov opined that the accident was the cause of her condition.

Because defendant failed to address the 90/180 claim with admissible evidence, defendant failed to meet its prima facie burden of proof on summary judgment. As the court previously articulated in *Rahman v Sarpaz*, 62 AD3d 979 (2d Dept 2009), when the motion papers do not adequately address the 90/180 claim clearly set forth in the bill of particulars with admissible evidence, summary judgment should be denied. Therefore, defendant failed to meet

its prima facie burden of establishing plaintiff did not suffer a serious injury, and shift the burden of proof to plaintiff, and the court need not address the merits of plaintiff's opposition.

Nevertheless, the court finds plaintiff's papers also raise a triable issue. Accordingly, defendant's motion for summary judgment is denied.

E N T E R:

RAB HON. REGINALD A. BODDIE
J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court

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