

Day v Ahmed

2021 NY Slip Op 30202(U)

January 19, 2021

Supreme Court, Kings County

Docket Number: 519175/2018

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 519175/2018
Motion Date: 1/6/21
Motion Seq.: 01 & 02

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LINDA M. DAY,

Plaintiff,

-against-

DECISION AND ORDER

ABDULNASSER A. AHMED AND
IBRAHIM AL HAMYARE,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 01 and 02), 12-20, 23-27, 33-38, were read on these motions for summary judgment.

The defendants seek an order granting summary judgment pursuant to CPLR § 3212 based on Insurance Law § 5102(d), claiming that the plaintiff’s injuries fail to meet the “serious injury” threshold as required by the statute. The plaintiff cross moves for summary judgment, pursuant to CPLR § 3212, on the issue of liability. For the reasons set forth below, the defendants’ motion is granted, and the plaintiff’s cross motion is denied as moot.

The plaintiff commenced this action based on personal injuries she allegedly sustained in an automobile accident which occurred on December 31, 2016 on East 58th Street near Avenue H in the County of Kings, City and State of New York. The plaintiff alleges that she was a pedestrian when she was struck by the defendants’ vehicle, which was owned by Abdunasser Ahmed and operated by Ibrahim Al Hamyare at the time of the accident.

In support of the motion the defendants submit the pleadings, Verified Bill of Particulars, plaintiff’s deposition transcript, the affirmed report of their medical expert, Dr. Pierce J. Ferriter, who is board certified in orthopedic surgery, and the affirmed report of Dr. Darren Fitzpatrick, who is a board certified radiologist. The defendants also submit an uncertified copy of the police accident report.

On June 3, 2019, Dr. Ferriter performed an examination of the plaintiff. According to his report, Dr. Ferriter reviewed the Verified Bill of Particulars and police accident report. Using a goniometer, Dr. Ferriter conducted objective range of motion testing of the cervical and lumbar spine, right and left shoulders, right and left knees, and right and left ankles. The thoracic spine was examined and no swelling, discoloration or deformity was found, and upon palpation, there

was no spasm or tenderness of the parathoracic muscles. Other objective testing of the thoracic spine was found to be normal. Active range of motion testing of the cervical spine revealed flexion to 50 degrees (50 degrees normal); extension to 60 degrees (60 degrees normal); right lateral flexion to 45 degrees (45 degrees normal); and left lateral flexion to 45 degrees (45 degrees normal); right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal). The lumbar spine showed active range of motion flexion to 60 degrees (60 degrees normal); extension to 25 degrees (25 degrees normal); right lateral bending to 25 degrees (25 degrees normal); and left lateral bending to 25 degrees (25 degrees normal). The right shoulder range of motion was found to be forward flexion to 180 degrees (180 degrees normal); extension to 60 degrees (40 degrees normal); abduction to 180 degrees (180 degrees normal); adduction to 30 degrees (30 degrees normal); internal rotation to 80 degrees (80 degrees normal) and external rotation to 90 degrees (90 degrees normal). The left shoulder revealed forward flexion to 180 degrees (180 degrees normal); extension to 60 degrees (40 degrees normal); abduction to 180 degrees (180 degrees normal); adduction to 30 degrees (30 degrees normal); internal rotation to 80 degrees (80 degrees normal) and external rotation to 90 degrees (90 degrees normal).

Dr. Ferriter's objective testing of the lower extremities found that the right knee had active range of motion in flexion to 150 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). The left knee had active range of motion to 150 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). The right ankle revealed active range of motion in extension to 20 degrees (20 degrees normal); plantarflexion to 40 degrees (40 degrees normal); inversion to 30 degrees (30 degrees normal); and eversion to 20 degrees (20 degrees normal). The left ankle had active range of motion in extension to 20 degrees (20 degrees normal); plantarflexion to 40 degrees (40 degrees normal); inversion to 30 degrees (30 degrees normal) and eversion to 20 degrees (20 degrees normal).

Other orthopedic and neurological testing of each area was also found to be normal. Dr. Ferriter opined that "[t]he orthopedic examination is objectively normal, and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts, for normal activities of daily living, as well as all usual daily activities."

On July 27, 2019, the defendants' expert radiologist, Dr. Fitzpatrick, interpreted the MRIs taken in February 2017 of the plaintiff's left shoulder, left and right knees, cervical and lumbar spine and right ankle. The right ankle was found to be normal, however Dr. Fitzpatrick opined that the findings as to the other areas were not related to trauma, but rather they were degenerative in nature, having developed over a protracted period of time. In particular, Dr. Fitzpatrick opined that the MRI of the left shoulder indicated acromioclavicular arthrosis, which is a degenerative injury due to repetitive forces; the left knee was found to have a degenerative

tearing of the medial meniscus body unrelated to trauma; the right knee showed degenerative tearing of the posterior horn and free edge of the medial meniscus unrelated to trauma; the cervical spine showed multilevel degenerative disc disease, more severe at C5-C6 producing canal stenosis; and the lumbar spine revealed moderate multilevel disc bulges at L3-L4, L4-L5, and L5-S1 that were degenerative in nature, and occur over a protracted period of time of at least six months. The MRI of the right ankle revealed normal findings.

The plaintiff opposes the motion and submits the affirmation and affirmed narrative report of Dr. Marvin Moy dated July 30, 2020, relating to his examination of the plaintiff on July 9, 2020. The plaintiff also submits unaffirmed medical records relating to treatment rendered by Dr. Moy on January 11, 2017, eleven days after the accident. The plaintiff further submits the affirmation of Dr. David R. Payne and the unaffirmed MRI reports of Stand-Up MRI of Brooklyn, P.C., which include his interpretation of the MRIs. The plaintiff's affidavit is also submitted in opposition to the defendants' motion.

According to the narrative report, using a goniometer, Dr. Moy performed objective testing of the plaintiff's cervical, thoracic and lumbosacral spine, right and left shoulders, elbows, wrists, knees and ankles and the right hip. The cervical spine was determined to have limitations in flexion to 20 degrees (50 degrees normal); extension to 20 degrees (60 degrees normal); right rotation to 15 degrees (45 degrees normal); left rotation to 15 degrees (45 degrees normal); right lateral flexion to 30 degrees (80 degrees normal) and left lateral flexion to 30 degrees (80 degrees normal). The thoracic spine limitations were not measured, however Dr. Moy opined that range of motion "is restricted due to pain and stiffness." The lumbosacral spine had limitations in flexion to 30 degrees (normal 90 degrees normal); extension to 10 degrees (25 degrees normal); right lateral flexion to 10 degrees (25 degrees normal) and left lateral flexion to 10 degrees (25 degrees normal). The left and right shoulders were determined to have decreased range of motion. The left shoulder showed limitation of flexion to 60 degrees (150 degrees normal); extension to 20 degrees (50 degrees normal); abduction to 60 degrees (150 degrees normal); and adduction to 15 degrees (30 degrees normal). The right shoulder showed decreased range of motion in flexion to 60 degrees (150 degrees normal); extension to 25 degrees (50 degrees normal); abduction to 70 degrees (150 degrees normal) and adduction to 20 degrees (30 degrees normal).

Dr. Moy also found limited active range of motion of the plaintiff's knees on flexion. The left knee had limitations of flexion to 60 degrees (150 degrees normal) and the right knee to 50 degrees (150 degrees normal). The plaintiff's left ankle had normal range of motion. The right ankle had limited range of motion on inversion to 15 degrees (30 degrees normal); and eversion to 20 degrees (10 degrees normal); plantar to 20 degrees (40 degrees normal). The range of motion of the elbows and wrists and hips were found to be within normal limits. Dr. Moy opined that a neurological assessment revealed decreased sensation in the cervical spine at

C6, C7 and C8. Dr. Moy's narrative report incorporates the findings of the MRIs performed in February 2017 of the plaintiff's cervical, thoracic and lumbar spine, right and left knees and shoulders, and the right ankle.

Dr. Moy's affirmation states that the plaintiff began a course of treatment on January 11, 2017, which included medical examinations, physical therapy, chiropractic treatment, acupuncture treatment and neurology consultation. However, Dr. Moy does not incorporate into the affirmation any of his findings relating to the examinations and course of treatment performed during that period.

Dr. Moy opined that the traumatic injuries sustained by the plaintiff were caused by the motor vehicle accident based, *inter alia*, on a review of the clinical history, the plaintiff's complaints and symptomatology, objective testing, and physical examinations, and that the injuries have no relation to any past medical history. Dr. Moy does not address the degenerative findings made by the defendants' examining physician.

The plaintiff also submits the affirmation of Dr. David R. Payne dated August 13, 2020, who is a board certified radiologist, along with the unaffirmed MRI reports relating to the plaintiff's cervical, thoracic and lumbar spine, left and right knees, left and right shoulders and right ankle. Dr. Payne interpreted the original findings of the MRIs taken in February and March 2017. Dr. Payne's affirmation attests that the findings in his report are a true and accurate reflection of his interpretation of the radiographic studies, however it does not discuss causation or address Dr. Fitzpatrick's opinion that the injuries alleged by the plaintiff are not traumatic, but rather are degenerative in nature.

The defendants assert that the medical evidence and plaintiff's testimony demonstrate that the plaintiff did not sustain a serious injury under the category of complete loss of use of a body organ or member. Moreover, according to the defendants, Dr. Ferriter's findings that the plaintiff has no current limitations and normal results on a variety of objective clinical tests, rule out any basis for a permanent consequential limitation or significant limitation of use of a body function or system. Lastly, the defendants assert that the plaintiff's testimony and the medical evidence submitted rule out the 90/180 day category of the statute, as this category requires proof that there was a causally related, medically determined injury, which prevented plaintiff from performing "substantially all" of her usual and customary activities for the requisite period.

The defendants argue that the findings of the defendants' medical experts and plaintiff's deposition testimony make clear that the plaintiff's injuries were not caused by the accident, and do not rise to the level of impairment to qualify under any category of Insurance Law § 5201(d). They argue that the normal objective findings of Dr. Ferriter and the radiological findings of Dr. Fitzpatrick establish the absence of trauma, and that therefore the injuries have no causal

connection to the accident. The defendants assert that the plaintiff's deposition testimony also supports their argument because she testified that she did not seek medical attention until a few days after the accident, and although she underwent physical therapy for approximately six months, the plaintiff ceased treatment even though she was receiving Medicaid benefits. Plaintiff was not employed at the time of the accident, and testified that no doctor told her that she should not work. Plaintiff further testified that there are no activities that she cannot do at all and that she was never confined to her bed or home as a result of the accident.

The defendants also assert that the plaintiff has failed to present a physician's affirmation based on examinations conducted contemporaneously or shortly after the accident that show restricted ranges of motion. The defendants argue that the first time the plaintiff notes any such limitations in ranges of motion are contained in Dr. Moy's narrative report relating to an examination he conducted on July 9, 2020, more than three years after the accident. Further, the defendants maintain that the plaintiff's physicians failed to address the objective proof submitted by the defendants that the plaintiff's alleged injuries are attributable to pre-existing degenerative conditions, and that the failure to address such causation issues is fatal, and renders plaintiff's proof insufficient to raise an issue of fact. The defendants also submit that the unsworn medical records attached to Dr. Moy's affirmation and narrative report, as well as the unsworn MRI reports attached to Dr. Payne's affirmation are inadmissible hearsay. The defendants further contend that the plaintiff's affidavit is not admissible because it is not probative evidence pertaining to medical issues.

The plaintiff argues that the expert medical reports of Dr. Payne and Dr. Moy establish that there is sufficient objective proof that the plaintiff sustained a serious injury pursuant to Insurance Law § 5201(d). They rely on Dr. Moy's evaluation, performed three and a half years after the accident, which found objective evidence of limitations of range of motion and his opinion that the traumatic injuries were a direct result of the accident. The plaintiff asserts that Dr. Payne's affirmation provides further support that objective testing revealed the plaintiff had sustained a serious injury under the statute. The plaintiff also contends that the findings of the defendants' examining physician, Dr. Ferriter, are conclusory and contradictory to those of Dr. Moy and Dr. Payne and therefore create a question of fact thereby precluding a grant of summary judgment.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in her Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by

the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006). Once the defendants have made a *prima facie* showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eyer*, 79 NY2d 955 (1992).

The defendants' submissions demonstrate their *prima facie* entitlement to summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendants have submitted competent medical evidence, including the affirmed report of their examining medical expert, Dr. Ferriter and the affirmed report of Dr. Fitzpatrick establishing that the alleged injuries do not constitute a serious injury under any of the categories of Insurance Law § 5102(d). *See Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009). "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury...despite the existence of an MRI which shows herniated or bulging discs." *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 (2d Dept 2005). The defendants have also met their *prima facie* burden under the 90/180 day-category of Insurance Law § 5102(d). The plaintiff alleges in the Bill of Particulars that she was confined to her bed for approximately 2-3 days and confined to her home for 1-2 weeks after the accident. The plaintiff later clarified in her deposition testimony that there was never a time when she was confined to her bed or home. The plaintiff further testified that she last worked in 2012 and was not employed at the time of the accident. The plaintiff's Bill of Particulars does not contain a claim for lost earnings.

In opposition, the plaintiff has failed to raise a triable issue of fact under any of the categories enumerated in Insurance Law § 5201(d). The plaintiff submits unsworn medical records in opposing the defendants' motion, including the January 11, 2017 report of Dr. Moy, and the radiographic reports of Stand-Up MRI of Brooklyn, P.C., which contain the findings of Dr. Payne. These records are not in admissible form, and therefore do not constitute competent medical evidence sufficient to raise a triable issue of fact of whether the plaintiff sustained a serious injury. *See Radoncic v Faulk*, 170 AD3d 1058 (2d Dept 2019).

Further, the plaintiff's submissions are insufficient in that they fail to establish causation. In order to prove causation the plaintiff must submit medical reports that are contemporaneous with the date of the accident that show objective testing which quantify limitations in range of motion. *See Perl v Meher*, 18 NY3d 208, 217-218 (2011) ("a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident"). The plaintiff's medical expert, Dr. Moy, first addresses the issue of causation in his July 30, 2020 report, more than three years after the accident. Likewise, the plaintiff has failed to present medical evidence that objectively shows limitations in range of motion contemporaneous with the accident. *See Nieves v Michael*, 73 AD3d 716 (2d Dept 2010); *Pierson v Edwards*, 77 AD3d 642 (2d Dept 2010). The only admissible evidence submitted by the plaintiff to show range of motion limitations are contained in Dr. Moy's report of July 30, 2020.

The plaintiff's submissions also fail to address the opinion of defendant's medical expert, Dr. Fitzpatrick, that the MRIs taken within the first 90 days following the accident revealed that the alleged injuries were degenerative in nature, with no indication of any traumatic injury. The plaintiff's failure to address this issue is fatal to proof of causation, and renders plaintiff's proof insufficient to raise an issue of fact. The affirmation of Dr. Payne merely confirms his findings of the MRIs that were taken in February and March of 2017, and does not causally link the findings to the accident or refute the defendants' claim that the injuries are degenerative in nature. *See Alvarez v NYLL Management Ltd.*, 24 NY3d 1191 (2015); *Iovino v Scholl*, 69 AD3d 799 (2d Dept 2010).

The plaintiff has also failed to raise an issue of fact with respect to the 90/180 category of Insurance Law § 5102(d). The plaintiff's reliance on her deposition testimony and affidavit alone are insufficient to raise a triable issue of fact. *See Glielmi v Banner*, 254 AD2d 255 (2d Dept 1998). Furthermore, although the plaintiff testified that she was not employed at the time of the accident, a doctor never determined that based on the alleged injuries she could not work after the accident. As such, the plaintiff has failed to establish that she had a medically determined injury. *See Pierre v Nanton*, 279 AD2d 621 (2d Dept 2001). The plaintiff presented no admissible evidence that the injuries she suffered curtailed her from performing her usual and customary activities to a great extent for the requisite 90/180-day period. Both plaintiff's deposition testimony and affidavit established only that, at the time of deposition (taken over two years after the accident) and the sworn affidavit (sworn to over three and a half years after the accident), plaintiff had difficulty with daily routines such as sweeping the floor, making the bed, and washing the dishes. *See Lanzarone v Goldman*, 80 A.D.3d 667 (2d Dept 2011). Furthermore, the plaintiff's subjective complaints of pain, standing alone, are insufficient. *See Pierre v Nanton*, 279 AD2d 621; *see also Guzman v Michael Mgt.*, 266 AD2d 508 (2d Dept

1999). Additionally, the plaintiff testified that she was not confined to her bed or home as a result of the accident.

The plaintiff's cross motion on liability is denied as moot in light of the grant of the defendants' motion.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted in its entirety; and it is further

ORDERED, that the plaintiff's cross motion is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: January 19, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.