Ahmed v Solovyev
2021 NY Slip Op 32871(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 503373/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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ISHTIAQ AHMED and FARAH NAZ,

Plaintiff,

-against-

LEONID SOLOVYEV and "JOHN DOE",

Defendants.

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Index No.: 503373/2017

DECISION AND ORDER

Motions Sequence #2

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	32-38,
Opposing Affidavits (Affirmations)	48-53,
Reply Affidavits (Affirmations)	56

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that purportedly occurred on February 18, 2014. On that day, Plaintiffs, Ishtiaq Ahmed and Farah Naz (hereinafter referred to collectively as the "Plaintiffs") were allegedly involved in a motor vehicle collision with a vehicle owned and operated by Defendant Leonid Solvyev (hereinafter the "Defendant"). The Plaintiffs allege that the collision occurred at or near the intersection of West 15th Street between Neptune Avenue and Heart Place, in Brooklyn, New York. Plaintiff Farah Naz ("Plaintiff Naz") claims, in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to her right elbow, right knee, cervical spine and lumbar spine. Plaintiff Naz also alleges that she was prevented from performing "substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during

the one hundred eighty days immediately following the occurrence of the injury or impairment." ("90/180 claim").

The Defendant now moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint as it relates to the claims of Plaintiff Naz on the ground that none of the injuries allegedly sustained by Plaintiff Naz meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of Plaintiff Naz and the report of Doctor Pierce J. Ferriter.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the Defendant failed to meet his *prima facie* burden since the medical examination report that the Defendant relies upon is insufficient. The Plaintiff also contends that there are sufficient issues of fact raised by the medical reports provided by Plaintiff Naz which serve to establish material issues of fact and support the denial of summary judgment.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real*

Estate Brokers v Oppenheimer, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of his motion, the Defendant proffers the affirmed medical reports of Dr. Pierce J. Ferriter, a board certified orthopedic surgeon. Dr. Ferriter examined Plaintiff Naz on September 11, 2019, more than five years and six months after the date of the accident. Dr. Ferriter conducted range of motion testing of Plaintiff Naz's cervical, thoracic and lumbar spines, right elbow, left elbow, right knee and left knee, using a handheld goniometer and found no limitation in the Plaintiff Naz's range of motion in relation to these areas. Dr. Ferriter opined that the cervical spine sprain/strain had resolved, the thoracic sprain/strain had resolved, the lumbar spine sprain/strain had resolved, the right elbow sprain/strain had resolved, and the right knee sprain/strain had resolved. Dr. Ferriter opined that "[t]here is pre-existing conditions to the lumbar spine and right knee as per diagnostic testing, however there was no impact on the claimants over all recovery." (See Defendant's Motion, Report of Dr. Ferriter, Exhibit D).

When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion for summary judgment. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars state (paragraph 7) that the "Plaintiff" was "confined to (a) Bed 7 days, (b) House 6 Months from the date of accident., and (C) Plaintiff Confined to Hospital one day." However, insofar as there are two Plaintiffs, and the Bill of Particulars related to both Plaintiffs, it is unclear which Plaintiff the statement relates to. Therefore, these statements have no relevance to Plaintiff Naz's claim. Moreover, in her deposition, when asked if there was a period when she could not

leave her house she stated "I don't remember. I couldn't give you an estimation." (See Defendant's Motion, Exhibit C, Page 46, Lines 23 and 24). Accordingly, Plaintiff Naz does not state a 90/180 claim.

The Defendant made a *prima facie* showing that Plaintiff Naz had not sustained a serious injury as defined by the statute. It therefore becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of her action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

Some of the records that the Plaintiff relied upon, such as the reports of Adam Landskowsky, M.D. and Mark J. Decker, M.D. of Bay Ridge Medical Imaging, P.C., (not signed) are inadmissible, as both reports were not affirmed. *See Mora v. Riddick*, 69 A.D.3d 591, 591, 893 N.Y.S.2d 149, 150 [2nd Dept, 2010]; *Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 [2nd Dept, 2008]. Defendant has raised this lack of admissibility. What is more, the medical records from EV Physical Therapy and Acupuncture, PLLC and Jackson Heights Physical Therapy & Rehab, P.C., were inadmissible and are therefore without probative value. See CPLR 2106 and *Parente v. Kang,* 37 A.D.3d 687, 831 N.Y.S.2d 430 [2nd Dept, 2007]; *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693 [2nd Dept, 2006], *Joseph v. A&H Livery*, 58 A.D.3d 688, 871 N.Y.S.2d 663 [2nd Dept, 2009]. The Defendant also raised this issue.

The report of Dr. Ajoy K. Sinha, a board certified orthopedist, is properly sworn under the penalties of perjury pursuant to CPLR §2106 and is admissible. Dr. Sinha examined Plaintiff Naz in August of 2014 (eight months after the accident) and May of 2015 and detailed those findings based upon his review of Plaintiff's medical records, personal observations and testing. Dr. Sinha opined that "[m]ultiple body parts experienced collision trauma from vehicle contact from the collision including her cervical spine,

lumbar spine, right elbow and right knee." Dr. Sinha also opined that "[o]n this basis, it is my considered medical opinion that the Plaintiff is to be considered medically permanently disabled and, further, her injuries are causally related to plaintiff's February 18, 2014 accident. However, this report is insufficient to create a material issue of fact as it merely serves to present the existence of injuries at the time of the motor vehicle collision. In addition, Dr. Sinha relies on inadmissible evidence, such as unaffirmed reports of other doctors, and this renders doctor's conclusions, including causation, speculative. See *Wagman v. Bradshaw*, 292 AD2d 84, 88, 739 N.Y.S.2d 421, 424 [2d Dept 2002]. Further, the report does not reflect "objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration." *Cornelius v. Cintas Corp.*, 50 AD3d 1085, 1087, 857 N.Y.S.2d 637, 640 [2d Dept 2008]; *see also Washington v. Mendoza*, 57 AD3d 972, 973, 871 N.Y.S.2d 336, 337 [2d Dept 2008]. Finally, the Plaintiff fails to explain the cessation or gap in treatment. *See Neugebauer v. Gill*, 19 AD3d 567, 568, 797 N.Y.S.2d 541, 542 [2d Dept 2005]. As a result, the Defendant's motion is granted, and the complaint of Plaintiff Naz is dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment by the Defendant (motions sequence #2) as against Plaintiff Farrah Naz is granted and the complaint as it relates to Plaintiff Farrah Naz is dismissed.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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