

King v Cocho Corp.

2021 NY Slip Op 33027(U)

November 12, 2021

Supreme Court, Bronx County

Docket Number: Index No. 20881/2019E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

-----X
JOAN KING,

Plaintiff,

-against -

**Index No. 20881/2019E
DECISION/ORDER
Motion Seq. 2**

COCHO CORP. and RAMON P. BATISTA,
Defendants.
-----X

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants COCHO CORP. and RAMON P. BATISTA, (defendants) [Mot. Seq.2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JOAN KING (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on August 13, 2018 (the Accident). Plaintiff testified that she was confined to home for three days post-Accident. Plaintiff underwent right shoulder surgery on November 9, 2018.

In the bill of particulars, in relevant part, plaintiff alleges that as the result of the Accident plaintiff suffered serious injuries that satisfy the following Insurance Law 5102(d) threshold

categories: permanent loss¹, 90/180 days²; permanent consequential limitation, and significant limitation.

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendants argue that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff’s deposition transcript, plaintiff’s medical records, and the expert affirmation/report of Dr. Renzoni (orthopedist) and Dr. Berkowitz (radiologist).

Dr. Renzoni bases his opinion on the details of a physical examination of plaintiff that he conducted on July 9, 2019 (one year post-Accident), the police report, and the bill of particulars. In terms of the lumbar spine, the range of motion tests were normal and all of the objective tests were negative with the exception of a finding of 15 degrees of extension where 25 degrees is normal. In the “Impression” section the doctor finds that the lumbar spine is “sprain/strain-resolved”.

As for the right shoulder, the doctor finds no significant loss of range of motion and all objective tests are normal. In the “Impression” section, the expert finds “status post right shoulder surgery on 11/09/2018-healed by exam”.

In terms of the left shoulder, the expert records normal ranges of motion and negative results for the objective tests.

¹ It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 115 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Authority* 115 AD3d 507 [1st Dept 2014]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 1010 AD3d 452 [1st Dept 2021]).

² . Plaintiff was out of work for three days following the Accident and declines to argue, in the opposition, that plaintiff’s injuries satisfy the 90/180 category. As such, the 90/180 category is dismissed.

In the opinion section, the doctor opines that plaintiff presents with a normal orthopedic examination on all objective testing. The exam indicates no findings which would result in orthopedic limitations in the use of the body parts examined. He opines that there were no objective findings to support plaintiff's subjective complaints of pain and limitation of motion. She does have complaints and the range of motion is entirely in plaintiff's control. Objective findings such as atrophy, reflex changes, tension signs and sensory changes were, however, absent. Plaintiff is capable of functional use of the examined body parts for the activities of daily living as well as usual daily activities including work duties.

In her report, dated April 25, 2019, Dr. Berkowitz reviews plaintiff's MRI studies of the lumbar spine and right shoulder (performed on 09/24/2018). In terms of the lumbar spine, she finds a minimal disc bulge that is degenerative in nature. There is no evidence of herniation or of an acute traumatic injury, and the MRI reveals no causal relationship between the Accident and the MRI findings.

As for the MRI of the right shoulder, the expert finds that there is no joint effusion and a small amount of fluid is present in the subacromial/subdeltoid bursa. Moderate degenerative changes in the joint impinging on the superior surface of the supraspinatus unit. There is a high-grade tear of the tendon.

In the impression section, the expert opines that there are degenerative changes with the tear of the tendon. Partial thickness tearing of the tendon at its attachment to the humeral head is present. She opines that "these rotator cuff abnormalities are related to chronic repetitive microtrauma to the rotator cuff. This wear and tear on the rotator cuff leads to the rotator cuff degeneration, tendinopathy and tearing". There is no evidence of acute traumatic injury and no causal relationship between the Accident and the findings of the MRI is shown.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential

limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

In opposition, plaintiff submits an attorney affirmation, plaintiff's affidavit, medical records, including MRI and operative reports, and the affirmation/reports of Dr. Reddy (radiologist- lumbar spine and right shoulder), Dr. Kolb (radiologist-cervical spine dated 01/26/2019), Dr. Apazidis (surgeon-right shoulder), Dr. Distasio (pain management), and Dr. Ahmed (pain management).

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine, lumber spine, and right shoulder under the permanent consequential limitation and significant limitation categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injuries after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident and at the recent examination by plaintiff's expert in February 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, plaintiff suffered herniated and bulging discs, and a shoulder tear that are confirmed by the MRI reports. The experts opine that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation.

Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants COCHO CORP. and RAMON P. BATISTA [Mot. Seq.2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JOAN KING has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: November 12, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 11/12/2021

Hon. Veronica G. Hummel, A.J.S.C.

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- 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