

Simmons v Berrera

2021 NY Slip Op 33968(U)

December 21, 2021

Supreme Court, Queens County

Docket Number: Index No. 712476/2019

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

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MAKEBA ALE SIMMONS,

Plaintiff(s),

- against -

ILIANA BERRERA, GABRIELA CAMPOS GIL and
ABDALAH SAIDOU,

Defendant(s).
-----X

DECISION/ORDER

Index No.: 712476/2019

Sequence No.: 1

Present: **HONORABLE ULYSSES B. LEVERETT:**

Notice of Motion- Affidavit/Affirmation-Exhibits
Notice of Cross-Motion-Affidavit/Affirmation in Support

Papers Numbered

EF 16-23
EF 25-26

Upon the foregoing papers, it is ordered that defendant Abdalah Saidou’s motion and co-defendants Iliana Berrera and Gabriel Campos Gils cross motion for an order pursuant to CPLR §3212 granting defendant summary judgment and dismissing plaintiff’s complaint pursuant to Insurance Law §5104(a) in that plaintiff did not sustain a serious injury as defined under Insurance Law §5102(d) is granted.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident on December 31, 2018, on Leavitt Street at or near the intersection of 137 Street, County of Queens, State of New York.

Plaintiff alleges that she was a passenger in a vehicle owned and operated by defendant Abdalah Saidou which was involved in a collision with the motor vehicle owned by defendant, Iliana Barrera and operated by the defendant, Gabriela Campos Gil. Plaintiff states that as a result of the accident, she sustained injuries to her right knee, shoulder, hand, and cervical, thoracic and lumbar spine.

Insurance Law §5102(d) defines a “serious injury” as “ a personal injury which results in death; dismemberment; significant disfigurement; a fracture, loss of a fetus, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts, which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

“[T]o prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury... An expert’s qualitative assessment of a plaintiff’s condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

In support of the motion, defendant Abdalah Saidou asserts that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted a September 17, 2020 report by Dr. Salvatore Corso, a board certified orthopedic surgeon who performed an orthopedic examination of plaintiff on September 8, 2020 and reviewed plaintiff’s Verified Bill of Particulars. Dr. Corso states that plaintiff’s cervical spine range of motion examination using goniometer revealed range of motion of the cervical spine flexion to 50 degrees (50 normal), extension to 60 degrees (60 normal), right and left lateral flexion to 45 degrees (45 normal) and right and left rotation to 80 degrees (80 normal). Reflexes are present, equal & symmetrical in the upper extremities. Muscle strength is good with no noted atrophy. No sensorial deficits notes. No neurotrophic changes noted, Handgrip, pinch and grasp are normal. There is right sided paracervical tenderness reported. There is evidence of paracervical spasm. Reflexes are 2+ and equal. Spurling, Traction and Compression tests are all negative.

The thoracolumbar spine range of motion revealed right sided paralumbar tenderness. There is no evidence of spasms. Alignment is normal. Sensation is intact to the lower extremities. Range of motion of flexion to 50 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right rotation to 25 degrees (25 degrees normal) and left rotation to 25 degrees (25 degrees normal). SLR is negative in a seated position; SLR is negative in a supine position. Reflexes are 2+ and equal.

Plaintiff’s right shoulder range of motion examination revealed no swelling. There is a posterior tenderness reported. Range of motion of flexion to 180 degrees (180 degrees normal), extension to 60 degrees (60 degrees normal), abduction to 30 degrees (30 degrees normal), abduction to 180 degrees (180 degrees normal), external rotation 90 degrees (90 degrees normal) and internal rotation to 70 degrees (70 degrees normal). Muscle strength is 5/5 to the rotator cuff, biceps and triceps. Based upon various clinical diagnostic test and physical examination technique there are no signs of instability. Apprehension is negative.

Examination of plaintiff’s right hand revealed no swelling, tenderness or ecchymosis. Range of motion of dorsiflexion to 20 degrees (20 degrees normal), palmar flexion to 40 degrees (40 degrees normal), eversion to 20 degrees (20 degrees normal) and inversion to 30 degrees (30 degrees normal). Muscle strength is 5/5. Based upon various clinical diagnostic test and physical examination technique there is no instability. Sensation is intact. Range of motion of the fingers is normal with a normal thumb opposition and no triggering.

Plaintiff’s right knee range of motion examination revealed a Valgus alignment. There are multiple well healed arthroscopic portals present. There is no effusion. There is patella tenderness reported. Muscle strength is 5/5. There are no signs of instability. There is no atrophy.

Range of motion of flexion to 140 degrees (140 degrees normal) and extension to 0 degrees (0 degrees normal).

Dr. Corso's assessment revealed that plaintiff's cervical sprain, thoracolumbar sprain, right shoulder sprain, right hand sprain, and status post right knee arthroscopy are all resolved. Dr. Corso notes that the injured body parts alleged in the Bill of Particulars have fully resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the plaintiff from engaging in Activities of Daily Living (ADL), and usual activities including work, school, and hobbies.

Defendant also submitted a report dated June 30, 2019 from Dr. Darren Fitzpatrick, a board certified radiologist who performed an independent radiology evaluation on June 30, 2019. Dr. Fitzpatrick states that images were partially degraded by patient motion. Normal marrow signal. The medical and lateral menisci are intact. The tricompartmental cartilage is preserved. The cruciate ligaments, collateral ligaments and extensor mechanism are unremarkable. Normal musculature. No fluid collection. Rotator cuff tendinosis with findings of subacromial impingement. Dr. Fitzpatrick opined that there is no traumatic injury. Tendinosis is a non-traumatic entity that is the result of chronic overuse, resulting in protracted tendon degeneration over the course of months to years. Subacromial impingement is an acquired degenerative condition with no traumatic basis. Motion degraded study which appears normal. No internal derangement or evidence of traumatic injury.

Co-Defendants Iliana Barrera and Gabriela Campos Gil's cross motion adopts the arguments and proofs submitted by defendant Abdalah Saidou.

Where a defendant has made a showing sufficient for entitlement to summary judgment, the burden shifts to the plaintiff to raise an issue of material fact as to whether plaintiff has sustained a serious injury. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Plaintiff submitted no opposition to the motion. Defendant Abdalah Saidou filed this summary judgment motion on December 28, 2020. On January 6, 2021, defendants Iliana Barrera and Gabriel Campos filed a cross-motion for summary judgment against plaintiff. The motion was returnable on March 4, 2021. On March 5, 2021, the parties entered into a stipulation adjourning the motion from March 4, 2021 to April 23, 2021 for plaintiff to file Affirmation in Opposition. The motion was made returnable on July 21, 2021 and then adjourned again to September 15, 2021. On September 15, 2021 the motion was submitted by the Court without opposition.

The Court finds that the medical evidence submitted by defendants as to plaintiff Makeba Ale Simmons made out a prima facie case that plaintiff Simmons did not sustain a serious injury within the meaning of Insurance Law §5102(d), which was not rebuked by plaintiff.

Accordingly, defendant Abdalah Saidou motion and co-defendants Iliana Barrera and Gabriela Campos cross motion for an order pursuant to CPLR §3212 granting summary judgment in favor of defendants and dismissing the complaint on the grounds that there are no

triable issues of fact, in that plaintiff Makeba Ale Simmons has failed to meet the serious injury threshold requirement mandated by New York Insurance Law §5102(d) and §5104(a) is granted.

This is the Decision and Order of this Court.

Dated: 12/21/2021


Ulysses B. Leverett, J.S.C

FILED
2/25/2022
COUNTY CLERK
QUEENS COUNTY