

Romain v City of New York

2023 NY Slip Op 33288(U)

September 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 504853/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____X

VENANTE ROMAIN and CLARKE ROMAIN,

Plaintiff,

-against-

**THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, HANS JOSEPH,
STEVEN D. FREED and HVS MANAGEMENT INC.,**

Defendants.

_____X

DECISION / ORDER

**Index No. 504853/2017
Motion Seq. No. 4**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Steven Freed and HVS Management, Inc.'s motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>85-107</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>112-116</u>
Reply Affirmation.....	<u>117</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is a personal injury action arising from a motor vehicle accident which took place on December 30, 2015. The plaintiff was a passenger in a taxi owned and driven by the moving defendants, which was allegedly rear-ended by a truck owned by the City of New York and driven by defendant Joseph. She testified at her EBT that she was on her way to work, was in the back seat and was not wearing a seatbelt. The impact caused the rear windshield of the taxi to shatter. The plaintiff claims in her bill of particulars that, as a result of the accident, she injured her neck and back. She left the scene of the accident in an ambulance, which took her to Kings County Hospital, and she subsequently sought treatment from other providers. At the time of the accident, plaintiff was

approximately 30 years old. As the co-plaintiff's claims are derivative, for loss of services, the court will refer to plaintiff in the singular, for clarity.

The defendants contend in their motion (Motion Seq. #4) that they are entitled to summary judgment dismissing the complaint, as plaintiff did not sustain a serious injury as a result of the accident, as defined by Insurance Law §5102(d). The defendants support their motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, the ambulance call report and emergency room records, an independent radiologist's review of plaintiff's MRIs, affirmed IME reports from a neurologist, a doctor of physical medicine and rehabilitation, a doctor who is board certified in emergency medicine, and an affidavit of sorts from a chiropractor. It must be noted that the motion, and all these medical reports, were filed in June of 2020, and for reasons unknown to this court, the motion was adjourned for two years despite the fact that the opposition papers were filed in January of 2021, and the reply was filed in March of 2021. In November of 2021, plaintiff settled with defendants City of NY and Hans Joseph, and executed a stipulation of discontinuance [Doc 122]. The movants here did not execute it, and thus their cross-claims for contribution and common law indemnification asserted [Doc 10] in their answer against the City of New York, the New York City Department of Transportation and Hans Joseph were deemed to be converted to third-party claims. This motion was submitted on June 22, 2023 for decision. This action is on the trial calendar to pick a jury in a few weeks.

Dr. Sarasavani Jayaram, a neurologist, examined plaintiff on May 14, 2019, on behalf of the defendants. This was four years after the accident. He states, "Ms. Romain reports that she has a complaint of pain in her low back." Dr. Jayaram examined plaintiff

and tested the range of motion in her cervical and lumbar spine. He states that he used a hand-held goniometer and used the “Guidelines to the Evaluation of Permanent Impairment” 5th edition, published by the American Medical Association. Dr. Jayaram reports that plaintiff had normal ranges of motion in her cervical and lumbar spine, that all related tests were negative, there was no tenderness, and “Ms. Romain does not complain of pain on any movements.” His “diagnoses/impression” is that her cervical and lumbar sprain/strain had “resolved”, and that it was a normal neurological exam.

Dr. Jayaram opines that “[f]rom a neurological point of view, there are no objective findings of disability or permanency. Ms. Romain is capable of working without restrictions from a neurological perspective. She is currently working full-time. Ms. Romain may perform her activities of daily living as she was doing prior to the accident. There is no need for causally related neurological treatment.”

Defendants next provide an MRI review from Dr. Scott Springer, a radiologist. He reviewed the MRI films of her lumbar spine taken two months after the accident, and concludes that “mild lordosis, likely positional and related to the patient's comfort level during the examination. There are small anterior osteophytes, which are chronic, bony productive changes. Disc bulges are seen in L4-L5 and L5-S1. Disc bulging has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. Mild-to-moderate paraspinal musculature atrophy of the lower lumbar spine is noted, compatible with disuse. There is no fracture, subluxation or acute disc herniation, There is no posttraumatic change causally related to the incident of 12/30/2015.” Dr. Springer also reviewed the MRI films of plaintiff’s cervical spine, also taken about two months after the accident. He reports that “Small anterior osteophytes

are seen, which as chronic, bony productive changes. Disc bulges are seen at C5-C6 and C6-C7. Disc bulging has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. A disc herniation is seen at C7-T1. The most common cause for disc herniation is degenerative disc disease and, given the associated degenerative changes and the lack of increased signal in the annular ligament, the disc herniation seen is chronic in nature e. There is no fracture or subluxation. There are no posttraumatic changes causally related to the 12/30/2015 incident.”

Defendants also provide an acupuncture IME performed by Dr. Francisco H. Santiago on August 25, 2016, presumably in connection with plaintiff’s no-fault claims. His exam was about seven months after the accident. He concludes that her cervical and lumbar sprain/strain had resolved. He concludes that “this claimant does not require further physical medicine treatments including physical therapy. Her physical medicine treatments, and physical therapy are no longer medically necessary. She is not receiving acupuncture therapy. This therapy/modality is not medically necessary. She does not need future diagnostic testing, any medical supplies, household help or special transportation. She can perform her activities of daily living, as well as seek gainful employment with no physical restrictions. She has no disability.” Defendants also provide a notarized chiropractic report which was prepared in May 2016, and which comes to a similar conclusion.

Lastly, defendants provide an affirmed report from Dr. Rikki Lane, board certified in emergency medicine, who reviewed plaintiff's emergency room records and her bill of particulars. Dr. Lane states that plaintiff “presented with pain to the back, head and neck.

Toradol and Valium were administered in the ER. Upon assessment by the doctor, the patient was a 30-year-old woman with a history of high blood pressure. She stated she was a passenger in the backseat of a car that got rear ended by a truck. She stated she was not wearing her seatbelt and she hit her head on the front seat. She denied LOC. She stated she was not ambulatory, and EMS took her out on a board. She complained of pain in frontal lobe b/1 as well as forehead. She also complained of numbness of the left arm near bicep and triceps. She had proper strength and movement of all limbs. No spine tenderness was noted. The patient denied CP, abdominal pain or extremity injury. . . . CT scans of the head and cervical spine were obtained and unremarkable. She was discharged to home in stable condition. She was advised to take Motrin 400mg as needed for pain. She was also advised to follow up with her primary care physician. The diagnosis at discharge was: 'Acute pain due to trauma.'" Dr. Lane opines that, after reading the claimed injuries in the plaintiff's bill of particulars, "The records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin [and cannot be demonstrated to be causally related to the accident on 12/30/15. It is my opinion, within a reasonable degree of medical certainty that there were no acute injuries other than mild neck and back musculoskeletal strain."

Plaintiff testified at her EBT that on the date of the accident, she had been working full time since April 2015 as an occupational therapist at a nursing home in Brooklyn, assigned there by a staffing agency [Doc 95 Page 33]. By the time of her EBT she had moved to Florida, where she was working full time as an occupational therapist. She testified that she had physical therapy, acupuncture and chiropractic treatment after the accident, but stopped treatment in 2016 and has not had any treatment for the injuries

from this accident since [*id.* Page 87]. Plaintiff was asked if she missed any time from work after the accident, and she responded, “I didn’t go to work the day afterwards.” She said her back really hurt, but she would “switch from standing to sitting” and was able to work [Page 89].

The court finds that defendants make a prima facie case for summary judgment dismissing the complaint (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 956-957 [1992]). The affirmation of the neurologist who examined plaintiff, who states that she had a completely normal exam, demonstrates that she did not sustain a serious injury as a result of the subject accident. Further, plaintiff’s testimony that she only missed a day or so of work after the accident makes a prima facie showing on the 90/180-day category of injury. The burden of proof then shifts to plaintiff.

Plaintiff contends that the medical evidence she has submitted overcomes the motion and raises a triable issue of fact as to whether she sustained a serious injury under Insurance Law § 5102(d). Plaintiff opposes the motion with an attorney’s affirmation, MRI reports from her cervical and lumbar MRIs, which were not submitted in admissible form, and another copy of the emergency room records. There is no medical affirmation from any medical provider. Plaintiff’s counsel argues that defendants did not make a prima facie case.

In reply, defendants argue that “The plaintiff has failed to submit satisfactory evidentiary proof as is required to defeat defendants’ motion” [Doc 117 ¶11]. Counsel notes that there is no evidence of a recent examination provided by plaintiff.

The court finds that plaintiff's submissions are insufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is **ORDERED** that the defendants' motion is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: September 22, 2023

ENTER:



Hon. Debra Silber, J.S.C.