

Delvalle v Rahman

2019 NY Slip Op 35140(U)

May 13, 2019

Supreme Court, Bronx County

Docket Number: Index No.: 29618/2017E

Judge: ShawnDya L. Simpson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 17

-----X
DELVALLE, GENESIAH

Index No. 0029618/2017E

-against-

Hon. Shawndya L. Simpson

RAHMAN, MOHAMMAD A
-----X

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, (Seq. No. 1) for
SUMMARY JUDGMENT DEFENDANT, noticed on **February 06 2019**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is *denied in accordance to the attached decision & order.*

Motion is Respectfully Referred to Justice:

Dated:

Dated: 5/13/19

Hon. Shawndya L. Simpson
Shawndya L. Simpson, J.S.C.

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

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

-----X
GENESIAH DEL VALLE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 29618/2017

MOHAMMAD A RAHMAN & MOSAMMAT P.
KHATON,

Defendants.

-----X
Shawndya L. Simpson, J.:

INTRODUCTION

By notice of motion dated January 7, 2019, and the affirmation and exhibits submitted in support thereof, defendants seek summary judgment and dismissal asserting that plaintiffs did not sustain “serious injuries” in the subject May 31, 2017, motor vehicle accident. Plaintiff filed an affirmation in opposition dated March 29, 2019, with supporting exhibits. For the foregoing reasons, after review and consideration, the defendants’ motion for summary judgment is denied.

Plaintiff alleges she was bicycling when struck by a vehicle, which resulted in various injuries, including to her right knee, lumbar and cervical spine. Plaintiff claims that these injuries constitute serious physical injury as required by Section 5102(d) of the Insurance Law categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury. Defendants counter that plaintiff did not sustain a serious injury and that her injuries do not meet the threshold provided by law.

In support of the motion, defendant submits the summons, verified complaint, bill of particulars, and answer in this case, as well as plaintiff’s deposition transcript, and the affirmed reports of Dr. Ronald L. Mann, an orthopaedic surgeon, and radiologist Scott A. Springer. In opposition, attached to the plaintiff’s papers are her affidavit, affirmations from two physicians, and certified medical records.

DISCUSSION

On November 28, 2018, Dr. Mann examined plaintiff, approximately a year and a half after the accident. The Dr. Mann found that plaintiff had a normal orthopedic examination on all objective testing. The doctor states in his report that the orthopedic examination was objectively normal and there was no indication which would result in orthopedic limitations in the use of the body parts that were examined. The doctor also found that plaintiff had functional use of the body parts he examined for usual and normal daily living activities. Dr. Mann reviewed the police accident report, Fire Department pre-hospital care report, emergency room records, MRI reports, and operative reports and images. The plaintiff was transported to a hospital after the accident the same day, where she was evaluated and treated. Plaintiff alleges she sustained fracture and lacerations to her knee. At the hospital she was advised to take pain medication. She was released the same day and subsequently saw various doctors.

Plaintiff began receiving physical therapy seven times a week. Plaintiff was not receiving treatment at the time of Dr. Mann's examination. Plaintiff indicated that she required the use of a neck brace, back brace, and a cane. On July 20, 2017, within two months of the accident, she had surgery on her right knee. The doctor reported that she takes Seroquel, Fluvoxamine, Chantix, and Trazodone for medication. Plaintiff complained to the doctor that she has pain in her neck, upper neck, mid neck, and right knee. Dr. Mann further reports that plaintiff was employed part-time at the time of the accident as a dog walker. The doctor reports that she is currently working part-time at a new job performing duties with limitation. Plaintiff states that her condition has remained unchanged and that she has pain in the neck and both shoulders.

Radiologist Springer, reviewed plaintiff's right knee MIR that was conducted on June 27, 2017. The radiologist notes this MIR was conducted twenty-seven (27) days after the accident. His impressions are that there is a grade 2 linear degenerative signal in the posterior horn of the

medical meniscus as well as a small joint effusion. The radiologist also found that there was no fracture, dislocation or internal derangement of the knee. Additionally, the radiologist concluded that there was no posttraumatic change casually related to the accident.

The radiologist examined the plaintiff's lumbar spine MIR. The radiologist found that there was disc space narrowing at the L5-S1 position and a bulging disc at the same position. The radiologist also concluded that there was no fracture, subluxation or disc herniation and no posttraumatic changes casually related to the accident. In the radiologist's report on the cervical spine MRI performed on July 5, 2017, disc bulges in the C4-C5 and C5-C6 position were observed. The radiologist found similarly that there was no fracture, subluxation or disc herniation and no posttraumatic changes casually related to the accident on this MRI. This MRI was performed approximately one month and five days after the accident.

Defendant's proof is insufficient to meet their *prima facie* burden with respect to plaintiff's claim of serious injury to her right knee, lumbar and cervical spine. In their opposition, the plaintiff provides sufficient facts to dispute that the threshold has not been met. The plaintiff argues that she was a bicyclist lawfully traversing the road when she was struck by a vehicle operated and owned by the defendants. The plaintiff argues that even according to the defendants' own experts findings the plaintiff has sustained a serious injury. The defendants' experts note that the surgery was performed on plaintiff's right knee which required repair to a traumatically caused torn meniscus. The experts also note that the plaintiff began with physical treatment seven days a week with extensive treatment to her neck and back. The plaintiff also avers that her continued limitation on ranges of motions in different parts of her body are recorded by the defendants' examining experts. The plaintiff continues to be on significant medication as noted by the defendants' physician. Plaintiff also asserts that her treating physician has recorded significant limitations in her ranges of motion in her knee as recently as February 28, 2019. The plaintiff also

submitted sufficient detailed evidence to overcome the defendant's motion.

As the plaintiff asserts, there are triable issues of fact as to whether she sustained serious injury as required by law in the various categories. The dispute in this instance between the defendants' expert and plaintiff's treating physician creates questions of facts appropriate for trial. The defendant's motion fails to overcome plaintiff's *prima facie showing* of serious injury, "permanent consequential limitations", "significant limitations", or 90/180 days requirement (Insurance Law § 5102 (d)). The defendant fails in its motion to disprove the issue of the plaintiff's lack of employment proceeding the accident for the 90/180 day period. It is alleged that defendant worked as a dog walker and her livelihood involved physical mobility. She is said to now perform work with limitations. Reliable evidence of an abnormality in the plaintiff's ranges of motion consistent after the accident is demonstrated (*see Munoz v. Robinson*, 2019 NY Slip Op 01520 [1st Dept 2019]; *Ortiz v. Boamah*, 169 A.D.3d 486 [1st Dept 2019]; *Hayes v Gaceur*, 162 A.D.3d 437 [1st Dept. 2018]). Consequently, defendants' have failed to demonstrate that plaintiff has not meet the threshold for recovery.

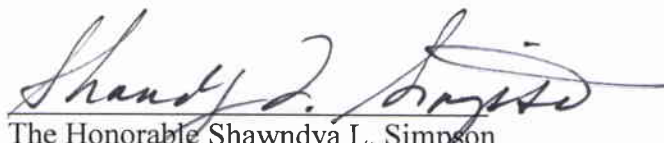
CONCLUSION

Accordingly, it is:

ORDERED, that the defendant's motion for summary judgment dismissing plaintiff's claims of "serious injury" with respect to injuries claimed to her right knee, lumbar and cervical spine and shoulders, and with respect to the Insurance Law § 5102(d) categories of permanent loss of use and 90/180-day injury, is denied.

This constitutes the decision, opinion and order of the Court.

Dated: Bronx, New York
May 13, 2019


The Honorable Shawndya L. Simpson
Justice of the Supreme Court