

Allen v Green

2021 NY Slip Op 34108(U)

May 28, 2021

Supreme Court, Bronx County

Docket Number: Index No. 30526/2017E

Judge: Kim Adair Wilson

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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 IA-12

C

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ALLEN, GLORIA

Index No. 30526/2017E

-against-

Hon. KIM ADAIR WILSON

GREEN, DAPHNE, J.

Justice Supreme Court

-----X
The following papers numbered _____ to _____ were read on this motion (**Seq. Nos. 002 and 003**) for **SUMMARY JUDGMENT DEFENDANT** noticed on **JUNE 22, 2020**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <input checked="" type="checkbox"/>
Answering Affidavit and Exhibits	No(s). <input type="checkbox"/>
Replying Affidavit and Exhibits	No(s). <input type="checkbox"/>

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided in accordance with the annexed Decision and Order.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: **MAY 28, 2021**

Hon. 
KIM ADAIR WILSON, 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, NEW YORK : Part IA-12

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GLORIA ALLEN,

Plaintiff,

-against-

DAPHNE J. GREEN, APEX CAR SERVICE INC.,
JOHN "DOE" and DAMIEN LEONARD,
Defendants.

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DECISION AND ORDER

Index No. 30526/2017E

Motion Seq #s 002 and 003

**HON. KIM ADAIR WILSON
J.S.C.**

Kim Adair Wilson, J.:

"NOTICE OF MOTION FOR SUMMARY JUDGMENT" (Motion Seq # 002), dated and filed May 7, 2020, by Michelle R. Kolodny, Esq. (Law Offices of John Trop), counsel for defendants Daphne J. Green and Damien Leonard, seeks an "order: i) pursuant to INSURANCE LAW § 5104 AND C.P.L.R. Rule 3212 granting defendants, Daphne J. Green and Damien Leonard's judgment on the grounds that plaintiff Gloria Allen did not suffer a "serious injury" in the accident for which she sues."

"NOTICE OF CROSS-MOTION" (Motion Seq #003), dated and filed June 15, 2020, by Summer Tinnie, Esq. (Baker, McEvoy & Moskovit, P.C.), counsel for defendant Apex Car Service Inc. ("Apex Car Service"), cross-moves, seeking an "Order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the Complaint of plaintiff, in as much as plaintiff, GLORIA ALLEN fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102(d)."

Both motions are decided as set forth below.

Plaintiff Allen claims in her **"AMENDED VERIFIED COMPLAINT,"** dated May 13, 2019, that, on July 7, 2017, she was a rear-seat passenger in a 2009 Ford taxicab, owned by defendant Apex Car Service Inc. and operated by John Doe, when it was involved in a collision with a 2011 Nissan, owned by defendant Green and operated by defendant Leonard, causing her to sustain serious personal injuries. According to plaintiff's **"VERIFIED BILL OF PARTICULARS,"** dated June 13, 2018, plaintiff injured her cervical, thoracic and lumbar spine; and was confined to her bed and home for a period of approximately three months except to go on occasional outings and doctor's appointments.

By “**AFFIRMATION IN SUPPORT**,” counsel for defendants Green and Leonard asserts that plaintiff’s injuries do not meet the threshold criteria, in that, they are not permanent in nature; plaintiff received no medical assistance at the accident site; did not file a police report; has not received physical therapy since September 2017; and worked her regularly scheduled days and hours. Similarly, counsel for defendant Apex Car Service asserts, by “**AFFIRMATION IN SUPPORT**,” that plaintiff’s injuries do not meet the threshold criteria.

Insurance Law § 5102(d) delineates the serious injury threshold, stating in pertinent part:

a personal injury which results in...a fracture...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 nonpermanent 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.

Significant limitations of a body function as defined in Insurance Law § 5102(d) are established by identifying objective tests employed to measure ranges of motion, providing the patient’s test results and indicating normal ranges of motion (*Nagbe v Minigreen Hacking*, 22 AD3d 326 [1st Dept 2005]).

In interpreting the statutory definition of a 90/180 day claim, the words “substantially all” should be construed to mean that the injured person has been prevented from performing his usual and customary activities to a great extent (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]).

Defendants Green, Leonard and Apex Car Service proffer, collectively, plaintiff’s deposition testimony and medical records and the affirmed independent medical examination findings of Drs. Steven A. Renzoni and Warren E. Cohen.

Plaintiff Allen testified, in substance, that she was an unrestrained back-seat passenger in a taxicab when it was involved in a rear-end collision. She neither lost consciousness nor bled from any part of her body. She went to City MD-Urgent Care immediately after the accident where she was examined and underwent x-rays. She was not prescribed any medication or medical devices. She subsequently underwent physical therapy and chiropractic and acupuncture treatment for six or seven months, but treatment has ceased. She has not undergone any surgeries as a result of this accident. At the time of the accident, she was working as a property manager for fifteen buildings, responsible for performing building inspections from the roof to the basement by taking the stairs. She missed twelve days of overtime work on the weekend but continued working her regular Monday to Friday- 8AM to 5PM shift without interruption. She was not confined to her bed and/or home for any period and was able to fly to Arizona in September 2018 without issue.

Plaintiff's medical records include her July 7, 2017 cervical spine x-rays which shows no evidence of acute fracture and no prevertebral soft tissue swelling; evidence of "scoliosis of the thoracic spine" and "mild asymmetry the lateral mass of C1 with the odontoid" are present; and an MRI is recommended for further evaluation.

Plaintiff's cervical, lumbar and thoracic spine MRI findings performed by Dr. Harold Augenstine on September 5, 2017 are as follows, in relevant part:

- Cervical:** Posterior disc bulges at C4/5 and C5/6; mucosal thickening, reversal of the normal cervical lordotic curvature.
- Lumbar:** Moderate thoracolumbar junction dextroscoliosis, mild lumbar levoscoliosis, anterior disc bulges, bilateral facet hypertrophy.
- Thoracic:** Moderate lower thoracic junction dextroscoliosis; posterior disc bulges and "thoracic derangement, thoracic or lumbosacral neuritis or radiculitis with sprain and strain of the thoracic spine," pain, sprain and strain, "limitation of motion and loss of function and use, with damage to the underlying muscles, tendons, ligaments, fascia, soft tissues, blood vessels, capillaries and nerves in and about the injury site."

Dr. Renzoni, a board-certified orthopedic surgeon, reviewed plaintiff's medical and physical therapy records and reports. He examined plaintiff Allen and reported his findings on June 4, 2019. Ms. Allen informed the doctor that she went to Urgent Care on the day of the accident and was evaluated and treated. On the following day, she went to Lenox Hill Hospital's Emergency Room where she was evaluated and treated, underwent x-rays and CT scans and then released on the same day. Dr. Renzoni reports that the plaintiff had "minimal complaints of pain in the neck, mid back, and lower back." Range of motion tests performed on plaintiff's cervical and thoracic spine revealed no restrictions; she presented a 20-degree restricted range of motion of her lumbar spine during flexion movement; and her Straight Leg Raise Test and all diagnostic tests were negative. Dr. Renzoni opined that the plaintiff's cervical, thoracic and lumbar spine sprains/strains were resolved; she is currently working and may continue to do so without restriction; she is neither disabled nor permanently injured; and she presents no evidence of a disability.

Dr. Cohen, a board-certified neurologist, reviewed the plaintiff's Verified Bill of Particulars. He examined the plaintiff on December 14, 2018 and reported his findings on December 28, 2018. The plaintiff's current complaints were of constant mid back pain. She denied radiating pain, numbness or tingling or weakness of the lower extremities, neck and lower back pain and headaches. Dr. Cohen, like Dr. Renzoni, performed cervical and lumbar spine range of motion tests which revealed no restrictions. Her thoracic spine examination revealed no tenderness or muscle spasms. She presented no abnormalities relative to her cranial nerve and motor exam and her sensation, coordination and gait were normal. Dr. Cohen opined that the examination revealed no abnormalities and presented no clinical objective evidence of a neurological function deficit; her subjective complaints did not correlate with the objective clinical exam findings; and she demonstrated no neurological impairment that would restrict her daily living and usual activities.

Defendants Leonard and Green move and defendant Apex Car Service cross-moves for summary judgment on the ground that plaintiff Allen's claimed injuries do not meet the threshold criteria pursuant to the mandates of Insurance Law § 5102[d]. To prevail on a motion for summary judgment, the defendants bear the burden to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a serious injury because of the automobile accident. The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

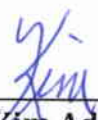
Upon review of the statutory authority, case law, the defendants' submitted evidence and the record, this Court determines that the defendants have made a prima facie showing of entitlement to judgment as a matter of law, and thus, have met their respective burdens. The MRIs of plaintiff's spine yielded disc bulges, which alone, are insufficient to establish a serious injury (*Toure v Avis Rent-a-Car Systems, Inc.*, 98 NY2d 345 [2002]) and sprains and strains, as a matter of law, are not serious injuries (*Cruz v Lugo*, 67AD3d 495 [1st Dept 2009]). Significantly, the doctors' respective examinations yielded no orthopedic or neurological deficits or abnormalities. Plaintiff Allen submits no opposition papers and thus, fails to meet her shifting burden and raise a triable issue of fact. In light of the foregoing, this Court determines that the defendants' respective motions are **GRANTED**.

Accordingly, defendants Leonard and Green's motion and defendant Apex Car Service, Inc.'s cross-motion for summary judgment are **GRANTED** as stated herein, and plaintiff's complaint is dismissed in its entirety.

Movants are directed to serve a copy of this Decision and Order with Notice of Entry, upon the parties within thirty (30) days of entry, pursuant to the Administrative Order of the Chief Administrative Judge (AO/114/20), effective May 25, 2020. Therein, it states, in pertinent part, that "in courts and case types approved for electronic filing through NYSCEF, represented parties must commence new matters or proceed in pending matters exclusively by electronic filing through NYSCEF. Represented parties must file and serve papers in such matters (other than service of commencement documents) by electronic means through NYSCEF...Unrepresented parties may file, serve and be served in such matters by non-electronic means."

This constitutes the Decision and Order of this Court.

Dated: May 28, 2021
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.

Hon. Kim Adair Wilson, J.S.C.