

Hodiantov v Laor

2021 NY Slip Op 34183(U)

May 7, 2021

Supreme Court, Queens County

Docket Number: Index No. 713820/2018

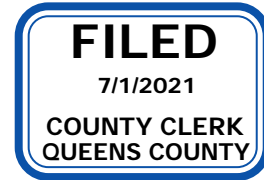
Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

RAISA HODIANTOV,
Plaintiff,

Index No.: 713820/2018

Motion Date: 5/6/21

- against -

Motion No.: 19

LEANNA F. LAOR,

Motion Seq.: 3

Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Memo. of Law-Exhibits....	EF 37 - 46
Affirmation in Opposition-Exhibits.....	EF 62 - 75
Affirmation in Reply.....	EF 76 - 77

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on August 19, 2016. As a result of the accident, plaintiff alleges that she sustained serious injuries to her right shoulder, cervical spine, lumbar spine, left wrist, bilateral knees, and right ankle.

Plaintiff commenced this action by filing a summons and complaint on September 7, 2018. Defendant joined issue by service of a verified answer on October 12, 2018. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on April 8, 2019 and testified that she was involved in the subject

accident. She did not lose consciousness and was not bleeding. She went to the hospital. She did not have any fractures. She was given a prescription and did not undergo any further treatment. She went to a physical therapy facility and treated with a physician whom she had treated with before, after previously fracturing her leg. She ceased treatment there in 2017. A left knee MRI confirmed arthritis in her knee. She first saw Dr. Kwon for her shoulder in November 2017. She was told she had a torn ligament in her right shoulder. Dr. Kwon performed right shoulder arthroscopy. Dr. Kwon informed her that the surgery was successful. Dr. Khaimov performed a right knee arthroscopy. She last saw Dr. Khaimov in 2017. She last saw Dr. Kwon in 2018. When she last saw Dr. Kwon, she informed him that she did not have any pain or discomfort. Since 2014 or 2015, she has been receiving Social Security Disability benefits for a prior injury to her lower back. She injured her lower back in a slip and fall in 2009 or 2010. She believes she also injured her left leg in that prior accident. Her prior lumbar injuries included a fracture, contusion and arthritis. Her prior treatment included hospital treatment, physical therapy, specialists, and lumbar injections. She sustained an injury to her left foot in another prior rear end motor vehicle accident in 2006. She was involved in another rear end motor vehicle accident in 2008. Prior to this accident, she was suffering from migraines and treated with neurologist, Dr. Khelemsky. Dr. Khelemsky provides injections for migraines. She was having lumbar pain at the time of the subject accident. She had a right shoulder injection prior to the subject accident. She had left wrist pain prior to the subject accident and underwent physical therapy and MRIs. Dr. Khaimov told her she had arthritis in the hands. She was told she had a tumor in her left knee prior to the subject accident. In November 2016, she fell on her knees and fractured her left ankle. On May 15, 2019, she was involved in another slip and fall and injured both knees, both hands, and her right shoulder. She was last employed in February 2011. She stopped working because she was having an issue with her husband. Since the accident, she has been able to travel to Israel for three weeks. She requires assistance with cooking, dressing, and bathing.

Edward A. Toriello, M.D. performed an independent medical examination on plaintiff on June 18, 2019. Plaintiff presented with current complaints of bilateral knee pain, numbness in the digits of her right hand, and numbness in her left buttock. Dr. Toriello identifies the records reviewed prior to rendering his report. Dr. Toriello performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's lumbar spine, left shoulder, bilateral wrists and hands, and bilateral ankles and feet. Dr. Toriello did note restricted

ranges of motion regarding plaintiff's cervical spine, right shoulder, and bilateral knees. All other objective testing performed was negative. Dr. Toriello concludes that plaintiff did not sustain any injury to her right shoulder or right knee on August 19, 2016 that would have required surgical intervention. Dr. Toriello notes that plaintiff reported that prior to the subject accident, she injured her right knee, right ankle, bilateral knees, and right shoulder. Dr. Toriello states that the examination of the bilateral knees and right shoulder revealed decreased range of motion. There was no objective evidence of impingement or internal derangement on examination. Dr. Toriello states that the examination of the cervical lumbar spine revealed decreased range of motion. There was no objective evidence of radiculopathy. The MRI reports of the cervical and lumbar spine did not reveal evidence of a traumatic injury. Pre-existing degenerative changes are noted. In Dr. Toriello's opinion, at most, plaintiff sustained soft tissue injuries. All of the injuries have since resolved. The observed decreased ranges of motion can be subjective in nature. There were no objective findings that support plaintiff's complaints. There is no objective evidence of continued disability. Plaintiff is able to return to work and perform her normal daily living activities without restriction. There is no objective evidence of permanency as it relates to the alleged injuries from the subject accident.

Jonathan Lerner, M.D. reviewed the MRIs of plaintiff's cervical spine taken on September 21, 2016, lumbar spine taken on September 28, 2016, right knee taken on September 14, 2016, right shoulder taken on September 14, 2016, and left wrist taken on September 21, 2016. Dr. Lerner opines that, inter alia, the MRIs reveal no causal relationship between the subject accident and the findings on the MRIs.

Defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a 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 organ, member, function or system. Defendant also contends that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of her usual daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting

competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, the conclusion that plaintiff did not suffer a serious injury as a result of the subject accident was directly contradicted by Dr. Toriello who examined plaintiff nearly three years after the subject accident and recorded objectively-measured limitations in range of motion (see Sook Houg v Beers, 151 AD3d 995 [2d Dept. 2017]; Mercado v Mendoza, 133 AD3d 833 [2d Dept. 2015]; Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]).

Since defendant failed to establish a prima facie case, it is unnecessary to consider plaintiff's opposition (see Smith v Rodriguez, 69 AD3d 605 [2d Dept. 2010]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]).

In any event, even if this Court were to find that defendant established a prima facie case, plaintiff raised triable issues of fact as to whether she sustained a serious injury by submitting, inter alia, the physician's affirmation of Colin Clarke, M.D. who examined plaintiff on January 27, 2021 and found continued limited ranges of motion in plaintiff's right shoulder, right knee, cervical spine, and lumbar spine. Dr. Clarke opines that the injuries sustained to plaintiff's right shoulder, right knee, cervical spine, and lumbar spine are attributable to the subject accident. Plaintiff also submits the surgeon's affirmation of Aleksandr Khaimov, D.O. Dr. Khaimov, who performed the right knee surgery, affirms that the arthroscopic surgery was medically necessary, and the condition is causally related to the subject accident.

Based on the affirmations stating that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion in a recent examination, was required to undergo surgery due to the injuries sustained in the subject accident, and concluding that the injuries are permanent and causally related to the subject

accident, triable issues of fact (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992][finding that the conflicting findings of the doctors create a triable issue of fact]).

Accordingly, and for the reasons stated above, it is hereby,
ORDERED, that the motion is denied.

Dated: May 7, 2021
Long Island City, N.Y.



ROBERT J. McDONALD
J.S.C.