

**Alfaro v Barcia**

2020 NY Slip Op 33314(U)

October 8, 2020

Supreme Court, New York County

Docket Number: 152450/2017

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

ANGELA ALFARO

Plaintiff,

- v -

RICHARD BARCIA,

Defendant.

-----X

INDEX NO. 152450/2017

MOTION DATE 01/23/2020, 02/18/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 49

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY

Before the Court is motion sequence 001 and 002. In motion sequence 001, defendant moves to strike this action from the trial calendar and vacate plaintiff's Note of Issue and Statement of Readiness on the grounds that it is not ready for trial; or in the alternative, to extend the time to file a motion for Summary Judgment to 60 days after the exchange of all outstanding discovery. In motion sequence 002, defendant moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiff, Angela Alfaro's Complaint on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Both motions are denied.

Note of Issue

This action stems from a motor vehicle accident which occurred on August 21, 2015 and allegedly led to plaintiff's serious injury. Plaintiff filed Note of Issue with the Court on January 6, 2020 (Mot, Exh B). Defendant alleges that the Certificate of Readiness and accompanying

papers are deficient and incorrect in that plaintiff has failed to fully respond to defendant's Post-Deposition Demand for Discovery and Inspection dated February 22, 2019 (Mot, Exh G).

Defendant alleges that no response has been received and that good faith efforts were made via correspondence to plaintiff's counsel on July 11, 2019, September 23, 2019, October 24, 2019, and January 15, 2020 (Mot, Exh H-K).

The Court notes that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1<sup>st</sup> Dep't 2002)(internal citations omitted). Defendant's motion attaches a stipulation signed by both parties on December 13, 2019, which states that all discovery is complete, plaintiff to file Note of Issue by January 13, 2020 and that plaintiff was to provide authorizations within 60 days after filing the note of issue (Mot, Exh F). Thus, defendant's argument that plaintiff's Certificate of Readiness contains an erroneous fact that discovery is complete is unavailing.

Defendant's counsel agreed and signed a stipulation that all discovery was complete. Defendant has failed to demonstrate that plaintiff willfully and contumaciously failed to comply with discovery directives. However, the Court does agree that defendant will be prejudiced absent authorizations and a response to defendant's Post-Deposition Demand for Discovery and Inspection dated February 22, 2019. Thus, the Court Orders that plaintiff provide all outstanding authorizations pursuant to the December 13, 2019, Stipulation and provide a response to defendant's Post-Deposition Demand for Discovery and Inspection dated February 22, 2019. Failure to provide authorizations and respond shall result in penalties and/or sanctions against

plaintiff. Thus, the branch of defendant's motion seeking to strike the Note of Issue is denied and the branch of defendant's motion to extend the time to file for summary judgment to 60 days from the date all discovery is completed is granted.

### Summary Judgment

Defendant's motion to dismiss plaintiff's complaint is denied. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendant alleges that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendant alleges that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of chronic and longstanding degenerative changes. Defendant attaches the September 18, 2019 report of Dr. Jeffrey Salkin who examined plaintiff on August 15, 2019 (Mot, Exh D). Dr.

Salkin's report concluded that there is no objective evidence of permanency in regard to the underlying accident (*id.*, at 5).

Defendant also attaches the reports of Dr. Elizabeth Ortof and Dr. Alan B. Greenfield (*id.*, Exh E & F). Dr. Ortof's report is based upon an examination of plaintiff on August 15, 2019, in which she observed normal ranges of motion and concluded that there were no objective findings of permanency or residuals (*id.*, Exh E at 4). Dr. Greenfield's November 22, 2019 report found degenerative disc disease in plaintiff's cervical spine and lumbar spine (*id.*, F). Dr. Greenfield concluded that there were no findings which can be attributed to the underlying accident beyond a reasonable medical doubt (*id.*). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, defendant, in contrast to the defendant in *Rosa*, has not submitted a finding by plaintiff's own doctor who presented findings of degeneration (*see Rosa* at 571; *Alvarez v NYLL Mgt. Ltd.*, 120 A.D.3d 1043, 1044 [1st Dept 2014])[finding that where plaintiff's own medical records show a degenerative condition, plaintiff's doctor must address or contest the findings of

that were acknowledge in reports of plaintiff's own physicians]). Defendant bases their findings from MRI's conducted by Dr. Greenfield, not by plaintiff's own doctors.

Further, plaintiff submits the report of Dr. Walter F. Pizzi who examined plaintiff on September 2, 2015 following her accident a month earlier on August 20, 2015 (Aff in Op, Exh B). Dr. Pizzi found a loss of range of motion to both the cervical spine and lumbar spine (*id.*). Dr. Pizzi concluded that the 44.3% loss of motion to the cervical spine and 40.5% loss of motion to the lumbar spine are causally related to the accident. Dr. Pizzi examined plaintiff again on March 18, 2020 and concluded that the injuries are permanent (*id.*). Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

Accordingly, it is

ORDERED that the branch of defendant's motion to strike the note of issue is denied; and it is further

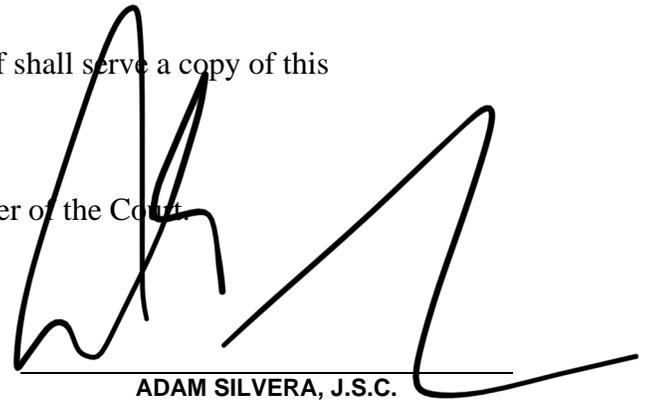
ORDERED that the branch of defendant's motion to extend the time to file a motion for Summary Judgment to 60 days after the exchange of all outstanding discovery is granted; and it is further

ORDERED that plaintiff provide all outstanding authorizations pursuant to the December 13, 2019, Stipulation and provide a response to defendant's Post-Deposition Demand for Discovery and Inspection dated February 22, 2019 within 30 days; and it is further

ORDERED that defendant's motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendant with notice of entry.

This constitutes the Decision/Order of the Court.



10/8/2020

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE