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| Greene v Ragoonanan |
| 2017 NY Slip Op 30023(U) |
| January 10, 2017 |
| Supreme Court, Queens County |
| Docket Number: 700096/2016 |
| Judge: Robert J. McDonald |
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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

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NYASHA GREENE, Index No.: 700096/2016
Plaintiff, Motion Date: 12/6/16
- against - Motion No.: 67
BISSOONDAYE RAGOONANAN, Motion Seq.: 1
Defendant.

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

| | Papers <u>Numbered</u> |
|--|---------------------------|
| Notice of Motion-Affirmation-Exhibits..... | EF 12 - 15 |
| Affirmation in Opposition-Exhibits..... | EF 17 - 28 |
| Reply Affirmation..... | EF 30 - 31 |

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 July 3, 2014 on the Van Wyck Expressway northbound exit ramp (Exit 3) at or near Linden Boulevard, in Queens County, New York. In the verified bill of particulars, plaintiff alleges that she sustained serious injuries to her cervical spine and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on January 5, 2016. Issue was joined by service of defendant's verified answer dated January 26, 2016. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment in favor of defendant and dismissing the complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Jeffrey Michael Marchese, Esq.; a copy of the pleadings; a copy of the verified bill of particulars; a copy of the transcript of the examination before trial of plaintiff taken on June 8, 2016; a copy of the Verified Bill of Particulars; and copies of the affirmed medical reports of Frank D. Oliveto, M.D., Marianna Golden, M.D., and Naunihal Sachdev Singh, M.D.

At her deposition, plaintiff testified that she was involved in the subject accident. Following the accident, she was not confined to her bed, but she was confined to her home for about one month. She was unable to perform her regular household chores for several months after the accident. At the time of the accident, she worked at Delta terminal at JFK International Airport. She tried to return to work following the accident, but was sent home by her manager. She was continuously absent from work for approximately three and a half months following the accident. She received disability benefits during that time period until October 2014. She returned to work on October 3, 2014. For approximately three and a half months thereafter, her manager instructed her not to lift passenger luggage, bend her body, or stand behind the counter. Lifting and bending would exacerbate her back injuries. She is currently working at her job without restrictions. She continues to experience back pain, spasms, and stiffness when attempting to perform household chores and when taking care of her four year old child. She was unable to continue receiving medical and physical therapy because the insurance company's physician's report cancelled further treatment.

Plaintiff first appeared for an independent neurologic examination before Dr. Singh on November 13, 2014. Plaintiff presented with current complaints of pain in her neck and upper, mid and lower back. She also stated that she has difficulty sleeping. Dr. Singh identifies the medical records he reviewed, and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine, except for a ten degree limitation regarding right and left lateral rotation. He also found full range of motion in plaintiff's lumbar spine, except for a twenty degree limitation regarding flexion. Dr. Singh notes that plaintiff has a tendency to move her cervical and lumbar spine cautiously and slowly stating that she will have pain. However, Dr. Singh concludes that plaintiff's neurological examination is normal. He opines that there is no neurological disability.

Plaintiff appeared for another independent neurologic examination before Dr. Golden on January 21, 2015. Plaintiff presented with current complaints of pain in the neck, mid and low back, and headaches. Dr. Golden identifies the medical records she reviewed, and performed objective range of motion testing using a goniometer. She found full range of motion in plaintiff's cervical spine and lumbar spine. She concludes that plaintiff is not disabled from a neurologic point of view. Plaintiff may continue to work and perform her normal activities of daily living without any restrictions or neurologic limitations. Dr. Golden states that there is no need for neurological treatment.

Most recently, Plaintiff appeared for an independent orthopedic evaluation before Dr. Oliveto on July 21, 2016. She presented with current complaints of mid and low back pain with exertion, bending, and lifting. She reported that her neck pain had improved. Dr. Oliveto identifies the medical records he reviewed, and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine. However, he found limitations with range of motion in plaintiff's thoracolumbar spine regarding flexion, extension, right and left lateral flexion, and right and left lateral extension. Dr. Oliveto attributes such limitations to subjective complaints of discomfort. He concludes that plaintiff has made a full recovery from all orthopedic injuries sustained as a result of the subject accident. Additionally, he states that there is no evidence of a causally related disability.

Defendants' counsel contends that the affirmed medical reports and plaintiff's testimony are sufficient to demonstrate that plaintiff did not sustain a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

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]).

Where the defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, this Court finds that defendant failed to meet the prima facie burden of demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Dr. Singh, who examined plaintiff four months after the subject accident, and Dr. Oliveto, who examined plaintiff two years after the subject accident, found range of motion deficits. Accordingly, the conclusion that plaintiff had no disability or impairment was, therefore, directly contradicted by the recorded objectively-measured limitations in range of motion (see 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).

Additionally, defendant's own experts use different normal values regarding range of motion testing. For example, inter alia, Dr. Singh uses a normal value of 45 degrees for extension of the cervical spine, while Drs. Oliveto and Golden use a normal of 60 degrees. Dr. Singh reported plaintiff's range of motion as 45 degrees, which would be a limited range of motion under Drs. Oliveto and Golden's normal values. Thus, the medical reports create issues of fact between themselves as to whether plaintiff's ranges of motion are within normal limits. Where defendants' experts offer different normal range of motion, defendants cannot demonstrate, prima facie, that plaintiff's

injuries were not serious within the meaning of the Insurance Law (see Cracchiolo v Omerza, 87 AD3d 674 [2d Dept. 2011]; Martinez v Pioneer Transp. Corp., 48 AD3d 306 [1st Dept. 2008]).

Based on the foregoing, this Court finds that defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

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]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the summary judgment motion by defendant is denied.

Dated: January 10, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.