

<b>Wingfield v Holubowich</b>
2017 NY Slip Op 31744(U)
August 18, 2017
Supreme Court, New York County
Docket Number: 158089/2013
Judge: Paul A. Goetz
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C. Justice

PART 22

Index Number : 158089/2013  
WINGFIELD, EURIDICE  
vs  
HOLUBOWICH, MICHAEL  
Sequence Number : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Name of Law | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2  
Replying Affidavits \_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

Defendants Michael Holubowich and Verizon New York, Inc.'s motion for summary judgment on the grounds that the injuries allegedly sustained by Plaintiff Euridice Wingfield as a result of the November 22, 2011, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges she sustained injuries to her cervical, thoracic and lumbar spine. Plaintiff avers that her injuries meet the following Insurance Law § 5102 (d) criteria: Significant disfigurement, fracture; permanent loss of use; permanent consequential limitation; significant limitation of use; and 90/180-day.

Defendants' orthopedist, Dr. Edmund Ganal, found during his exam of Plaintiff on December 15, 2014, normal ranges of motion of and negative objective tests for her cervical, thoracic and lumbar spine. Dr. Ganal concludes that Plaintiff's cervical, thoracic and lumbar spine strains are resolved.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: AUG 18 2017

10741

\_\_\_\_\_, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: \_\_\_\_\_
Justice

PART \_\_\_\_\_

-v-

INDEX NO. \_\_\_\_\_
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Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Defendants' radiologist, Dr. A. Robert Tantleff, reviewed MRI's of Plaintiff's cervical spine taken on January 31, 2012 and of her lumbar spine taken on February 3, 2012, and found that the causes of her pain in her cervical spine is potentially degenerative disc disease. Dr. Tantleff found that the causes of Plaintiff's pain in her lumbar spine is also degenerative disc disease and "congenital transitional lumbosacral junction."

Defendants' submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained a serious injury to cervical and lumbar spine. Dr. Ganal concludes that Plaintiff's injuries to her cervical and lumbar spine are resolved strains but Dr. Tantleff concludes that Plaintiff's injuries are the result of degeneration. These contradictory findings concerning Plaintiff's cervical and lumbar spine raise triable issues of fact for the jury to resolve (Martinez v Pioneer Transportation Corp., 48 AD3d 306 [1st Dept 2008]). Because there is a triable issue of fact as to whether Plaintiff sustained a serious injury that was causally related to the accident to her cervical and lumbar spine, it is unnecessary to address the alleged injuries to thoracic spine since she is entitled to seek recovery for all the injuries she allegedly incurred as a result of the accident (Boateng v Yiyen, 119 AD3d 424 [1st Dept 2014]; Caines v Diakite, 105 AD3d 404 [1st Dept 2013];

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: \_\_\_\_\_ 2014 \_\_\_\_\_, J.S.C.

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

-v-

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MOTION DATE \_\_\_\_\_

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Answering Affidavits — Exhibits \_\_\_\_\_ No(s) \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1<sup>st</sup> Dept 2012] [holding “[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants’ summary judgment.”]; *Sin v Singh*, 74 AD3d 1320 [2<sup>nd</sup> Dept 2010] [holding “[s]ince the Supreme Court found that there were triable issues of fact regarding whether the plaintiff sustained a serious injury to her right ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the accident.”]).

Defendants met their prima facie burden as to Plaintiff’s 90/180-day claim by annexing Plaintiff’s verified bill of particulars wherein she states she was confined to her home and bed for one week immediately following the accident and her deposition testimony wherein she states that within days of the accident she had guests for Thanksgiving, and was not confined to her bed. Also supporting Defendants prima facie showing are the self-evaluations contained in Dr. Cancellieri’s records showing Plaintiff was able to take part in her usual and customary daily activities (*Fernandez v Hernandez*, 2017 NY Slip Op 05026 [1<sup>st</sup> Dept June 20, 2017] [holding “defendants made a prima facie showing that plaintiff did not suffer a 90/180-day injury, given her admission in the bill of particulars that she was only confined to her bed or home for a period of five weeks.”]). Plaintiff failed to raise a triable issue of fact. Her unsubstantiated claim that she can only work 16-20 a week as result of her pain and limitations and that she is unable to perform certain activities such as lifting objects, gardening, bending down, cycling or taking long walks or hikes are insufficient to create an issue of fact (*Dembele v Cambisaca*, 59 AD3d 352, 353 [1<sup>st</sup> Dept 2009] [holding in part, “[w]ithout

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: \_\_\_\_\_ 394 \_\_\_\_\_, J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**HON. PAUL A. GOETZ**

PRESENT: \_\_\_\_\_  
**J.S.C.**  
*Justice*

PART **22**

-v-

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

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Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

any substantiating documentation or affidavit from the employer, plaintiff's vague and self-serving deposition testimony, that he did no return to work until 'three or four month' after the accident, does not suffice to show a 'serious injury' for purposes of the 90/180 day rule"]; *Reyes v Park*, 127 AD3d 459, 461 [1<sup>st</sup> Dept 2015] [holding in part that plaintiff's "claimed limitations, such as his inability to clean his house or play dominoes, were not "substantially all" of his usual and customary daily activities"]).

By attaching Plaintiff's bill of particulars to their moving papers, Defendants also met their prima facie burden as to Plaintiff's significant disfigurement and fracture claims. Nothing in the list of injuries detailed in the bill of particulars supports a claim under these two categories of Insurance Law § 5102 (d).

Accordingly, based on the foregoing it is hereby

**ORDERED** that Defendants' summary judgment motion is GRANTED as to Plaintiff's significant disfigurement, fracture and 90/180-day claims; and it is further

**ORDERED** that Defendants' summary judgment motion is DENIED as to Plaintiff's permanent loss of use, permanent consequential limitation and significant limitation of use claims.

This constitutes the Decision and Order of the Court.

Dated: 8/18/17

*4194*

*Paul A. Goetz* J.S.C.

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