

St. Cyr v Haq
2018 NY Slip Op 34285(U)
June 14, 2018
Supreme Court, Rockland County
Docket Number: 034709/2016
Judge: Thomas E. Walsh, II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
MARIE ST. CYR,

Plaintiffs,

034709/2016

ANWAR U. HAQ and JOHN L. GRASSO,

Motion.#1 - MD
DC - N
Adj: 7/25/18

Defendants.
-----X

Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1-3 read on this motion by Defendant for an Order pursuant to Section 3212 of the *Civil Practice Law and Rules* for Summary Judgment dismissing the Plaintiff's Complaint against Defendant(s) Anwar U. Haq and John L. Grasso together with such other and further relief as to this Court may deem just and proper:

<u>PAPERS</u>	<u>NUMBER</u>
Notice of Motion/Affirmation of Richard Schoenberg, Esq./Exhibits (A-I)	1
Affirmation of Ana M. Goncalves, Esq./Exhibits (A-E)	2
Reply Affirmation of Richard Schoenberg, Esq.	3

The motor vehicle collision giving rise to this action took place on January 22, 2014 at approximately 4:45 p.m. when the Plaintiff was traveling through the parking lot at Target when she collided with Defendant John Grasso's vehicle, which was driven by Defendant Anwar U. Haq. This action was commenced by the filing of a Summons and Complaint on November 2, 2016.¹ Issue was joined by Defendant by the filing of a Verified Answer on November 18, 2016. Defendant raised six (6) affirmative defenses, including the lack of a serious injury pursuant to *Insurance Law* § 5102(d).

¹ The Court notes that Defendant's motion contains a typographical error in paragraph 6, which indicates that the action was commenced on March 21, 2012. The date alleged is prior to the occurrence of the accident and must be a typographical error.

At the outset the Court notes that a Note of Issue was filed on November 20, 2017. Subsequently, Defendant filed the instant timely Motion of Summary Judgment with a return date of February 15, 2018 and requiring motion practice pursuant to *Civil Practice Law and Rules* § 2214(b). The Court administratively adjourned the return date of the instant motion to Friday February 16, 2018, as per the Court's part rules all motions are to be returnable on Fridays. The Plaintiff filed untimely opposition at 10:28 a.m. on February 14, 2018, two days before the return date. Defendant e-filed a Reply on February 23, 2018 (after the return date) along with an Affidavit of Service indicating that a reply was sent to Plaintiff's counsel via regular mail on February 22, 2018. Defendant seeks the Court to grant the summary judgment motion as unopposed due to the untimeliness of Plaintiff's opposition.

The Plaintiff's opposition were untimely without any application to the Court seeking an extension of time to file opposition or any record that Defendant's counsel was contacted asking for a consent adjournment of the return date. Nonetheless, the Court will consider the Plaintiff's opposition along with the Defendant's Reply arguments so as to avoid any prejudice to the parties.

Turning now to the assertions in the instant motion for summary judgment, the Court notes that in this action the Plaintiff's bill of particulars alleged that she sustained the following injuries: patellar osteocytes, internal derangement and loss of range of motion of the left knee, L4-5 diffuse posterior disc bulge which impresses upon the ventral aspect of the thecal sac and narrows the inferior recesses of the neural foramina bilaterally, L5-S1 diffuse posterior disc bulge which impresses upon the ventral aspect of the thecal sac and narrows the inferior recesses of the neural foramina bilaterally, left L4-5 radiculopathy, loss of range of motion, C4-5 posterior disc bulge slightly eccentric to the left impressing upon the ventral thecal sac and partially effacing the anterior subarachnoid space, C5-6 posterior disc bulge slightly eccentric to the left impressing upon the ventral thecal sac and partially effacing the anterior subarachnoid space, straightening with reversal of the physiologic cervical curvature suggesting muscle spasms and acute bilateral C5-6 radiculopathy loss of range of motion.

Plaintiff's Bill of Particulars further alleged that Plaintiff sustained a serious injury as defined by *Insurance Law* § 5102 and alleged the injuries she suffered were permanent and continuing in nature. Further, Plaintiff alleged that the injuries and conditions caused and/or

contributed to the Plaintiff living a diminished quality of life, including less enjoyment of life than the Plaintiff would otherwise have experienced, but for the injuries and conditions alleged herein. Additionally, Plaintiff contends that she suffered and will continue to suffer pain and discomfort of the injured portions of her body, including the adjacent and surrounding muscles, tendons, nerves, joints, fascia, vessels and soft tissues.

The Plaintiff was examined by Dr. Joseph Laico at the request of the Progressive Insurance. In his report² of that examination, Dr. Laico states that he conducted a physical examination of the Plaintiff and that he reviewed Plaintiff's medical records. Dr. Laico reported: that Plaintiff was involved in a motor vehicle accident on January 22, 2014 and she was the seat-belted passenger in an automobile which was struck at right angles on the left front quarter by another sedan; that Plaintiff noted increasing pain in her neck, back and left knee, she had no reported lacerations or a claimed loss of consciousness, but was dazed for several minutes after the impact; that Plaintiff was treated by Dr. Cappelo, a chiropractor, with chiropractic manipulation, physical therapy and acupuncture. Dr. Laico further reports he reviewed the police accident report, the April 14, 2014 MRI of Plaintiff's lumbrosacral spine, April 14, 2014 MRI of Plaintiff's left knee, April 14, 2014 MRI of Plaintiff's cervical spine, the February 11, 2014 report of Dr. Kim (acupuncturist), reports from Dr. Cappello from February 11, 2014 through March 18, 2014, reports from February 13, 2014 through February 22, 2014 of physical therapy progress notes from Valley Medical. He stated that his diagnosis was cervical and lumbosacral strain and sprain, resolved and a contusion of the left knee with residual limited range of motion.

The Plaintiff was also examined by Dr. Kenneth S. Austin at the request of the Defendant. In his report of that examination, Dr. Austin states that he conducted a physical examination of the Plaintiff and that he reviewed Plaintiff's medical records. Dr. Laico reports: that Plaintiff was involved in a motor vehicle accident on January 22, 2014 and was a restrained driver of a late model automobile that was "T-boned" on its driver's side; that Plaintiff denied loss of consciousness at the scene, that she felt fine at the scene and declined medical treatment; that Plaintiff went to Nyack Hospital's emergency room the next day where she was treated and

² Exhibit H of Defendant's motion includes the report of Joseph Laico, M.D. from his independent examination of Plaintiff. Within the exhibit there is a blank page between Bates Stamp 000067 and 000068. In addition there is no page after the page with Bates Stamp 000068 and there is no page with the doctor's signature.

released; Plaintiff was treated by Dr. Cappelo, a chiropractor, after the accident for two (2) to three (3) times weekly for several months, that she saw him for complaints with her neck, lower back and knee pain and was treated with a variety of adjustments. Dr. Austin further reported that the Plaintiff was a sale manager for Target, that she missed one day of work after the accident, that she has continued working without restrictions or limitations with the exception of her complaint that she has pain when she wears high heels. Additionally, Dr. Austin surmises that Plaintiff suffered cervical spine sprain/strain lumbar spin sprain/strain and knee sprain/strain, all of which are resolved.

The Plaintiff testified at her examination before trial and stated therein, in relevant substance, that: that she was picked up from the accident since she only had a permit to drive and therefore could not drive; after the accident she went home and was that she reported to work the following day at 8:00 a.m. and that she left work early that day to go to the hospital that day; other than the half day you missed from work to go to the hospital Plaintiff did not loose any other time from work; she presented to Nyack Hospital the day after the accident with complaints of neck, back and left knee pain, tests were performed at the hospital including ex-rays and that she was treated and released; that she sought further treatment from Dr. Capello, two (2) weeks after the accident; that Plaintiff never received injections and was not told she would need surgery; that Plaintiff stated that she has difficulty lifting wet laundry and doing grocery shopping; that she had injuries from a prior accident in May 2010; that Dr. Capello treated her injuries after the last accident in 2010.

In opposition Plaintiff submitted the affirmed medical report of, Dr. Renato Cappello, which states that he saw the Plaintiff on February 11, 2014 and again on February 5, 2018. At the time of Dr. Cappello's initial examination in 2014 she presented with new injuries (not injuries from her 2010 accident) that the doctor stated in his medical opinion were traumatically induced from the 2014 accident and that Plaintiff had a reduced functional capacity as a result of her injuries. As a result of the records review and physical examination, Dr. Cappello stated that in his medical opinion that Plaintiff's injuries to her lumbar and cervical spine constituted a permanent, partial impairment that precludes the possibility of complete restoration. Further, Dr. Cappello reported that upon reexamination of Plaintiff in February 2018 that based on his recent observations together with Plaintiff's complaints of pain and the disc pathology that was

previously demonstrated that he believed with a reasonable medical certainty that the Plaintiff has sustained a permanent, partial disability to her cervical and lumbar spine.”

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from *any* condition defined in *Insurance Law* §5102(d) as a serious injury [*Healea v. Andriani*, 158 A.D.2d 587 (2d Dept 1990)]. As the proponent of this summary judgment motion defendants must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in their favor, as a matter of law [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); and *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

To meet their summary judgment burden plaintiffs must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether Plaintiff suffered a “serious injury” within the meaning of the Insurance Law [*Zoldas v. St. Louis Cab Corp.*, 108 A.D.2d 378 (1st Dept. 1985), *Dwyer v. Tracey*, 105 A.D.2d 476 (3rd Dept. 1984)]. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of *Insurance Law* §5102 (d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident [*Bonner v Hill*, 302 A.D.2d 544 (2d Dept., 2003); *O'Neill v O'Neill*, 261 A.D.2d 459 (2d Dept., 1999)].

In opposition to defendant’s summary judgment motion Plaintiffs submit the affirmed report of Dr. Reanto Cappello. Based on the medical report of Dr. Cappello, Plaintiff argues that she, in response to Defendant’s motion, demonstrated factual disputes as to Plaintiff’s claim of having sustained a personal injury which resulted in 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 if use of a body function or system, or a medically determined injury or impairment of a non-permanent 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 ninety days during the one hundred eighty days following the occurrence of the injury or impairment

Where as here Plaintiff's doctor's findings are set forth in admissible form in sworn statements and are based on their personal examination and observations, the such examination and observation form an acceptable basis for that doctor's opinion regarding the existence and extent of Plaintiff's range of motion limitation, and, where those findings conflict with those of the Defendant's examining doctor issues of fact exist that preclude summary judgment and that require a trial [*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 (1st Dept 1998)].

Where conflicting medical evidence is offered on the issue of whether the Plaintiff's injuries are permanent or significant, and varying inference may be drawn, the question is one for the jury [*Martinez v. Pioneer Transportation Corp.*, 48 AD 3d. 306 (1st Dept 2008)]. Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

Where the medical affirmations submitted create a triable issue of fact on the question of whether Plaintiff sustained a serious injury, Defendant's motion should be denied [*Chand v. Asghar*, 6 Misc.3d 1010(A), 800 N.Y.S.2d 344, 2005 N.Y. Slip Op. 50025(U)] and discrepancies between the competing reports of the treating physicians and the defendants's examining physicians create issues of credibility and issues of fact that cannot be resolved on summary judgment and that require a trial [*Francis v. Basic Metal, Inc.*, 144 AD2d 634 (2d Dept 1981); *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 (1st Dept 1996)].

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

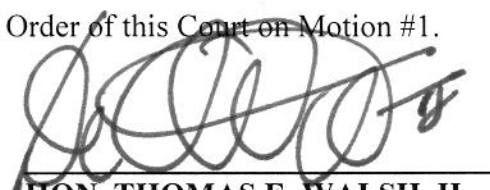
Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Motion #1) is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on **WEDNESDAY JULY 25, 2018 at 9:30 a.m. in TAP** before the Honorable William Sherwood.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
June 4, 2018



HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

LAW OFFICES OF MARTIN H. POLLACK, P.C.
Attorney for Plaintiff
(via e-file)

LAW OFFICES OF JOHN TROP
Attorney for Defendants
(via e-file)