

Dennison v Mones-Levy
2018 NY Slip Op 34378(U)
September 4, 2018
Supreme Court, Rockland County
Docket Number: Index No. 030799/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
CHEYENNE DENNISON,

Plaintiff,

-against -

KAREN S. MONES-LEVY and SARAH
LEVY,

Defendants.
-----X

HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 030799/2017

(Motion #1)

The following papers, numbered 1-4, were read in connection with Defendants Karen S. Mones-Levy and Sarah Levy's (collectively "Defendants") Notice of Motion for summary judgment and dismissal of the Complaint against them on the ground the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A"-"L"	1-2
PLAINTIFF'S AFFIRMATION IN OPPOSITION/EXHIBIT "A"	3
AFFIRMATION IN REPLY	4

Plaintiff commenced the instant action to recover damages for personal injuries arising out of an automobile accident which occurred on November 14, 2016, on Route 59 at or near its intersection with Old Nyack Turnpike, in the Town of Clarkstown, County of Rockland. At the time of the subject occurrence, Plaintiff's stopped vehicle was struck in the rear by Defendants' vehicle. Plaintiff, a 29 year old woman, alleges that as a result of the accident, she sustained the following injuries: closed head injury; concussion; post-traumatic anxiety; post-traumatic depressive syndrome; sprain and strain of the cervical spine; cervical radiculopathy; left foraminal disc herniation at L4-5; sprain and strain of the lumbar spine and lumbosacral radiculopathy.

In support of their summary judgment, Defendants submit the affirmed report

of John T. Rigney, M.D., who reviewed Plaintiff's MRI scans of her cervical and Lumbar spine. Though he found several disc herniations and bulges, he states that they have the appearance of "chronic findings" and nothing in appearance at any level to indicate that they are causally related to the accident in question.

Defendants also submits the affirmed medical report of orthopedic surgeon, Ronald L. Mann, M.D., who examined Plaintiff on December 15, 2017. Upon examination, approximately one year after the accident, Dr. Mann noted significant restriction of motion in Plaintiff's cervical spine including flexion of 40 degrees (normal 45); extension of 30 degrees (normal 45); right rotation of 30 degrees (normal 80); and left rotation of 30 degrees (normal 80). Examination of Plaintiff's lumbar spine also revealed limitations including forward flexion of 10 degrees (normal 60) and lateral flexion of the right and left of 5 degrees (normal 25). Dr. Mann diagnosed Plaintiff with cervical and lumbar sprain and strain. Notwithstanding the limitations in motion, Dr. Mann opined that Plaintiff did not sustain any serious physical injury as a result of the accident and has no disability. With respect to the allegations regarding post-traumatic anxiety depression and a closed head injury, Defendants submit the Plaintiff's medical records from Dr. Cooper, a psychiatrist, and argues that since Plaintiff was treating before the accident with a psychiatrist for depression and anxiety, there is no medical evidence to support her psychological claims as a result of the accident at issue.

In opposition to the motion, Plaintiff argues that Dr. Mann's report contains multiple positive findings that he observed during objective testing performed during the plaintiff's physical examination. As such, pursuant to controlling case law, Defendants have failed to establish their prima facie case and the Court need not consider the opposition papers. Plaintiff further contends that in the event the Court deems that Defendants have met their prima facie burden, she submits the narrative report of Dr. Evan H. Bellin, which she contends establishes triable issues of fact regarding whether Plaintiff sustained a "serious injury." She asserts that Dr. Bellin recounts Plaintiff's treatment history pre-accident and post-accident;

identifies his findings upon his psychological examination of Plaintiff; causally relates his findings to the subject accident and opines that the plaintiff has a permanent disability in terms of her post-traumatic stress disorder and anxiety.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

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, 551 N.Y.S.2d 554 (2d Dept 1990). Precedent in the Second Department holds that where a defendant relies upon the affirmed medical report of its examining physician in support of its motion for summary judgment which notes a significant limitation of motion in a body part, the defendant has failed to meet his prima facie burden and the Court need not consider the sufficiency of the plaintiff's opposition papers. Robinson v. Yeager, 62 A.D.3d 684, 880 N.Y.S. 88 (2d Dept. 2009); Locke v. Buksh, 58 A.D.3d 698; 872 N.Y.S.2d 148 (2d Dept. 2009); Bentivegna v. Stein, 42 A.D.3d 555; 841 N.Y.S.2d 316 (2d Dept. 2007); Zamaniyan v. Vrabeck, 41 A.D.3d 472; 835 N.Y.S.3d 903 (2d Dept. 2007); Kovalenko v. General Electric Capital Auto Lease Inc., 37 A.D.3d 664; 831

N.Y.S.2d 438 (2d Dept. 2007)

In Meyer v. Gallardo, 260 A.D.2d 556; 688 N.Y.S.2d 624, 625 (2d Dept. 1999), the Second Department affirmed a denial of summary judgment where one of the physicians who examined the injured plaintiff on behalf of the defendant stated that the lateral rotation of his cervical spine was 80 degrees to the right and 50 degrees to the left. The Court found that this alone raised an issue of fact as to whether the injured plaintiff suffered a "significant limitation of use of a body function or system." Id. See also Rodriguez v. Ross, 19 A.D.3d 395, 396; 796 N.Y.S.2d 398 (2d Dept. 2005)(since defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines, and his right shoulder, he did not make a prima facie showing of entitlement to summary judgment.); Korpalski v. Lau, 17 A.D.3d 536; 793 N.Y.S.2d 195 (2d Dept. 2005)(dismissal of complaint reversed because defendant failed to make prima facie showing that plaintiff did not sustain a serious injury where defendant's experts reported finding a limitation of motion in plaintiff's left shoulder and lower back.); Alam v. Karim, 61 A.D.3d 904, 879 N.Y.S.2d 1151 (2d Dept. 2009); Bagot v. Singh, 59 A.D.3d 368; 871 N.Y.S.2d 917 (2d Dept. 2009); Colon v. Chu, 61 A.D.3d 805; 878 N.Y.S.2d 127 (2d Dept. 2009).

In the instant matter, Dr. Mann finds significant physical limitations in Plaintiff's cervical and lumbar spine. As such, Defendants have failed to sustain their prima facie burden upon summary judgment and the Court need not address the sufficiency of Plaintiff's opposition papers. Additionally, simply because Plaintiff treated with a psychiatrist prior to the subject occurrence, does not, as a matter of law, negate all triable issues of fact as to whether she sustained psychological injuries sufficient to meet the serious injury threshold. Moreover, an examination of the Psychiatrist's records contain multiple references to the automobile accident as being the cause of anxiety and/or depression. Defendant has simply not met their prima facie burden with regard to the psychological injuries as well.

However, plaintiff has failed to demonstrate a triable issue of fact that she was

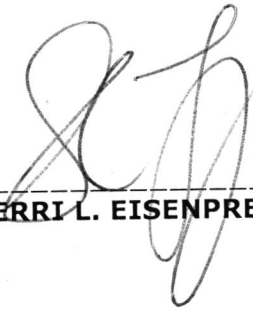
disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. Her allegation that she had some restrictions with regard to her work and/or everyday activities, coupled with her failure to submit medical evidence which documents that she was prevented from performing "substantially all" of her usual and customary activities for the requisite period is insufficient to sustain her burden upon summary judgment. See Rubin v. SMS Taxi Corp., 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010). As such, that claim is hereby dismissed.

ORDERED that Defendants Karen S. Mones-Levy and Sarah Levy's motion (#1) for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that this matter is scheduled for an appearance in the Trial Readiness Part on **Wednesday, October 3, 2018, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: New City, New York
September 4, 2018



HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)