

**Torres v Porcelli**

2019 NY Slip Op 30558(U)

March 1, 2019

Supreme Court, Suffolk County

Docket Number: 06073/2016

Judge: William G. Ford

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SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY**

PRESENT:

**HON. WILLIAM G. FORD  
JUSTICE OF THE SUPREME COURT**

**SUSANA L. TORRES,**

**Plaintiff,**

**-against-**

**SAIGE M. PORCELLI,**

**Defendant.**

**Motions Submit Date: 01/25/2018  
Motion Seq 001 MG; CASEDISP**

**PLAINTIFF'S COUNSEL:**

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**DEFENDANT'S COUNSEL:**

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Upon the following papers numbered read on this Motion for Summary Judgment: Notice of Motion & Affirmation in Support dated January 25, 2018, and supporting papers; Affirmation in Opposition dated March 9, 2018; and Reply Affirmation dated March 22, 2018; it is,

**ORDERED** that defendant's motion seeking summary judgment pursuant to CPLR § 3212 dismissing the Complaint on the basis that plaintiff Susana Torres did not sustain a serious injury as defined by Insurance Law § 5102 (d) is **granted** as outlined below; and it is further

**ORDERED** that plaintiff's complaint is dismissed as against the defendant; and it is further

**ORDERED** that counsel for defendant is hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

**BACKGROUND**

This action arises out of a motor vehicle accident which occurred on September 1, 2015, at the intersection of Ormond Avenue and South Bicycle Path in Brookhaven. Plaintiff Susana Torres was employed as a home health aide for Good Shepard Hospice at the time of the collision. She was driving a 2010 Nissan Rogue at the time of the accident. After coming to a complete stop at the stop sign on Ormond Avenue, plaintiff began to turn right onto South Bicycle Path. As she turned, plaintiff's vehicle was struck on the front left side by a vehicle turning left onto Ormond Avenue from South Bicycle Path. The vehicle was owned and operated by the defendant.

Plaintiff commenced this action by filing a summons and complaint on June 21, 2016, seeking money damages for the serious injuries she claimed she sustained in the accident.

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Plaintiff's bill of particulars lists her injuries as a tear of the anterior-superior left acetabular labrum, aggravation and/or exacerbation of degenerative changes of her left hip, aggravation and/or exacerbation of herniated disc C5-6, aggravation and/or exacerbation of herniated disc cervical spine, and aggravation and/or exacerbation of degenerative changes lumbar spine.

Before the Court is defendant's motion for summary judgment on the basis that plaintiff has failed to sustain a "serious injury" within the meaning of Insurance Law § 5102 (d).

#### DISCUSSION

Pursuant to CPLR § 3212, when moving for summary judgment, a party must establish her cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." To oppose a motion for summary judgment, a party must show the existence of a triable issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

In support of her motion, the defendant submits a copy of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Kelman.

Plaintiff argues that she has satisfied the "serious injury" threshold and submits two affirmed reports from Dr. Zilkha and Dr. Setton, and various unsworn medical records in opposition.

#### STANDARD OF REVIEW

Under Insurance Law § 5102 (d), "serious injury" is defined as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 of 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 a person's 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."

In order to recover under the "permanent loss of use" category, plaintiff must show a total loss of use of a body organ, member, function, or system (*Oberly v Bangs Ambulance Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 [2001]). A minor, mild, or slight limitation of use cannot satisfy the meaning of "serious injury" as defined by § 5102 (d) (*Licari v Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982]). To satisfy the definition of "serious injury" under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically-determined injury of a nonpermanent nature which prevented them from performing

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their usual and customary activities for no less than 90 out of the 180 days following the subject accident (*Sainte-Aime v Suwai Ho*, 274 A.D.2d 569, 712 N.Y.S.2d 133 [2<sup>nd</sup> Dept 2000]).

The defendant has the initial burden of making a prima facie showing, through admissible evidence, that the plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*Gaddy v Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992]). A defendant who relies on the findings of their own witnesses in support of a motion for summary judgment based on the lack of “serious injury” must submit the evidence in an admissible form such as affidavits or affirmations (*Pagano v Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2<sup>nd</sup> Dept 1992]). A defendant can submit the plaintiff’s deposition testimony and the affirmed medical reports of the defendant’s own examining physician in order to satisfy the burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*Moore v. Edison*, 25 A.D.3d 672, 811 N.Y.S.2d 724 [2<sup>nd</sup> dept 2006]). Once the defendant has made a prima facie showing, the burden then shifts to the plaintiff to produce sufficient admissible evidence that her injuries satisfied the meaning of “serious injury,” to defeat the defendant’s motion (see *Gaddy v Eyler*, *supra* at 957).

Defendant, by submitting an affirmed report from their examining physician and through the use of the plaintiff’s deposition testimony, has established a prima facie case that plaintiff did not sustain a “serious injury” under § 5102 (d) (see *Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 [2002]; *supra*; *Gaddy v Eyler*, *supra*). At defendant’s request, Dr. Gary Kelman examined the plaintiff on July 12, 2017, approximately one year and ten months after the subject accident. Dr. Kelman physically examined the plaintiff and found no paraspinal spasms or tenderness to palpitation. He also administered a foraminal compression test and a straight leg raising test, and all results were negative or normal. Using a standard goniometer, Dr. Kelman measured plaintiff’s range of motion and compared her results to both the New York State Workers’ Compensation guidelines and the American Medical Association guidelines. Dr. Kelman found the plaintiff’s range of motion to be equal to the normal range provided by both. He concluded that the plaintiff had resolved sprains/strains of the cervical spine, lumbar spine, and left hip. Dr. Kelman further concluded that the plaintiff does not have any applicable orthopedic disability.

The plaintiff testified during her deposition that she currently works in the same position as she did before the accident. She stated that her work duties are the same as they were prior to the accident. Plaintiff also stated that she missed three days of work over the course of a week as a result of the accident. Based on the affirmed report from Dr. Kelman and plaintiff’s deposition testimony, defendant meets their initial burden of establishing that plaintiff did not sustain a “serious injury” as defined by § 5102 (d) under the permanent loss of use, significant limitation, or 90/180 categories ( see *Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4<sup>th</sup> Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2<sup>nd</sup> Dept 1997]).

Once defendant establishes their prima facie case, the burden shifts to the plaintiff to come forward with evidence in admissible form to raise a triable issue of fact as to whether she sustained a “serious injury” as defined by § 5102 (d) (see *Gaddy v Eyler*, *supra*).

In opposition to defendant's motion, plaintiff submits affirmed medical reports from Dr. Zilkha and Dr. Setton. Plaintiff also submitted various unaffirmed medical records. Unless an acceptable excuse for failure to comply is furnished, findings of a medical witness must be in the form of affidavits or affirmations to be admissible (*see Pagano v Kingsbury, supra*). Plaintiff's unaffirmed medical records submitted in opposition to the motion are inadmissible and therefore will not be considered.

While a plaintiff should not be punished for failing to seek out a doctor who knows how to create a record for litigation immediately after being injured, a contemporaneous medical report is important for proving causation (*see Perl v Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 [2011]). The affirmed radiological reports submitted by the plaintiff do not adequately address causation. The reports merely mention in the clinical history that the plaintiff has a history of a recent motor vehicle accident. Dr. Zilkha compared the results of the cervical spine MRI taken approximately one month after the subject accident to the MRI taken approximately four months before the accident. When compared, the radiologist noted that the herniated disc at C5-C6 was unchanged from the prior study, a small syrinx within the cervical cord at the level of C6-C7 was not as well visualized as on the prior study, and the degenerative disc disease from C2 to T1 was unchanged from the previous study. Dr. Zilkha also compared an MRI of the plaintiff's lumbar spine taken on October 20, 2015, to one taken August 5, 2013. He found that the degenerative disc disease from L1 to S1 remained unchanged from the prior study.

Bulging or herniated discs must be accompanied by objective medical evidence of the alleged physical limitations resulting from the disc injury and their duration in order to support a claim of serious injury (*see Pommells v Perez*, 4 N.Y.3d 566, 797 NYS2d 380 [2005]; *Yakubov v CG Trans Corp.*, 30 A.D.3d 509, 817 N.Y.S.2d 353 [2<sup>nd</sup> Dept. 2006]; *Kearse v N.Y.C. Transit Auth.*, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2<sup>nd</sup> Dept. 2005]; *Diaz v Turner*, 306 A.D.2d 241, 761 N.Y.S.2d 93 [2<sup>nd</sup> Dept. 2003]). The affirmed reports from the plaintiff's radiologists do not address any physical limitations resulting from the alleged aggravation or exacerbation of the previously existing herniations. Without admissible, objective medical evidence of the plaintiff's limitations, the mere existence of her herniated discs cannot support her serious injury claim (*see Pommells v Perez, supra* at 574).

Where a plaintiff alleging serious injury has preexisting degenerative conditions, the plaintiff must address or contest the existence of such conditions and the role they played in the alleged injury (*see Alvarez v. NYLL Mgmt. Ltd.*, 120 A.D.3d 1043, 993 N.Y.S.2d 1 [1<sup>st</sup> Dept. 2014]). The affirmed medical report submitted by the defendant states that the plaintiff had degenerative joint disease of the bilateral hips, cervical spondylosis, and lumbar spondylosis. The affirmed radiologists' reports submitted by the plaintiff acknowledge the plaintiff's preexisting degenerative conditions. Dr. Zilkha states that degenerative disc disease is visible from C2-T1 and L1-S1. Dr. Setton identified mild to moderate degenerative disc disease and spondylosis at C5-6. However, neither radiologist addresses how the preexisting degenerative conditions could have affected the plaintiff's alleged injuries.

The plaintiff testified at her deposition that she had previously had an MRI and treated

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with a chiropractor due to back pain as a result of an earlier car accident. The plaintiff further testified that prior to the subject accident, she had been involved in seven car accidents in the last 22 years. The plaintiff stated during the deposition that a resulting personal injury claim from one of her previous accidents had settled. Plaintiff's evidence is insufficient to show a triable issue of fact as and therefore summary judgment is proper (see *Camilo v Villa Livery Corp.*, 118 A.D.3d 586, 987 N.Y.S.2d 164 [1<sup>st</sup> Dept. 2014]).


CONCLUSION

The defendant made a prima facie showing that the plaintiff did not sustain a serious injury under § 5102 (d) through affirmed medical evidence and the plaintiff's deposition testimony. After establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident, defendant shifted the burden to plaintiff to raise a triable issue of fact (see *Gaddy v Eyler, supra*).

The plaintiff has failed to raise a triable issue of fact as to whether she sustained a "serious injury" under § 5102 (d). Therefore, the defendant's motion for summary judgment dismissing the complaint is **granted**.

The foregoing constitutes the decision and order of this Court.

Dated: MARCH 01, 2019  
Riverhead, New York

  
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WILLIAM G. FORD, J.S.C.

  X   FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION