

Hoggrove v Dominguez
2019 NY Slip Op 32600(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 151210/2017
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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OCTAVIA HOGGROVE, INDEX NO. 151210/2017
Plaintiff, MOTION DATE 01/10/2019
MOTION SEQ. NO. 001

- v -

F DOMINGUEZ, NELO CAR ENTERPRISES CORP,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY

Before the Court is defendants' motion for summary judgment, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants, FF Dominguez and Nelo Enterprises Corp. and to dismiss plaintiff Octavia Hoggrove's complaint on the grounds that plaintiff has failed to demonstrate that he suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motions.

This matter stems from a motor vehicle incident which occurred on December 20, 2016, on West 14th Street at or near its intersection with Lenox Avenue, in the County, City and State of New York, when a vehicle operated by defendant FF Dominguez and owned by defendant Nelo Enterprises Corp. struck a vehicle operated by plaintiff Octavia Hoggrove which allegedly led to her serious injury.

Defendants' motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of

fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep’t 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep’t 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from degenerative pre-existing conditions. In support of their motion, defendants submit doctor affirmations by Dr. Pierce J. Ferriter, Dr. Warren E.

Cohen and Dr. Eric L. Cantos (Mot, Exh F, G, & H). Dr. Pierce found a 10 degree decrease in range of motion in plaintiff's right shoulder but concluded that plaintiff had no orthopedic limitations in use of her body parts and had functional use for normal activities of daily living as well as usual daily activities (Mot, Exh F). Dr. Cohen found that plaintiff had a normal range of motion and no impairment of neurologic function that would impair the ability of plaintiff to participate in daily living and usual activities (Mot, Exh G). Dr. Cantos concluded in his affirmed report that plaintiff has degeneration in cervical spine and lumbar spine, and that findings of injuries "reflect a preexistent and unrelated degenerative condition" (Mot, Exh H).

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa*, plaintiff, submits an opinion from her doctors which address findings of degeneration. In opposition plaintiff submits the affirmation of Dr. Tamer Elbaz who notes that while plaintiff does suffer from degeneration in the cervical spine and lumbar spine, she had an onset of pain and symptoms to her cervical and lumbar region following the accident at issue which she never had before the accident at issue (Aff in Op, Exh C). Dr. Elbaz concluded that plaintiff's injuries are causally related to the December 20, 2016

accident. Thus, plaintiff has raised an issue of fact barring summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff Octavia Hoggrove's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

9/3/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE