

Lurry v UG Imperial Inc.
2019 NY Slip Op 33103(U)
October 7, 2019
Supreme Court, Kings County
Docket Number: 504448/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of OCTOBER, 2019.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

-----X
DOROTHY LURRY,

Plaintiff,

Index No.: 504448/2017

-against-

Decision and Order

UG IMPERIAL INC. JOHN DOE
DRIVER NAME UKNOWN,

Defendants.

-----X

2019 OCT 15 AM 8:10
KINGS COUNTY CLERK
FILED

The following papers numbered 53 to 70 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	10-21
Opposing Affidavits (Affirmations) _____	22-24
Reply Affidavit _____	25

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant moves this court pursuant to C.P.L.R. §3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law §5102(d); and granting such other further relief as this Court

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deems just and proper. Plaintiff opposes the same contending there are material issues of fact.

ARGUMENTS

Defendants argue Plaintiff's injuries do not meet the threshold requirements of a "serious injury" as defined by Insurance Law § 5102(d). Defendant contend the plaintiff own doctor fails to find that the injury is causally related to the accident. Defendant's further argue that Plaintiff fails to raise a triable issue of fact for the jury to refute the evidence of degeneration as the causal connection of the injury and not the accident.

Plaintiff argues Defendants' moving papers fail to shift the burden to the plaintiff. Additionally, plaintiff contends that the defendants fail to establish no serious injury as a matter of law, because there are conflicting range of motion measurements in all doctor reports submitted.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". C.P.L.R. §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

In the Court of Appeals cases regarding serious injury threshold, *Pommells*, 4 NY3d 566, (2005), and *Brown, id.*, defendant's submissions shifted to plaintiff the burden of coming forward with evidence indicating a serious injury causally related to the accident. Unlike *Brown*, however, the defendant in the present case has presented evidence of a preexisting degenerative disc condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact.

In the present case, Dr. Guttman, after physically examining plaintiff and reviewing prior medical records, including MRIs, and concluded that the pain in areas identified by the plaintiff as injured were caused by preexisting and degenerative conditions. Dr. Decker also arrived at the same conclusion after reviewing the MRI of the plaintiff. Such evidence shifts the burden to the plaintiff to refute the allegation that the injuries are casually related to the accident.

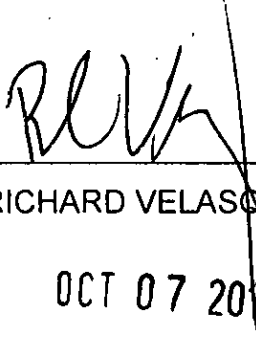
While plaintiff provided Dr. Dayan's expert report of specific losses of range of motion in plaintiff's spine, opining that plaintiff suffered serious and permanent injuries (*Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]) in opposition to the defendants motion, Dr. Dayan fails to opine that the injuries were casually related to the accident in any report submitted in response to defendants' motion. Additionally, plaintiff did not refute defendant's evidence of a preexisting degenerative condition. To the contrary, the

Dayan's reports supplied by plaintiff with regard to each MRI taken of the patient, (the court notes no MRI report for the right knee was annexed by the plaintiff) explained that the MRI's show a degenerative condition. In this case, with "persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition", plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation. In the absence of any such evidence, "the defendant is entitled to summary dismissal of the complaint", such is the case here. (see *Franchini*, 1 NY3d at 537; see also *Licari v Elliott*, 57 NY2d 230, 237 [1982]); quoting, *Pommells v. Perez*, 4 NY3d 566, 579-80, 830 NE2d 278 (2005).

Accordingly, defendant's Motion for Summary Judgment is hereby granted as the plaintiff failed to establish the injuries were casually related to the accident.

This constitutes the Decision/Order of the Court.

Date: October 7, 2019


 RICHARD VELASQUEZ, J.S.C.
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 So Ordered
 Hon. Richard Velasquez

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