FILED: KINGS COUNTY CLERK 09/05/2019 03:05 PM INDEX NO. 512752/2015
NYSCEF DOC. NO. 168 RECEIVED NYSCEF: 09/05/2019

At an IAS Term, Part 81 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 16th day of August, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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TATIANA CAMES,

*Plaintiffs,*

Index No.: 512752/2015

- against -

DECISION AND ORDER

RANDOLPH CRAIG, and FLOYD JOSEPH

Motion Sequence, #7, #8

*Defendants.*

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..... | 1/2, 3/4, |
| Opposing Affidavits (Affirmations)..... | 5, 6, |
| Reply Affidavits (Affirmations)..... | 7, |



Upon a review of the foregoing papers, and after oral argument, the Court finds as follows:

This action relates to a motor vehicle accident that occured on July 23, 2014. Plaintiff Tatiana Cames (hereinafter "the Plaintiff") was a passenger in a car she owned that was being operated by Defendant Randolph Craig (hereinafter "Defendant Craig"). The Plaintiff's vehicle collided with a vehicle owned and operated by Defendant Floyd Joseph (hereinafter "Defendant Joseph").

The Plaintiff claims in her Verified Bill of Particulars (Defendant Craig's Motion Exhibit P, Paragraph 4), that as a result of the incident she sustained a number of serious injuries, including but not limited to, injuries to her right knee, left knee, lumbar spine, and cervical spine. The Plaintiff also claims in her Verified Bill of Particulars (Defendants Craig's Motion Exhibit P, Paragraph 5), that as a result of the incident she was prevented from "performing substantially all of the material acts which constitute their usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the incident."

Defendant Craig now moves (motion sequence #7) for an Order: (1) pursuant to CPLR 2221(a), (d) and (e), to to renew and reargue and ultimately vacate the underlying Decision of this Court dated August 2, 2017; and alternatively (2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by either Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).[1]

The Plaintiff opposes the motion. Specifically, the Plaintiff argues that the motion to renew and reargue is untimely. Also the Plaintiff contends that although the Plaintiff signed a release, it would be against public policy to enforce that release. What is more, the Plaintiff argues that the release was signed without the assistance of counsel, and that there were mutual mistakes of law and fact that should prevent this Court from enforcing the terms of that release as against the Plaintiff. The Plaintiff also opposes that aspect of the motion and cross-motion that seeks summary judgment pursuant to the threshold requirement of Insurance Law § 5102(d)

*Defendant Craig's Application pursuant CPLR 2221(a), (d) and (e)*

As an initial matter, the Court denies that aspect of Defendant Craig's motion pursuant to *CPLR 2221(a), (d) and (e)*. Defendant Craig contends that this Court misapplied the law in the underlying Decision and Order by denying Defendant Craig's prior motion made pursuant to CPLR 3211(a)(5) and General Obligations Law 15-108. In that motion Defendant Craig contended that this proceeding should be dismissed as a result of the Plaintiff having accepted an offer of settlement and payment and tendered a release to Defendant Craig in return.

In this Court's Decision and Order dated August 2, 2017, the Court found that the Plaintiff, after retention of new counsel, by affidavit, raised issues of fraud, duress, misrepresentation and lack of knowledge of the extent of her injury in order to provide an informed release together with

[1] Defendant Joseph cross-moves (motion sequence #8) for the same relief and represents that for the sake of judicial economy it adopts and incorporates the submissions made by Defendant Craig.

circumstances which generally indicate unfairness in relation to her signing the release. The release had been executed some 5 days after the accident. In so far as the Defendant Craig disputed these representations by the Plaintiff, the Court denied the motion and determined that the issue of the validity of the lease be resolved by the trier of fact.

As to that aspect of Defendant Craig's motion seeking to reargue the Court's application of the law, it is denied as untimely given that CPLR 2221(d)(3) provides that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." In the instant proceeding, the underlying Decision and Order was served with Notice of Entry on or about August 17, 2017, more than a year prior to the instant motion having been made (see Defendant Craig's Motion Exhibit "A"). Accordingly, that aspect of Defendant Craig's motion is denied as untimely.

As to that aspect of the instant application seeking to renew, Defendant Craig does not point to any testimony of the Plaintiff during her deposition that contradicts or undermines the affidavit provided by the Plaintiff as contained in the underlying Affirmation in Opposition to the prior motion. In fact when asked about the release the Plaintiff stated (Defendant Craig's Motion, Exhibit M, Page 91) in her deposition that "I'm not comfortable with this document. I don't know what it is." This does not serve to constitute new facts upon which a motion for leave to renew may be founded. See *Lindbergh v. SHLO 54, LLC*, 128 A.D.3d 642, 644–45, 9 N.Y.S.3d 105, 107 [2nd Dept, 2015], quoting CPLR 2221(e). Finally, the deposition testimony did not undermine the Plaintiff's position taken in the prior motion that, *inter alia*, the release was made shortly after the accident and prior to retaining counsel and as such was "not fairly and knowingly made." *See Sacchetti-Virga v. Bonilla*, 158 A.D.3d 783, 784, 73 N.Y.S.3d 194, 196 [2nd Dept, 2018]; *Pacheco v. 32-42 55th St. Realty*, LLC, 139 A.D.3d 833, 33 N.Y.S.3d 301 [2nd Dept, 2016]. Accordingly, Defendant Craig's motion in relation to relief pursuant to CPLR 2221(a), (d) and (e) is denied.

*Defendants' Application pursuant to CPLR 3212 and Insurance Law § 5102(d)*

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Defendant Craig contends that the affirmed reports of Dr. Jeffrey Passick and Dr. David A. Fisher support his contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds the Defendant has the initial burden of demonstrating that the Plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102. Dr. Jeffrey Passick conducted an examination of Plaintiff on September 28, 2018, more than four years after the accident at issue. In his report, Dr. Passick detailed his findings based upon his review of, *inter alia*, Plaintiff's medical records, the Dr.'s personal observations, Plaintiff's verified Bill of Particulars and range of motion

testing of the cervical spine, the thoracic spine, the lumbar spine, the right knee, the left knee, the right hip and the left hip. Dr. Passick found normal range of motion for each examination. Dr. Passick opined that "[t]here are no objective residuals or permanency related to the 07/23/14 accident." (See Defendant Craig's Motion, Examination by Dr. Passick, Annexed as Exhibit Q).

Dr. David A. Fisher, a radiologist, did not conduct a medical examination but instead reviewed the MRI films related to examinations of the Plaintiff's lumbar spine, and cervical spine. The date of the lumbar spine MRI was November 17, 2014, about 117 days after the date of the accident, while the date of the cervical spine MRI was February 26, 2015, more than seven months after the date of the accident. In relation to these reviews, Dr. Fisher opined that "[t]here is no radiographic evidence of traumatic or causally related injury to the lumbar spine." As to the cervical spine Dr. Fisher opined that "[t]here is no radiographic evidence of traumatic or causally related injury to the cervical spine." (See Defendant Craig's Motion, Examination by Dr. Fisher, Annexed as Exhibit R).

Turning to the merits of the motion by the Defendant Craig, the Court is of the opinion that the instant motion papers do not adequately address as a matter of law the totality of the Plaintiff's claims, as set forth in the subject Verified Bill of Particulars (Defendant's Motion, Exhibit P, Paragraph 5). Among other things, Plaintiff alleged that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Neither Dr. Passick nor Fisher examined the Plaintiff during this period and none of the physicians make any reference to the Plaintiff's condition during the relevant 180 day period in relation to that claim. "The injured plaintiff was not examined by the defendants' examining neurologist and orthopedist until more than one year after the accident, and both failed to relate their findings to the 90/180 category of serious injury for the period of time immediately following the accident." *Rouach v. Betts*, 71

A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]; *see also Epstein v. MTA Long Island Bus*, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]; *Stead v. Serrano*, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017][Defendants failed to address 90/180 category claims as reflected in the Bill of Particulars]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2nd Dept, 2003]; *Frier v. Teague,* 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001]. "Since the defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011].

Even assuming, *arguendo*, that the Defendant had met his *prima facie* burden, the Plaintiff's opposition to Defendant's motion raises issues of fact regarding the injuries allegedly sustained by the Plaintiff. Plaintiff's evidence, namely the affirmed reports of Jared Hoffman, DC, and Leonid Reyfman, MD, raise triable issues of fact with regard to the Plaintiff's claim that she sustained a serious injury. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. As a result, both Defendants' motions are denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Craig's motion (motion sequence #7) is denied.
Defendant Joseph's motion (motion sequence #8) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

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**Carl J. Landicino, J.S.C.**