

Moroni v Kasica

2019 NY Slip Op 34251(U)

November 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 57597/2018

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
CHRISTOPHER MORONI and TRINA MORONI,

Plaintiffs,

-against -

KAZIMIEREZ KASICA and RUSSELL MCCALL'S INC.
d/b/a GFI NORTHEAST, LLC.,

Defendants.

-----X

**Index No. 57597/2018
DECISION/ORDER
Submission Date: 09/25/2019
Motion Seq. 1**

ECKER, J.

The following papers were considered on the motion of defendants KAZIMIEREZ KASICA and RUSSELL MCCALL'S INC. d/b/a GFI NORTHEAST, LLC. (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that TRINA MORONI (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d):

PAPERS

Notice of Motion, Affirmation, Exhibits A-I
Affirmation in Opposition, Exhibits A-C

Upon the foregoing papers, the court determines as follows:

This action for personal injuries arises from an auto accident that occurred on December 28, 2017 (the Accident). Plaintiff Christopher Morini was driving northbound in the left lane on Central Avenue when defendants' vehicle struck the passenger side of Christopher's vehicle. Plaintiff was in the passenger seat of Christopher's vehicle. In this action, plaintiff claims that she suffered a serious injury, as defined under the Insurance Law, as the result of the Accident.

Defendants now move for summary judgment dismissing the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that she sustained a serious injury as defined in Insurance Law 5102. In support of their respective positions on the motion for summary judgment, the parties have submitted copies of the pleadings, the bills of particular, deposition transcripts, attorney affirmations, medical records, and medical expert reports and affirmations. Plaintiff also submits a personal affidavit.

Defendants submit the IME report of Dr. Ronald L. Mann, M.D., a Board Certified Orthopedic Surgeon, dated March 1, 2019. [NYSCEF No. 24]. Dr. Mann states that the examination of plaintiff's cervical and thoracolumbar spine forward flexion was within the normal range. An examination of both shoulders revealed forward flexion of 170 degrees and abduction of 165 degrees, and normal is 170 degrees. Plaintiff internally rotated 75 degrees and externally rotated 60 degrees, and normal is 75 degrees. The doctor found no impingement sign and no painful arc. As for plaintiff's knees, both knees revealed flexion of 0-140 degrees, within the normal range of 140 degrees. No pain, tenderness, swelling or instability were noted.

Under "Diagnoses," Dr. Mann finds cervical, thoracolumbar, left shoulder and left knee strains. He opines that plaintiff has no disability related to the Accident, and is able to do all activities of work and daily living without restriction.

In opposition, plaintiff submits the medical examination report of David Dynof, M.D. [NYSCEF 28]. Dr. Dynof records the results of range of motion tests applied to plaintiff and finds, in essence, reductions in flexion in the cervical and lumbar spines, left shoulder, and left knee. He also reviewed MRIs of plaintiff's cervical spine, lumbar spine, left shoulder and left knee. As for the cervical and lumbar spines, in sum and substance, Dr. Dynoff diagnosed the presence of herniated and bungling discs. Reading the MRI of the left shoulder, he found suparspinatus tendon inhomogeneity extending toward its anterior leading edge. The MRI of the left knee showed anterior cruciate ligament attenuation and partial tearing.

In an examination conducted on July 1, 2019, the doctor found that plaintiff was in constant and daily pain, with an increase in the pain in the neck and shoulder. He states that "everyday activities have become much harder for her." The examination revealed below-normal flexion in the cervical and lumbosacral spines, and the left shoulder.

Based on his findings Dr. Dynoff opines that:

"It is my opinion with a reasonable degree of medical certainty that the patient has a permanent partial disability with respect to her cervical spine, lumbar spine, left knee and left shoulder. In addition, it also my opinion that she sustained a significant limitation of a body function or system; the ability to use her cervical spine, lumbar spine, left knee and left shoulder in normal daily activities without pain and limitation. It is my opinion with a reasonable degree of medical certainty that [the Accident] caused her neck, lower back, left shoulder, and left knee condition which was the current and competent producing cause of this injury."

In addition, plaintiff submits the affirmation of radiologist Steven Winter, M.D. [NYSCEF 27]. Dr. Winter interprets the same four MRI's that Dr. Dynoff read, and, in essence, agrees with Dr. Dynoff's interpretation.

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298,

1299 [2d Dept 2014]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). “Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact” (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]; *Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]). Thus a motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]).

Applying these governing legal principles here, the court finds that defendants met their *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting the medical findings and opinions of their expert (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]). In opposition, plaintiff submits competent medical expert evidence that generates triable issue of facts as to the same relevant medical issues (*Karademir v D.A. Mirando-Jelinek*, 153 AD3d 509 [2d Dept 2017]; *Mulhern v Gregory*, 161 AD3d 881 [2d Dept 2018]). To the extent that the experts conflict in their opinions, conflicting expert opinions may not be resolved on a motion for summary judgment (*Savilo v Denner*, 170 AD3d 1570 [4th Dept 2019]). It is not for this court on a summary judgment motion to decide which experts are to be accepted over the others. That is the function of the trier of fact (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]).

Accordingly, it is hereby

ORDERED that motion of defendants KAZIMIEREZ KASICA and RUSSELL MCCALL’S INC. d/b/a GFI NORTHEAST, LLC. (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that TRINA MORONI (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on January 7, 2020, at 9:15 A.M.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
November 8, 2019

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties via NYSCEF.