

<b>Hiles-Briganti v Rivas</b>
2019 NY Slip Op 34458(U)
July 18, 2019
Supreme Court, Westchester County
Docket Number: Index No. 69172/2017
Judge: Lawrence H. Ecker
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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  
ROBIN HILES-BRIGANTI,

Plaintiff,

-against-

ANDREW A. RIVAS, E.C. RUIZ-HERNANDEZ,

Defendants.

-----X  
ECKER, J.

Index No. 69172/2017  
DECISION/ORDER  
Motion date: 06/19/2019  
Motion Seq. 2

The following papers were read on the motion for summary judgment of ANDREW A. RIVAS and E.C. RUIZ-HERNANDEZ (defendants) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint, as against ROBIN HILES-BRIGANTI (plaintiff) on the grounds that she did not sustain a "serious injury" as defined by Insurance Law §5102(d):

PAPERS

Notice of Motion, Affirmation in Support of Motion, Exhibits A-E

Affirmation in Opposition to Motion, Exhibits A-H

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges that she sustained injuries as a result of an automobile accident which occurred on Bowman Ave in the Village of Rye Brook (the Accident) on August 18, 2016, at approximately 6:20 p.m. Plaintiff was a passenger of a vehicle (plaintiff's vehicle) driven by Ray Maldonado, which was struck in the rear by the car driven and owned by defendants (defendants' vehicle). The force with which plaintiff's vehicle was struck by defendants' vehicle, pushed plaintiff's vehicle forward into the rear of the vehicle in front of it (vehicle 3).

Plaintiff commenced this action against defendants to recover damages for injuries sustained as a result of the Accident on November 16, 2017. Defendants filed an answer and discovery was conducted. In the bill of particulars, plaintiff alleged that

she sustained a serious injury in the form of: "a permanent loss of use of a bodily function or system; a permanent consequential limitation of use of a bodily function or system; and a significant limitation of use of a bodily function or system and [was] incapacitated within the meaning of Section 5102" of the Insurance law. [NYSCEF No. 39].

By decision dated March 26, 2018, this court granted plaintiff's motion, made pursuant to CPLR 3212, for summary judgment on the issue of liability against defendants. [NYSCEF No. 24]. A note of issue was filed on February 1, 2019.

Defendants now move for summary judgment dismissing the complaint arguing that plaintiff fails to demonstrate, by competent medical evidence, that she sustained a "serious injury" as defined by the New York Insurance Law §5102(d). Plaintiff opposes the motion. In support of their retrospective positions on the motion for summary judgment both parties have submitted copies of the pleadings, the bill of particulars, deposition transcripts, police report, attorney affirmations, medical records, and medical expert reports and affirmations.

Defendants submit the physician's affirmation of John R. Denton, M.D., an orthopedic surgeon, dated December 24, 2018. [NYSCEF No. 42]. Dr. Denton conducted range of motion tests on plaintiff's cervical spine, lumbar spine, right knee, and left knee. He notes in his report that while plaintiff's left ACL was surgically repaired prior to the Accident, Dr. Denton found no evidence of re-injury to the ACL or the occurrence of any other injury to plaintiff's left knee as a result of the Accident. In terms of plaintiff's back, Dr. Denton states that, although plaintiff suffered strains and/or sprains to the cervical and lumbar spine from the Accident, there was no medical basis for plaintiff's subjective complaints of back pain and muscle spasms because both injuries had resolved by the time of his medical examination. He opines that there "is no orthopaedic disability" and that plaintiff "may work without restrictions." Dr. Denton concludes that plaintiff "may perform all activities of daily living as she was doing prior to the accident."

In opposition, plaintiff submits the physician's affirmation of Michael Cushner, M.D., orthopedic surgeon, dated June 4, 2019. Dr. Cushner records the results of range of motion tests on plaintiff's cervical spine and lumbar spine. Dr. Cushner refutes the findings of Dr. Denton, stating that plaintiff "remains with restricted range of motion of the cervical and lumbar spine and it is my opinion the restrictions are permanent." He goes on to note that treatment options for plaintiff's spinal injuries such as injections "would likely only provide temporary relief." Dr. Cushner further describes that it is "my opinion, within a reasonable degree of medical certainty, that the 2016 motor vehicle accident will cause cartilage cell death in the knee which can continue for years resulting in traumatic arthritis." He states that this injury, although stemming from a pre-existing condition, was exacerbated by the Accident and may require plaintiff to undergo a full knee replacement at some as yet undetermined point in the future.

He finds that plaintiff is likely to suffer from lifelong orthopedic issues stemming from injuries sustained during the Accident including pain, loss of range of motion, and difficulty with activities of daily living. Dr. Cushner opines that:

"Ms. Hiles-Briganti's injuries to her neck, back, and left knee are serious injuries, which have resulted in a significant limitation of use of her neck, back, and left knee for a substantial period of time, spanning years, following the collision. I believe that the limitation in range of motion to the cervical, lumbar spine, and left knee is also permanent, as the patient remains with restrictions of motion almost three years after the collision."

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]), To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure (*Matter of Suffolk Co. Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Vumbico v Estate of Wiltse*, 156 AD3d 939 [2d Dept 2017]).

Importantly, it is not the court's function on a motion for summary judgment to assess credibility (*Rawls v Simon*, 157 AD3d 418 [2d Dept 2018]), or to engage in the weighing of evidence (*Scott v Long Is. Power Authority*, 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]). 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 AD 3d 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 which generates triable issues of fact as to those 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]). It is not for this court on a summary judgment motion to decide which expert is to be accepted over the other. That is the function of the trier of fact (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants ANDREW A. RIVAS and E.C. RUIZ-HERNANDEZ [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint as against plaintiff ROBIN HILES-BRIGANTI on the grounds that plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d) is denied; and it is further

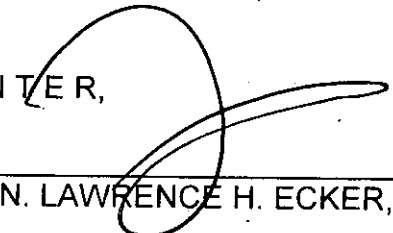
ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on September 24, 2019 at 9:30 a.m.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York

July 18, 2019

ENTER,

  
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HON. LAWRENCE H. ECKER, J.S.C.<sup>1</sup>

*Appearances*

All parties via NYSCEF

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<sup>1</sup> The court acknowledges the fine contribution of Aidan Barry to the drafting of this decision.