

Folchetti v Freese

2019 NY Slip Op 34512(U)

December 6, 2019

Supreme Court, Putnam County

Docket Number: 501014/2018

Judge: Victor G. Grossman

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This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period 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 PUTNAM**

-----X

REGINA FOLCHETTI,

Plaintiff,

-against -

RUSSELL FREESE and CHERYL KROLL a/k/a
CHERYL KNOLL,

Defendants/Third Party Plaintiffs,

-against-

ROBERT FOLCHETTI,

Third Party Defendant.

-----X

GROSSMAN, J.S.C.

DECISION & ORDER

Index No. *501014*/2018
Sequence No. 2
Motion Date: 10/30/19

The following papers, numbered 1 to 20, were considered in connection with Defendant's

Notice of Motion, dated August 8, 2019, for an Order, granting summary judgment.

PAPERS¹	NUMBERED
Notice of Motion/Affirmation in Support/Exhs. A-I	1-11
Affirmation in Opposition/Exhs. A-H	12-20

This is an action for personal injuries allegedly sustained by Plaintiff, a passenger in Third Party

¹The parties and counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

Defendant Robert Folchetti's motor vehicle, involved in an incident (with no contact) with Defendants/Third Party Plaintiffs Russell Freese and Cheryl Kroll a/k/a Cheryl Knoll on November 22, 2017, at or near the intersection of Stoneleigh Avenue and Drewville Road in Carmel, New York. Mr. Folchetti was forced to make a sudden stop due to Defendants' actions, causing Ms. Folchetti to strike the inner door jam of the passenger door of Mr. Folchetti's car. Ms. Folchetti asserts that she has been seriously injured as a result of this incident.

On August 10, 2018, Ms. Folchetti commenced this action, alleging that she sustained a "serious injury" as defined by New York Insurance Law Section §5102(d) (Notice of Motion; Exh. A, Complaint at ¶27).

In her Verified Bill of Particulars, dated November 20, 2018, Ms. Folchetti stated (Notice of Motion; Bill of Particulars and Supplemental Bill of Particulars at ¶8):

8. The following injuries were sustained by plaintiff REGINA FOLCHETTI and were caused, aggravated, accelerated, and/or exacerbated by the within incident:
- Right knee tear in the anterior horn and body of the lateral meniscus with moderate-sized joint effusion;
 - Right knee signal abnormality in the medial collateral ligament consistent with grade 2 partial tear or sprain;
 - Right knee lateral meniscus tear;
 - Right knee clicking, popping, buckling and giving way;
 - Right knee sprain/strain;
 - February 9, 2018 procedure including, but not limited to: Depo-Medrol/lidocaine in the right knee under ultrasound guidance;
 - L1/2 central disc herniation measuring 0.6 cm craniocaudal x 0.2 cm AP; with attenuation of the central AP dimension of the canal;
 - L2/3 broad-based disc herniation measures about 0.7 cm craniocaudal x 0.3 cm AP with canal stenosis and bilateral neural foraminal narrowing;
 - L3/43 broad-based disc herniation measuring 0.9 cm craniocaudal x

- 0.4 cm AP with canal stenosis and bilateral neural foraminal narrowing;
- L4/5 broad-based disc herniation measures 1 cm craniocaudal x 0.4 cm AP;
 - L4/5 ligamentum flavum hypertrophy;
 - L4/5 facet joint effusion;
 - L5/S1 broad-based disc herniation measuring 0.7 cm cranio caudal x 0.5 cm AP with moderate bilateral neural foraminal narrowing;
 - L5/S1 bilateral facet joint effusions;
 - Lumbar spine spondylosis;
 - Lumbar spine canal stenosis;
 - Lumbar spine sprain/strain;
 - Left mid-low cervical radiculopathy;
 - C5/6 large herniated disc;
 - C6/7 large herniated disc;
 - Cervical spine radiculopathy;
 - Cervical spine sprain/strain;
 - T12/L1 central/right paracentral disc herniation measuring 0.6 cm craniocaudal x 0.1 cm AP;
 - Thoracic spine sprain/strain;
 - Left knee tear of the posterior medial meniscus and anterior lateral meniscus;
 - Left knee chondromalacia;
 - Left knee sprain/strain;
 - April 8, 2019 procedure including, but not limited to: Left knee aspiration with injection of Depo-Medrol/lidocaine;
 - June 17, 2019 procedure including, but not limited to: Left knee aspiration with removal of 15 cc of serous fluid;
 - June 17, 2019 procedure including, but not limited to: Left knee injection with Depo-Medrol/lidocaine under ultrasound guidance;
 - Left shoulder impingement syndrome;
 - Left shoulder sprain/strain;
 - Right hip sprain/strain;
 - Use of crutches;
 - Left arm sprain/strain;
 - Left arm numbness;
 - Bilateral hand numbness and tingling;
 - Numbness;
 - Tingling;
 - Possibility of future epidural injections;
 - Possibility of future trigger point injections;

- Possibility of future right knee surgery;
- Possibility of future left knee surgery;
- Possibility of future surgery;
- Paresthesias;
- Muscle spasms;
- Arthritis;
- Swelling;
- Diminished strength;
- Diminished sensation;
- Stiffness;
- Loss of sensation;
- Loss of mobility;
- Loss of range of motion; and
- Loss of enjoyment of life.

She asserts that the injuries are permanent, which “includes, but is not limited to loss of mobility, pain, swelling, scarring, stiffness, arthritis, loss of sensation, and limitation of motion” (Notice of Motion; Exh. H at ¶8).

On May 29, 2019, Ms. Folchetti was deposed (Notice of Motion; Exh. E, Deposition). Ms. Folchetti stated that after the accident, she had an MRI of her right knee, which revealed tears (Deposition at 38). Her orthopedist, Dr. Weinstein, administered two shots and drained her knee (Deposition at 39). She also experienced pain in her lower back that radiated down her right leg to her foot (Deposition at 39-40). Mrs. Folchetti underwent physical therapy for her knee (Deposition at 43). In July 2018, Ms. Folchetti fell down the steps because her right knee locked, hurting her left wrist and resulting in her wearing a brace (Deposition at 47-49, 56-57). She explains that her knee locks up since the incident, and she has had two other “major falls” on steps as a result (Deposition at 49-50, 57-60). She has experienced a burning back pain that radiates down into her leg, along with spasms throughout her back if she is on her feet for too long (Deposition at 52). She is no longer able to work

out, resulting in a significant weight gain (Deposition at 53-54, 65). She experiences pain in her neck which causes some headaches (Deposition at 53-54). Ms. Folchetti has difficulty sleeping and being still for long periods of time (i.e., in the car) because of the resultant burning in her foot (Deposition at 65-66). Ms. Folchetti stated that Dr. Weinstein has recommended she undergo knee surgery (Deposition at 66).

On July 27, 2019, Ms. Folchetti underwent an independent medical examination with Dr. Paul G. Kleinman. According to his report, he reviewed her medical records and conducted a physical examination, and concluded, inter alia, that she “had pre-existing degenerative changes and disc disease in the cervical and lumbar spine as well as pre-existing degenerative changes in both shoulders,” and a right knee contusion (Notice of Motion, Exh. I at 4). Dr. Kleinman noted that Ms. Folchetti was currently working full time, and that she could do her regular activities of daily living with regard to dressing, ambulating, eating, going to the bathroom, etc. (Notice of Motion, Exh. I at 4). He also noted, inter alia, that her range of motion for “both knees was from 0-130 degrees flexion”, and that normal knee range of motion would be 0-150 degrees flexion (Notice of Motion, Exh. I at 4).

Defendant moves for summary judgment, asserting that Ms. Folchetti has not suffered a serious physical injury as a matter of law, and summary judgment is required. In response, Ms. Folchetti argues that she has demonstrable, objective proof of “significant limitation” of a body, organ, member and/or system.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*,

3 NY2d 395, 404 [1957]). Initially, “the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact.” However, once a movant makes a sufficient showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; see also *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

According to Insurance Law §5102(d), “serious injury” is defined as:

“a personal injury which results in * * * a permanent loss of a body member and/or permanent consequential limitation of use of a body member; or significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“[A] defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). These findings “must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a ‘prima facie showing of entitlement to judgment as a matter of law’” (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, “a moving defendant may rely on unsworn reports of the plaintiff’s treating physician” (*Cody v Parker*,

263 AD2d 866, 867 [3d Dept 1999]).

“With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law” (*Grossman v Wright, supra* at 84). “Similarly, a plaintiff’s opposition, to the extent that it relies solely on the findings of plaintiff’s own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished” (*Pagano v Kingsbury, supra*). “Unsworn reports of plaintiff’s examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment” (*Mobley v J. Foster Phillips Funeral Home, Inc.*, 47 Misc3d 1205[A] [Sup Ct, Queens County 2015], citing *Grasso v Angerami*, 79 NY2d 813 [1991]). And, “[u]nsworn MRI reports are not competent evidence unless both sides rely upon those reports” (*Mobley v J. Foster Phillips Funeral Home, supra.*, citing *Azyen v Melendez*, 299 AD2d 381 [2d Dept 2002]). However, once the movant relies upon unsworn medical reports in support of a motion for summary judgment, the door is open for the opposing party to rely on the same (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45 n 1 (2d Dept 2005)). Finally, the serious injury threshold is a threshold imposed exclusively on the plaintiff (*Pagano v Kingsbury, supra; see also Licari v Elliott*, 57 NY2d 230 [1982]). Subjective complaints of pain, absent other proof, are insufficient to establish a “serious injury” (*Cody v Parker, supra* [internal quotations and citations omitted]).

Defendant relies primarily upon the sworn IME report to establish a prima facie case. After conducting a physical examination of Plaintiff, approximately 20 months after the accident, Dr. Kleinman did not make any significant findings of permanent injury to Plaintiff. His report is

inconclusive as to whether Ms. Folchetti's complaints were of a non-permanent nature. In fact, he fails to make any significant conclusions in his report at all. Thus, the Court finds that Defendant has failed to establish a prima facie case.

But even if the Court were to find that Defendant established a prima facie case, the burden then shifts to Plaintiff, and in response, Plaintiff points to her deposition testimony and her treating physician's report. Plaintiff testified to her ongoing pain since the accident and which is a direct result of the accident. She explained that her knee buckles constantly, and it is this buckling that has caused her to fall on three occasions. She described the ongoing burning pain that radiates down her right side to her foot, as well as her neck pain. Dr. Weinstein has been her treating orthopedist since immediately after the accident. He examined her on multiple occasions, prescribed various treatments and therapies, and concluded that her injuries were permanent and she required knee surgery. And her MRI reports show, inter alia, tears in both knees. As such, the Court finds that Plaintiff established a triable issue of fact with respect to whether she suffered a serious physical injury under the Insurance Law. Stated another way, this case is a classic "battle of the experts" that is properly left for the fact finder to resolve.

As such, it is hereby

ORDERED that Defendant's motion is denied; and it is further

ORDERED that the parties are to appear before the undersigned on Thursday, January 2, 2020 at 9:30 a.m. for a pre-trial conference the purpose of which is to set a trial date.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
December 6, 2019


HON. VICTOR G. GROSSMAN, J.S.C.

To: Karen Queenan, Esq.
Law Office of Brian Rayhill
Attorneys for Defendants Kroll & Freese
565 Taxter Road, Suite 110
Elmsford, New York 10523

Steve Z. Gokberk, Esq.
Salenger, Sack, Kimmel & Bavaro, LLP
Attorneys for Plaintiffs
180 Froehlich Farm Boulevard
Woodbury, New York 11797

Goergen, Manson & McCarthy
Attorneys for Third Party Defendant
90 Crystal Run Road, Suite 405
Middletown, New York 10941