

Chukwu v Viboch
2019 NY Slip Op 34644(U)
December 31, 2019
Supreme Court, Westchester County
Docket Number: Index No. 58548/2018
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
OBIAGELI CHUKWU,

Plaintiff,

DECISION & ORDER
Index No. 58548/2018
Seq. # 1 & 2

-against-

PAUL VIBOCH,

Defendant.
-----X

The following papers were read and considered in deciding the present motions:

Notice of Motion/Affirmation/Exhibits A-G	1-9
Notice of Motion/Affirmation/Exhibits A-E	10-16
Affirmation in Opposition/Exhibits 1-3	17-20

Upon the foregoing papers it is ordered that the defendant's motion is DENIED and the plaintiff's motion is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Obiageli Chukwu ("Chukwu/the plaintiff"), commenced this action on May 30, 2018, in Westchester County, to recover monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on April 11, 2017, on the Tappan Zee Bridge. At the time of the accident, the plaintiff alleges that she was operating her vehicle in the right lane of a three lane highway, when her vehicle was hit in the rear by the defendant's vehicle. The defendant, Paul Viboch ("Viboch/the defendant"), testified

that he was behind a truck and changed lanes into the right lane and immediately saw that there was a car that appeared stopped and had her hazard lights flashing. He jammed on the brakes, but could not stop in time.

The bill of particulars alleges acute bilateral back pain without sciatica, back pain in mid-thoracic, neck pain, lower back pain exacerbated by sitting extended periods and right elbow pain, which are all permanent. The bill of particulars also alleges that the plaintiff was at the hospital for approximately one day, in bed for approximately three days and at home for approximately three months.

The defendant now files the instant motion for summary judgment pursuant to CPLR 3212, seeking dismissal of the action, asserting that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d) and 5104(a). The plaintiff also filed a motion for summary judgment pursuant to CPLR 3212, on the issue of liability and dismissal of all affirmative defenses, an award of costs, disbursements and reasonable attorney's fees to abide the motion.

The defendant's attorney argues that the plaintiff's medical records document no total loss of use of any body organ or member; that neither the bill of particulars nor the medical records point to the existence of any laceration or scarring; that absent contemporaneous objective medical evidence of any injury of significance or consequence, absent contemporaneous objective medical evidence causally relating the symptoms to the accident, absent objective medical evidence of anything more serious than a sprain or contusion, and absent any treatment for more than five years, the claim for permanent consequential limitation of use/significant limitation of use, must be dismissed; and that given the admissions in the bill of particulars respecting the

length of confinement and the limited time out of work, along with the plaintiff's own testimony, the absence of any contemporaneous medical opinion respecting a causally related disability, and the absence of any documented treatment more than 90 days after the accident, the claim for 90/180 day disability must be dismissed.

Discussion

"[T]he proponent of a summary judgment motion 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 issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, 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" (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1988]).

Serious Injury

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no

right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition 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 (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, Chukwu did not suffer death, dismemberment, significant disfigurement, fracture, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Chukwu alleges that she sustained permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her 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. Viboch argues that Chukwu did not sustain any injuries corresponding to those categories; that herniations, and sprains and strains are not serious injuries that objective, contemporaneous, and recent medical evidence is required; and that a permanent loss of use claim requires a total loss of use.

Ronald L. Mann, M.D. conducted an independent orthopedic medical examination of the plaintiff on February 4, 2019. Using observation and a goniometer, Dr. Mann reported normal ranges of motion in the cervical and lumbar spine and

diagnosed that her cervical and lumbar sprain/strain were resolved. Dr. Mann reported that the plaintiff has no disability related to the accident and is able to do activities of daily living and self-care without restriction.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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.

The plaintiff's IME showed no range of motion deficiencies and revealed the cervical, lumbar sprains/strains to be all resolved, but stated that the injuries were causally related to the accident. The contemporaneous medical records shows deficiencies in the range of motion performed on the plaintiff and the defendant did not discuss those contemporaneous findings. The IME was performed over two years after the accident occurred.

With regard to any alleged injuries that prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately

following her alleged injury, the bill of particulars, states that the plaintiff was confined home from work for three months, although, the plaintiff testified to missing work for two months and the doctor's note covered a sixty-four day period. However, the plaintiff had limitations upon returning to work and testified that she could not perform all of her duties at work because of the accident and could not work as much overtime as a result. Since the defendant has failed to make a prima facie showing, the Court need not address the sufficiency of the plaintiff's opposition.

Liability

With regard to the issue of liability, the plaintiff has made out a prima facie showing of her entitlement to summary judgment, thereby shifting the burden to the defendant to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]) [Rear-end collision is sufficient to create a prima facie case of liability.] If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (see *Leonard v City of New York*, 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*, 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*, 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. NY VTL § 1129 (a)

In (*Leal v Wolff*), the Second Department held that "[s]ince the defendant was under a duty to maintain a safe distance between his car and [the plaintiff's] car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*. 224 AD2d 392 [2d Dept 1996]).

Further, "[w]hen the driver of an automobile approaches from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (see *Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Id.*).

Here, the defendant did not oppose the motion and therefore, failed to offer any non-negligent explanation for the accident, thereby not creating any issues of fact with regard to liability. The fact that the defendant rear ended the plaintiff's vehicle, demonstrates that he was following too closely.

The Court also grants dismissal of the defendant's first affirmative defense, but denies dismissal of the defendant's second and third affirmative defenses and denies the request for costs and attorney's fees for the filing of the motion. .

Accordingly, based upon the foregoing, it is

ORDERED that the defendant's motion for summary judgment is DENIED and it is further

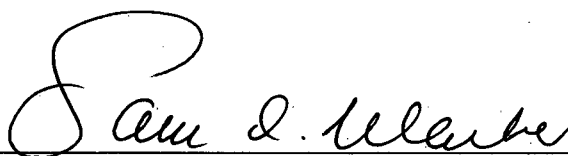
ORDERED that the plaintiff's motion for summary judgment on the issue of

liability is GRANTED.

The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on February 18, 2020 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2019



HON. SAM D. WALKER, J.S.C.