

Nieves v MRP Limo Corp.

2019 NY Slip Op 34963(U)

October 3, 2019

Supreme Court, Queens County

Docket Number: Index No. 710085/17

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

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GLORIA NIEVES,

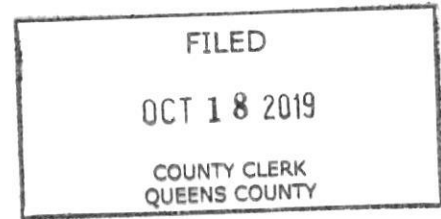
Plaintiff,

-against-

**MRP LIMO CORP., EDWIN R. PALLO, CHEN
WANG and GUIZHI WANG,**

Defendants.

**Index No.710085/17
Motion Date: 8/22/19
Motion Cal. No. 23
Seq. No. 1**



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The following papers numbered E20-E45, E48-E57 read on this motion by the defendants MRP Limo Corp. and Edwin R. Pallo (hereinafter "MRP") for an order pursuant to CPLR 3212, granting them summary judgment, and dismissing the Complaint for failure to meet the no-fault statute's threshold pursuant to Sections 5104(a) and 5102(d) of the Insurance Law.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	E20-E31
Affirmation in Support.....	E32-E35
Stipulation.....	E36
Affirmation in Opposition-Exhibits.....	E37-E45
Amended Affirmation in Opposition-Exhibits.....	E48-E56
Reply Affirmation.....	E57

Upon the foregoing papers, it is ordered that defendants MRP's motion is determined as follows:

This is an action to recover damages for personal injuries plaintiff allegedly sustained as a result of a motor vehicle accident that allegedly occurred on March 26, 2017 in the County of Queens. In the Bill of Particulars, plaintiff claims that as a result of this accident she sustained, amongst others, the following injuries: right shoulder - a partial rotator cuff tear involving both supra and infraspinatus tendons with an associated joint effusion; labral tear, partial thickness cuff tear; synovitis and subacromial impingement; surgery on June 13, 2017 at Surgicare Surgical Associates of Jersey City, LLC for right shoulder arthroscopy, debridement of the labral tear, debridement of partial-thickness rotator cuff tear, synovectomy and subacromial decompression; and herniations to her cervical spine. Plaintiff

also claims that, as a result of the accident, she sustained permanent loss of use, permanent consequential, significant limitation, and 90/180 injuries under Insurance Law 5102.

Defendants MRP now move for summary judgment, dismissing the Complaint, alleging that plaintiff did not sustain an a "serious injury" within the meaning of Insurance Law 5102. Defendants MRP have submitted, among other things, the following: an attorney affirmation; Summons and Verified Complaint; defendant MP's Verified Answer & Cross-Claim, and Demand for a Bill of Particulars; plaintiff's deposition transcript; affirmation from Darren Fitzpatrick, MD; affirmation from Edward M. Weiland, MD; affirmation from Thomas P. Nipper, MD, F.A.C.S.; and affirmation from Stacey M. Donegan, MD.

At her deposition, plaintiff testified that she returned to work immediately after the accident, worked for almost three months, and was not confined to home during that period of time. The plaintiff further testified that she was confined to bed for two weeks following her surgery on June 13, 2017, and returned to work two months later.

At defendants MRP's request, Dr. Fitzpatrick, a radiologist, reviewed the MRI film of plaintiff's right shoulder. In his report, Dr. Fitzpatrick found that the MRI revealed rotator cuff tendinosis, with subacromial impingement and moderate ACL arthrosis.

On July 17, 2018. Dr. Weiland, a neurologist, examined plaintiff at defendants MRP's request. Through the use of a goniometer, Dr. Weiland found that the plaintiff had full ranges of motion in her cervical, thoracic and lumbar spine. The segmental motor evaluation revealed 5/5 power resistance throughout. Plaintiff's gait and coordination skills were normal, and there was no evidence of a foot drop or hip tilt. Dr. Weiland concluded that there was no evidence of any lateralizing neurological deficits, and that the plaintiff was able to perform all activities of daily living without restrictions.

On July 12, 2018. Dr. Nipper, an orthopedist, examined plaintiff at defendants MRP's request. Through the use of a goniometer, Dr. Nipper determined that the plaintiff's right shoulder strain had resolved, and that she had normal ranges of motion in both shoulders without crepitus.

At defendants MRP's request, Dr. Donegan, a board-certified specialist in emergency medicine, reviewed plaintiff's Emergency Department records from Northwell Health Hospital. In her report, Dr. Donegal concluded that the plaintiff's initial presentation was inconsistent with the allegations made in the Bill of Particulars.

Defendants MRP argue that, based on the affirmed medical reports they submitted, plaintiff's allegations alleging "permanent loss of use," "permanent consequential limitation," "significant limitation" and "substantial curtailment of all activities" are unsubstantiated, and she does not meet the no-fault statute's threshold.

Co-defendants Chen Wang and Guizhi Wang have submitted an affirmation in support of defendants MRP's motion.

In opposition, plaintiff has submitted, among other things, the following: an attorney affirmation; photographs; affidavit of Ruth Fernandez; affirmation from John T. Rigney, MD; and affirmation from Kevin E. Wright, MD. Plaintiff argues that defendants MRP's motion should be denied, because they failed to establish their *prima facie* burden of proof. In the alternative, plaintiff argues that the medical evidence she has submitted contains sufficient objective evidence proving she sustained a significant limitation, and permanent consequential injury as a result of this accident.

At her deposition, plaintiff testified that she was a passenger in a taxi cab owned by defendant MRP Limo and operated by defendant Ewin R. Pallo, which collided with a vehicle owned by defendant Chen Wang and operated by defendant Guizhi Wang. Plaintiff testified that on March 27, 2017, she was examined by Samuel Arce, a doctor of internal medicine, and was referred to Ruth Fernandez, a chiropractor. Dr. Fernandez treated plaintiff on average three times a week until March 2018. Plaintiff also testified that after the accident she could not assist her mother with domestic chores for which she was previously responsible. She testified that for six months after her surgery, her mother had to help her feed herself, assist her with bathing and washing her face, dress or undress.

In her affidavit, Dr. Fernandez stated that she has treated plaintiff since March 27, 2017. On March 27, 2017, Dr. Fernandez conducted range of motion testing on plaintiff's cervical spine using a goniometer, and found plaintiff had restricted range of motion. Plaintiff received a total of 138 chiropractic treatments and 144 physical therapy treatments, all of which Dr. Fernandez stated were casually related to this accident. On February 19, 2019, Dr. Fernandez performed range of motion testing on plaintiff's cervical spine using a goniometer, and determined she had restricted range of motion. At her last examination of plaintiff on June 13, 2019, plaintiff reported that she had not returned to all her normal activities in the work place or home.

In his affirmation, Dr. Rigney, a Diplomate American Board of Radiology, stated that seven weeks after the accident plaintiff had an MRI of her right shoulder. In reviewing this MRI, Dr. Rigney concluded that plaintiff had a deep partial thickness tear of the supraspinatus tendon as well as fluid in the subscapularis bursa, fluid in the biceps tendon sheath, and tearing of the superior glenoid labrum. It was these conditions that led to plaintiff's surgery on June 13, 2017. Dr. Rigney also reviewed plaintiff's MRI of her cervical spine, taken approximately four months after the accident. Based upon his review of this MRI, Dr. Rigney concluded that plaintiff had cervical herniations.

In his affirmation, Dr. Wright stated that on June 13, 2017 he performed right shoulder arthroscopy on the plaintiff. Dr. Wright's post operative diagnosis stated that plaintiff had a labral tear, partial thickness rotator cuff tear, synovitis, and subacromial impingement.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Here, the Court finds that the defendants MRP have submitted competent proof in admissible form establishing that plaintiff has not suffered a serious injury as a result of the accident pursuant to Insurance Law § 5102, under the categories of permanent loss of use of a body organ, member, function, or system, a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and 90/180 (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Consequently, 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 (see, Gaddy v Eyler, supra; Sin v Singh, 74 AD3d 1320 [2d Dept. 2010]).

The Court finds that plaintiff raised a triable issue of fact as to whether she sustained a serious injury to her right shoulder and cervical spine under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d), and as to whether the alleged injuries were caused by the accident (see, Sinfelt v Helm's Bros., 62 AD3d 983 [2d Dept. 2009]; Paul v Allstar Rentals, 22 AD3d 476 [2nd Dept. 2005]; see also, Fabiano v Kirkorian, 306 AD2d 373 [2nd Dept. 2003]). Significantly, Dr. Fernandez, Dr. Rigney, and Dr. Wright gave no indication that plaintiff's symptoms may have been caused by anything other than the accident (see Harris v Boudart, 70 AD3d 643 [1st Dept. 2010]). As such, plaintiff has demonstrated issues of fact exist as to whether she sustained a serious injury to her right shoulder and cervical spine under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d), and as to whether the alleged injuries were caused by the accident (Golden v Harlem Riv. of Manhattan, 149 AD3d 698 [2d Dept. 2017]; Bates v Peeples, 171 AD2d 635 [2d Dept. 2009]). The Court also finds that plaintiff has raised an issue of fact as to whether her injuries prevented her from performing substantially all of her customary and usual activities during at least 90 of the first 180 days following the accident. At her deposition, plaintiff testified that after the accident, she was confined to bed for two weeks following her surgery on June 13, 2017, and returned to work two months later. Plaintiff also testified that for six months after her surgery, her mother had to help her feed herself, assist her with bathing and washing her face, dress or undress. Moreover, Dr. Fernandez, Dr. Rigney, and Dr. Wright concluded that plaintiff's injuries were the result of the accident. Under these circumstances, the Court finds that plaintiff has raised issues of fact which preclude granting defendant summary judgment with respect to her 90/180 claim.

Based upon the foregoing, the motion is denied.

Dated: October 3, 2019



ROBERT I. CALORAS, J.S.C

