

Cascio v Conwood Corp.

2019 NY Slip Op 34966(U)

November 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 713223/2017

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short-Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: Hon. Chereé A. Buggs
Justice

IAS PART 30

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GRACE CASCIO,

Index No.
713223/2017

Plaintiff,

Motion Date:
October 30, 2019

- against -

Motion Cal. No.: 10

CONWOOD CORP., BODGAN OLEKSZYK and
LESLIE MCCURDY,

Motion Seq. No.: 4

Defendants.
-----X

The following efile papers numbered 37-49, 58-75 submitted and considered on this motion by defendants Conwood Corp. and Bodgan Olekszyk seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment in their favor on the basis that plaintiff Grace Cascio did not sustain a serious injury under Insurance Law 5102(d).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 37-49
Affirmation in Opposition-Affidavits-Exhibits.....	EF 58-74
Reply Affirmation-Affidavits-Exhibits.....	EF 75

This action arises from a three-car motor vehicle accident which occurred on October 17, 2014 on Cross Bay Boulevard at or near its intersection with 156th Avenue, County of Queens, State of New York. Plaintiff Grace Cascio (hereinafter "Cascio") sued to recover damages for serious injuries to her person, initiating this lawsuit against defendants Conwood Corp. (hereinafter "Conwood"), Bogdan Olekszyk (hereinafter "Olekszyk") and Leslie McCurdy (hereinafter "McCurdy"). Discovery is now complete and now, Conwood and Olekszyk move for summary judgment against Cascio on the grounds that she did not sustain a serious injury as defined under Insurance Law 5102(d). In support of the motion, in

addition to the pleadings, Conwood and Olekszyk's documentary evidence included Cascio's verified bill of particulars dated March 5, 2018; Cascio's deposition transcript dated October 2, 2018; the Independent Medical Examination ("IME") report of Dr. Eial Faierman dated November 20, 2018; the IME report of Dr. Mathew M. Chacko dated December 3, 2018; and, the IME report of Dr. Arthur Fruauff dated March 8, 2019.

Plaintiff Grace Cascio's Verified Bill of Particulars

In her verified bill of particulars dated March 5, 2018, Cascio alleged that as a result of the accident she sustained injuries to her back, with radiating pain to her right buttocks, right leg, right ankle and right foot. She asserted that was confined to her home for 12 months following the accident and was confined to her bed for 7 months, except for trips to her healthcare providers. She claimed that any injuries which were pre-existing were exacerbated by the accident. She claimed that she was totally disabled for approximately 12 months following the accident. Cascio asserted that as a result of the accident she sustained a serious injury under the permanent loss of use of a body organ, member function or system; permanent consequential limitation of use of a body organ, member, function or system; significant limitation of use of a body organ, member, function or system and/or the 90/180 day categories as defined by Insurance Law §5102.

Deposition testimony of Plaintiff Grace Cascio

Cascio gave sworn testimony in this matter on October 2, 2018. She testified in relevant part that as a result of the accident, she sustained injuries to her neck, right leg, back and headaches. She stated that she was unable to perform her work duties for about five months following the accident. She did not have any prior or subsequent injuries to these areas, except she had prior chiropractic treatment to her neck. She recalled that following the accident she received medical treatment, including physical therapy, acupuncture and water therapy, however she had to stop treatment due to an unrelated injury. Cascio also related that she underwent Magnetic Resonance Imaging (MRI) on her back and was told that she was suffering with a herniated disc. She stated that she still experienced difficulty sitting and standing. She has not been involved in any other accidents.

Independent Medical Report of Dr. Eial Faierman dated November 20, 2018

Dr. Eial Faierman, Board Certified orthopedic surgeon, performed an IME of Cascio and rendered his report on November 20, 2018. The doctor related that Cascio advised that as a result of the accident she experienced back pain which radiated down into her right thigh. The doctor noted that at the time of the accident Cascio was working part-time and took off 6 to 8 months and then returned to the same position. She was no longer receiving

any therapy and was still complaining of back pain. The doctor reviewed plaintiff's verified bill of particulars, various medical records and he performed an examination. Range of motion testing was performed with a goniometer and was the following:

Lumbar Spine-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left rotation 30 degrees (30 degrees normal); lateral flexion 25 degrees (25 degrees normal).

The doctor indicated that there was a negative seated straight leg raise but a positive right sided supine straight leg raise. There was full range of motion of both hips flexion 100 degrees (100 degrees normal); extension 30 degrees (30 degrees normal); external rotation 50 degrees (50 degrees normal); abduction 40 degrees (40 degrees normal).

In Dr. Faierman's opinion, Cascio suffered a lumbar spine sprain which was objectively resolved, with pre-existing degenerative changes. He reviewed MRI reports of Cascio's lumbar spine and stated whether the findings were degenerative or traumatic could not be ascertained without his review of the MRI films themselves.

Independent Medical Examination report of Dr. Mathew M. Chacko dated December 3, 2018

Dr. Mathew M. Chacko, Board Certified neurologist, performed an examination on Cascio on December 3, 2018 and rendered a report. Her present complaints were lower back pain with right leg numbness. The doctor reviewed Cascio's verified bill of particulars and various medical records and rendered a report. Range of motion testing was performed using a goniometer and was the following:

Lumbar Spine: flexion 45 degrees (60 degrees normal); lateral flexion 15 degrees (25 degrees normal); extension 15 degrees (25 degrees normal). Straight leg raise was up to 45 "years" (sic) bilaterally, with 90 degrees being normal.

In Dr. Chacko's opinion, Cascio sustained a lumbar strain which had resolved from a neurological standpoint.

Independent Medical Examination report of Dr. Arthur Fruauff dated March 8, 2019.

Dr. Arthur Fruauff, Board Certified Radiologist performed an independent radiology review of several MRI films taken of Cascio. He reviewed the MRI performed of Cascio's lumbar spine at Stand-Up MRI of Manhattan on November 13, 2014. In the doctor's opinion, the film revealed degenerative disc disease and degeneration with disc space

narrowing at L5-S1, and a second right-sided disc herniation, which was likely degenerative in origin. He also reviewed a MRI of the lumbar spine performed at Great Neck Stand-Up MRI on January 15, 2015. The study was compared to the prior MRI taken on November 13, 2014. In Dr. Fruauff's opinion, his impression was degenerative disc disease with secondary right disc herniation at L5-S1, unchanged. Dr. Fruauff also reviewed a MRI film performed on May 22, 2015 performed at Great Neck Stand-Up MRI, and his impression was degenerative disc disease with secondary right disc herniation at L5-S1, which had decreased in size from prior examinations of January 15, 2015 and November 13, 2014.

The doctor also reviewed radiographs of Cascio's spine taken at NYU Langone on March 12, 2015. In the doctor's opinion, these radiographs showed a minimal left scoliosis centered at the thoracolumbar junction, degenerative disc disease at C5-C6 and C-6-C7 and L5-S1, without evidence of fracture.

Discussion

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980].) Summary judgment which is a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]).

Pursuant to New York Insurance Law §5102(d) a "serious injury" is "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."


The Court finds that Conwood and Olekszyk failed to establish their entitlement to judgment as a matter of law. They failed to demonstrate that Cascio did not sustain a serious injury under the permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system categories of the Insurance Law. Their expert, Dr. Faierman failed to state Cascio's range of motion on straight leg raise in comparison to normal (*see Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]; *Walker v Public Admin. of Suffolk County*, 60 AD3d 757 [2d Dept 2009]) and in fact, their expert neurologist, Dr. Chacko found range of motion deficits on examination of Cascio on straight leg raise of 45 degrees (90 degrees normal) and range of motion deficits in Cascio's lumbar spine on flexion. Thus, Conwood and Olekszyk failed

to demonstrate prima facie that Cascio's injuries were not exacerbated by the motor vehicle accident (see *Iam v Santaniello*, 162 AD3d 751 [2d Dept 2018]; *McKenzie v Redl*, 47 AD3d 775 [2d Dept 2008]). Conwood and Olekszyk's papers also failed to adequately address Cascio's claims of serious injury under the 90/180 day category. (See *Vega v Moradof*, 175 AD3d 532 [2d Dept 2019]; *Ji Hae Kim v Quintanilla*, 175 AD3d 476 [2d Dept 2019]; *Houng v Beers*, 151 AD3d 995 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].)

Therefore, defendants' motion is denied.

This constitutes the decision and Order of the Court.

Dated: November 26, 2019



Hon. Chereé A. Buggs, JSC

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