Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART 36

Justice

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ERIN MCMAHON,

Plaintiff(s),

-against-

RONALD NEGRON and MICHAEL J. LADD,

Defendant(s)

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Index No.711461/17
Motion Date: 2/7/19
Motion Cal. No. 29
Seq. No. 2[1]

The following papers numbered E10-E19, E22-E28, 1 on the motion by defendants for an order pursuant to CPLR 3212 for summary judgment.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits.....	E10-E19
Affirmation in Opposition-Exhibits.....	E22-E26
Reply Affirmation.....	E27-E28
Letter, dated March 20, 2019.....	1

Upon the foregoing paper, it is ordered that defendants' motion for an order pursuant to CPLR 3212 for summary judgment on the grounds that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law 5102(d) is determined as follows:

Initially, the Court will address a procedural issue in this matter. On November 15, 2018, the motion filed under sequence number 1 was adjourned to December 20, 2018, and the motion filed under sequence number 2 was marked withdrawn. Thereafter, on February 7, 2019, the motion filed under sequence number 1 was marked fully submitted. In a letter, dated March 20, 2019, defendants' attorney states that the motion filed under sequence number 2 is in fact the motion that was fully submitted on February 7, 2019. Upon review of E Courts, there is no motion filed under sequence number 1, and only a motion filed under sequence number 2 exists in E Courts. Therefore, the Clerk of the Court is directed to restore the motion filed under sequence number 2, and withdraw any and all reference to motion

[1]At the February 7, 2019 motion calendar, the motion filed under sequence number 1 for this matter was marked fully submitted. For reasons set forth in this decision, the motion being decided herein is under sequence number 2.

sequence number 1.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained in an automobile accident, which occurred on or about March 28, 2016 on Rockaway Beach Boulevard, at or near its intersection with 118th Street. At the time of the accident, plaintiff was operating a vehicle.

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."

A defendant moving for 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]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see Fragale v Geiger, 288 AD2d 431 [2d Dept 2001]; Torres v Micheletti, 208 AD2d 519 [2d Dept 1994]; Craft v Brantuk, 195 AD2d 438 [2d Dept 1993]; Pagano v Kingsbury, supra). 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; Pagano v Kingsbury, supra; see generally Zuckerman v City of New York, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, defendants have submitted the following: the pleadings; verified bill of particulars; plaintiff's deposition transcript; an affirmed medical report from Dr. Igor Rubinshetyn, a board certified orthopedist; an affirmed medical report from Dr. Warren E. Cohen, a neurologist; and an affirmed medical report from Dr. Mark Decker, a board certified radiologist.

On May 23, 2018, plaintiff appeared for a deposition. At her deposition, plaintiff testified that she did not seek any medical treatment on the day of the accident. Instead, she

testified that she waited approximately four days before seeing Dr. Chakote for physical therapy. Plaintiff testified that she received physical therapy at Dr. Chakote's office for approximately four to five months. Plaintiff testified that she also treated with a chiropractor, whom she had been treating with for two to three months prior to the accident. Plaintiff testified that in 2017, she saw Dr. Dayan, an orthopedist, about eight to ten times for treatment for her alleged injuries. Plaintiff also testified that she had been previously diagnosed with scoliosis. At the time of the accident plaintiff was 5'5" and weighed 220 pounds. In June of 2017, plaintiff underwent gastric bypass surgery. At the time of the deposition, plaintiff testified that she weighed 148 pounds.

On August 17, 2018, Dr. Rubinshetyn, conducted an examination of the plaintiff. In his report, Dr. Rubinshetyn stated that he performed range of motion testing with the use of a goniometer, and found plaintiff's ranges of motion to be within normal limits. Regarding plaintiff's cervical spine, Dr. Rubinshetyn noted that his examination revealed no paraspinal or trapezii spasms, and that the upper extremities demonstrated normal muscle testing (5/5) throughout. Regarding plaintiff's lumbar spine, Dr. Rubinshetyn noted no paraspinal spasms to palpitation and muscle testing to be 5/5 throughout, with no give way weakness. Further, straight leg raising test was negative bilaterally in the sitting position. Regarding plaintiff's bilateral shoulders, examination revealed no tenderness to palpitation and no effusion or crepitus. In addition, Hawkins, drop arm, and Apprehension testing were negative. Based upon his examination, Dr. Rubinshetyn determined that plaintiff had no orthopedic limitations in her cervical spine, lumbar spine and bilateral shoulders, and that she is capable of functional use of these body parts for normal activities of daily living, as well as usual daily activities including regular work activities.

On September 4, 2018, Dr. Cohen examined the plaintiff. Dr. Cohen performed range of motion testing with the use of a goniometer, and found plaintiff's ranges of motion to all be within normal limits for plaintiff. Dr. Cohen noted all further objective neurological testing to be negative.

On September 4, 2018, Dr. Decker examined the plaintiff. Dr. Decker reviewed plaintiff's MRI studies of her right shoulder and cervical spine, both dated May 13, 2017, as well as the lumbar spine, dated October 29, 2016. Dr. Decker determined that these studies revealed degenerative changes in these body parts, with no traumatic findings found. As a result, Dr. Decker found no causal relation between plaintiff's alleged injuries with this accident.

Based upon the medical evidence defendants have submitted, along with plaintiff's own testimony, defendants argue that plaintiff's alleged injuries were not caused by the

accident, that no trauma was sustained, and that the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute.

In opposition, plaintiff argues that defendants have failed to establish their *prima facie* entitlement to summary judgment. Plaintiff asserts that Dr. Decker's report is not competent medical evidence, and should not be considered in support of this motion. Nowhere in his report does Dr. Decker state whether he reviewed the actual MRI films or just the report. Moreover, Dr. Decker does not state that he conducted a physical examination of the plaintiff in conjunction with authoring the reports or that he performed any objective tests. Even if the Court finds that Dr. Decker's report is admissible, plaintiff argues that his assertions that the bulges and herniations were degenerative, without more, is insufficient and not corroborated.

If the Court finds that defendants have satisfied their prima facie burden of proof, plaintiff argues that she has raised triable issues of fact in her opposition with respect to "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 serious injury. Should any relief be granted to the defendants, plaintiff requests that her claim for economic loss in excess of basic economic loss not be dismissed.

In support of her opposition, plaintiff has submitted the following: the pleadings; the verified bill of particulars; an affidavit, dated December 7, 2018, from Dr. Valjinath Chakote, plaintiff's treating doctor; and plaintiff's deposition transcript. In his affidavit, Dr. Chakote stated that plaintiff has been treated by numerous medical professionals, including West End Chiropractic, Dr. Michael Riskevich, One-on-One Physical Therapy, Dr. Scott Skolkin, and orthopedic specialist Dr. Alan Dayan. Dr. Chakote reviewed the MRI films for plaintiff's right shoulder and cervical spine at Lenox Hill Radiology, and concurred with the findings therein, which showed the following: a partial tackiness interstitial tear at the distal insertion of the supraspinatus tendon in the right shoulder, and a C6-7 central herniation with anterior thecal sac impingement, and a C5-6 disc bulge.

After the accident, Dr. Chakote treated plaintiff on April 1, 2016, May 13, 2016, and November 9, 2018. On April 1, 2016, Dr. Chakote determined that the plaintiff had spasm and restricted range of motion in her spine and shoulder. On November 9, 2018, Dr. Chakote performed range of motion testing on plaintiff using a goniometer which showed moderate restricted ranges on motion in plaintiff's cervical and lumbar spine, with pain and spasm. Dr. Chakote indicated that the plaintiff is currently receiving necessary pain management care, is scheduling epidural injections, and is scheduled for orthopedic surgery on her right shoulder on December 29, 2018. In his assessment of plaintiff, Dr. Chakote stated that the plaintiff

has not reached maximum medical improvement for her cervical spine or right shoulder. Dr. Chakote determined that plaintiff's medical history has not contributed to her present condition, and that the injuries to her cervical spine, lumbar spine, and shoulder were caused by the accident.

The Court finds that the defendants met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra). The defendants submitted competent medical evidence establishing, *prima facie*, that the alleged injuries to the cervical and lumbar regions of the plaintiff's spine, and to the plaintiff's right shoulder, did not constitute serious injuries under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d) (see Staff v Yshua, 59 AD3d 614 [2d Dept. 2009]).

In opposition, the Court finds that the plaintiff failed to raise a triable issue of fact (see Durand v Urick, 131 AD3d 920; see also Bayk v Martini, 142 AD3d 484, 484-485; see generally Perl v Meher, 18 NY3d 208, 215-218). Plaintiff did not submit any proof contemporaneous with the accident of any initial range of motion restrictions in opposition to the motion (Passarelle v Burger, 278 AD2d 294 [2d Dept. 2000]). In his affidavit, Dr. Chakote only reported plaintiff's subjective complaints, and did not state what, if any, objective testing he performed on plaintiff when he examined her on April 1, 2016. Moreover, Dr. Chakote's third examination of plaintiff was conducted two and a half years after plaintiff's second examination. Neither plaintiff, nor Dr. Chakote provided any explanation for this gap in treatment. Therefore, Dr. Chakote's conclusions following plaintiff's November 9, 2018 exam are insufficient to raise a triable issue of fact (Pommells v Perez, supra; Cabri v Park, 260 AD2d 525 [2d Dept. 1999]). The Court further notes that the only medical evidence plaintiff submitted in opposition to the motion was an affidavit from Dr. Chakote, who only treated plaintiff three times over a period of two and a half years. Although Dr. Chakote stated that the plaintiff has been treated by numerous doctors for her injuries, had an MRI of her cervical spine and shoulder, and was scheduled for surgery on her right shoulder in December 2018, the only medical evidence plaintiff submitted in opposition to the motion was Dr. Chakote's affidavit. Plaintiff failed to submit any other medical evidence in support of her opposition. Moreover, plaintiff's request not to dismiss her claims for economic loss in excess of basic economic loss is denied because plaintiff failed to produce any evidence supporting this claim (Clark v Farmers New Century Insurance Company, 117 AD3d 1208 [3rd Dept. 2014]). Therefore, the branch of defendants' motion seeking to dismiss under the categories of permanent consequential limitation of use, and

significant limitation of use are granted.

In light of plaintiff only opposing defendants' motion for summary judgment with respect to Section 5102(d) of the New York State Insurance Law, under the categories of "permanent consequential limitation of use", and "significant limitation of use", the remaining branches of defendants' motion seeking to dismiss the claims under the categories of permanent loss of use of a body organ, member, function or system, and 90/180 are also granted (Nichols v Turner, 6 AD3d 1009 [3rd Dept. 2004]).

Accordingly, defendants' motion is granted in its entirety, and the complaint is dismissed.

Dated: March 21, 2019

ROBERT I. CALORAS, J.S.C.

FILED

MAR 26 2019

COUNTY CLERK
QUEENS COUNTY