

Coombs v Zelekowitz
2020 NY Slip Op 31151(U)
May 1, 2020
Supreme Court, New York County
Docket Number: 158708/2016
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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DEBORAH MARIE COOMBS,
Plaintiff,
- v -

INDEX NO. 158708/2016
MOTION DATE 02/06/2020
MOTION SEQ. NO. 001

FERN ZELEKOWITZ and DESIGNER GREETINGS, INC.,
Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendants Fern Zelekowitz and Designer Greetings, Inc.'s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff Deborah Marie Coombs' Complaint is denied. Before the Court is defendants' motions for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident, which occurred on October 21, 2013, on the southbound Henry Hudson Parkway on the exit ramp at or near its intersection with West 79th Street in the County, City, and State of New York, which allegedly led to plaintiff's serious injury.

"The 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 eliminate any material issues of fact from the case" (Winegrad v New York University Medical Center, 64

NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and is a result of degenerative changes. Defendants attach the reports of Dr. Jeffrey D. Klein and Dr. Saran S. Rosner (Mot, Exh K, L, M, N).

Dr. Klein based his review upon radiographic findings on MRI studies of the cervical spine taken January 23, 2014, November 6, 2015, May 27, 2016, May 18, 2018 as well as X-rays of the cervical spine taken on May 27, 2016 (Mot, Exh L, ¶). In his report, Dr. Klein concludes that plaintiff suffers from degenerative changes throughout the cervical spine, which “existed prior to the accident on October 21, 2013 (Mot, Exh K at 4-5). Dr. Rosner also concluded that plaintiff’s cervical spine injuries were “of a degenerative type rather than a traumatic injury” (Exh M at 17). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa*, plaintiff, submits an opinion from her doctors which address findings of degeneration. Plaintiff submits the affirmation of Dr. Nizam Razack, who found degenerative changes in the cervical spine but attributes the accident to plaintiff's injury at C7 (Aff in Opp). Dr. Razack concludes that plaintiff "sustained a permanent injury in the form of a C7 radiculopathy as a result of the October 2013 motor vehicle accident" (Aff in Op, Exh C at 2). Plaintiff further submits the affidavit of Dr. Barry A. Loughner who found that plaintiff sustained a permanent injury to her jaw as a result of the accident (Aff in Op, Exh A). Dr. Loughner opines that plaintiff had a prior TMJ problem in 1992 and a surgery following an accident in 2010 but that the October 21, 2013 accident aggravated a pre-existing TMJ problem (*id.*, ¶9). Defendants' motion makes no mention of plaintiff's alleged jaw injury. Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

Accordingly, it is ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all defendants with notice of entry.

This constitutes the Decision/Order of the Court.



05/01/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE