

Kreizman v Glantz

2020 NY Slip Op 31516(U)

March 30, 2020

Supreme Court, Kings County

Docket Number: 523455/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of March, 2020.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
FRED KREIZMAN and STEPHANIE KREIZMAN,
Plaintiff,

Index No.: 523455/2017

- against -

DECISION AND ORDER

Yael GLANTZ,
Defendants.

Motion Sequence #2

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2. _____
Opposing Affidavits (Affirmations).....	3. _____
Reply Affidavits (Affirmations).....	4. _____

After a review of the papers and oral argument the Court finds as follows:

This action concerns a motor vehicle incident that occurred on July 7, 2017. The Plaintiffs, Stephanie Kreizman and Fred Kreizman (hereinafter either "Ms. Kreizman", "Mr. Kreizman" or collectively "the Plaintiffs"), were involved in a motor vehicle accident with a vehicle purportedly owned and operated by Defendant Yael Glantz (hereinafter "the Defendant").

The Defendant moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by Ms. Kreizman meet the "serious injury" threshold requirement of Insurance Law § 5102(d). Ms. Kreizman claims in her Verified Bill of Particulars (Defendants' Motion Exhibit C, Paragraphs 4), that as a result of the accident she sustained, *inter alia*, injuries to her cervical spine, loss of range of motion, persistent pain and suffering and loss of enjoyment of life.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 A.D.2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In support of Defendant’s motion the Defendant proffers affirmed medical reports from Dana A. Mannor, M.D. (Orthopedist). Dr. Mannor purportedly examined the Plaintiff on June 12, 2019, nearly two years after the accident. Dr. Mannor conducted range of motion testing, with the use of a goniometer, in relation to the Ms. Kreizman’s cervical spine. Dr. Mannor found “flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal)”. Dr. Mannor further opined that “[b]ased on today’s examination and within reasonable degree of a medical certainty, there is no objective

evidence of an orthopedic disability.” (Defendant’s Motion, Exhibit E, Report of Dr. Mannor).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, including expert medical testimony, the Defendant has met his initial burden of proof as to the Plaintiff. As a result, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries in order to avoid the dismissal of their actions. *See Jackson v United Parcel Serv.*, 204 A.D.2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. There is no particular claim set forth in the subject Complaint, verified Bill of Particulars or Supplemental Verified Bill of Particulars, that Ms. Kreizman sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Plaintiffs’ counsel argues that Ms. Kreizman may maintain a 90/180 claim. However, and notwithstanding this arguable representation of such a claim, where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. Ms. Kreizman’s documentation does not support a 90/180 claim.

In opposition, the Plaintiff presents the affirmed report of Matthew Alan Wert, M.D. Dr. Wert conducted an examination of Ms. Kreizman on December 6, 2019. As part of that examination, Dr. Welt reviewed the MRI of Ms. Kreizman’s cervical spine and conducted range of motion testing. Dr. Welt stated that a review of the “[a]n MRI of the cervical spine performed on

July 20, 2017 revealed a disc bulge.” As part of the range of motion test of the cervical spine, Dr. Welt found “flexion 45 degrees (normal 90), extension 25 degrees (normal 35), R rotation 60 degrees (normal 90), L rotation 60 degrees (normal 90 degrees), R lateral flexion 25 degrees (normal 40 degrees), L lateral flexion 25 degrees (normal 40 degrees).” Dr. Welt opined “it is my opinion, with a reasonable degree of medical certainty that the history, my clinical findings and the diagnosis upon MRI are causally related to the whiplash injury suffered by Stephanie on July 17, 2017.” Dr. Wert does not state how or whether the motion ranges were objectively measured.

Ms. Kreizman also provides an initial report from Yolande Bernard, M.D. who finds, as a result of an evaluation of Ms. Kreizman on July 20, 2017, ‘strain/sprain’ of the cervical spine. There is no indication of range of motion testing and no further findings of significance. The Report of Dr. Howard I. Baum is not affirmed. Moreover, the unaffirmed MRI report provided by Ms. Kreizman finds “mild circumferential disc bulge at C4-C5 disc level”.

“The mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration”. *Siegel v. Sumaliyev*, 46 A.D.3d 666, 846 N.Y.S.2d 583 [2nd Dept, 2007]. See also, *Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 [2nd Dept, 2008] Moreover, Dr. Wert did not indicate that the limitation of range of motion he found was objectively obtained. See *Kennedy v. Brown*, 23 A.D.3d 625, 805 N.Y.S.408 [2nd Dept, 2005] and *Schilling v. Labrador*, 136 A.D.3d 884, 25 N.Y.S.3d 331 [2nd Dept, 2016]. Finally, Dr. Wert examined Ms. Kreizman more than two years and four months after the date of the accident and the other medical documentation provided by Plaintiffs reflected no indication of further treatment other than examinations within days of the accident in July of 2017. Dr. Wert does not address or explain this apparent gap in treatment, notwithstanding his indication of Ms. Kreizman’s complaints of pain. This also calls into question his ability to find that the purported injuries were causally related to

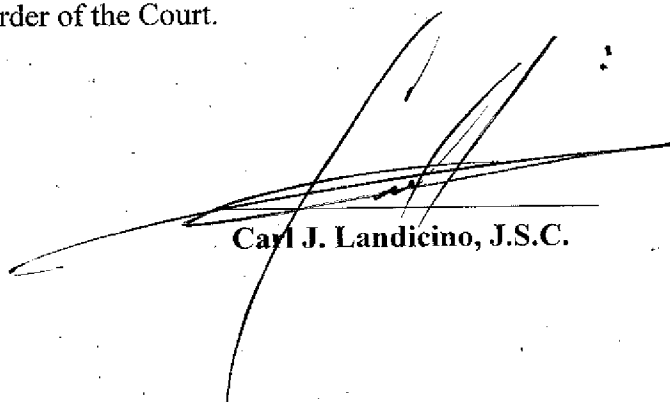
the accident. See *Pommells v. Perez*, 4 N.Y.3d 566 [2005] and *Aiken v. Jackson*, 164 A.D.3d 869, 79 N.Y.S.3d 917 [2nd Dept, 2018]. Accordingly, Ms. Kreizman has failed to raise a material issue of fact in relation to Defendant having initially established that Ms. Kreizman did not suffer a serious injury, as such term is defined by Insurance Law 5102(d), as a result of the accident.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motion sequence #2) is granted and the action is accordingly dismissed.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.