Hewitt v Singh
2020 NY Slip Op 33684(U)
September 25, 2020
Supreme Court, Queens County
Docket Number: 708063/18
Judge: Robert I. Caloras

Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS **PART**
Justice

----------X

CALICA HEWITT, **Index No. 708063/18**
Plaintiff, **Seq. No. 2**
-against-
NIRMAL SINGH and GURPINDER SINGH,
Defendants.

----------X

The following papers numbered E45-E69 read on this motion by Plaintiff for an order pursuant to CPLR 222I, granting re-argument of her opposition to Defendants' motion for summary judgment dismissing the complaint, which was granted in an order of this Court, dated June 22, 2020 and entered on or about June 23, 2020, and upon re-argument, vacating the original determination granting the motion and thereupon deny the motion

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits…….....	E45-E65
Affirmation in Opposition-Exhibits…..…….……	E66-62
Reply Affirmation……..…..……	E68-E69

Upon the foregoing papers, it is ordered that the motion filed by Plaintiff for an order, pursuant to CPLR 2221(d), granting leave to reargue this Court's June 22, 2020 decision that granted Defendants' motion for summary judgment based upon Plaintiff having not suffered a "serious injury" and upon re-argument, vacate that determination and deny the motion is granted, for the following reasons:

It is well settled that a motion to reargue may be granted in the court's discretion where it has overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (see CPLR 2221[d][2]; *see also* Frenchman v Lynch, 97 AD3d 632, 633, [2d Dept 2012]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (see McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]).

Here, Plaintiff asks this Court to reconsider facts and law that were proffered in the original motion and reviewed by the Court when it considered the original motion. Specifically, Plaintiff argues the Court misapprehended matters of law by overlooking the Court of Appeals case of Perl v. Maher, 18 NY3d 208 (2011), which specifically stated that contemporaneous qualitative assessments are not required to prove a serious injury. Plaintiff also claims that the Court overlooked the affirmation of the plaintiff's treating doctor, Dr. Patricia Kelly, who affirmed her own records in paragraph 2 of said affirmation.

Defendants oppose claiming although Perl rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery, the Court of Appeals confirmed the necessity

of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the subject accident. Based on this, Defendants claim the June 22, 2020 decision of this Court was correct.

The Court finds that Plaintiff has demonstrated that this Court overlooked or misapprehended the law (McGill v Goldman, 261 AD2d 593 [2d Dept. 1999]), regarding the affirmation of the plaintiff's treating doctor, Dr. Patricia Kelly. Accordingly, the branch of the motion seeking leave to reargue is granted, and upon re-argument, the Court makes the following determination:

This is an action to recover damages for personal injuries Plaintiff allegedly sustained as a result of a motor vehicle accident, which occurred on February 19, 2018. In the Bill of Particulars, Plaintiff stated that she is not seeking damages for "lost wages and time", but does claim, that as a result of the accident she sustained, *inter alia*, the following injuries:

> Left Shoulder: bursal surface tear of the posterior distal infraaspinatus tendon (MRI confirmed); rotator cuff tear tendinitis and bursitis (MRI confirmed); labral tear; synovitis; impingement syndrome; and an arthroscopic rotator cuff repair, subacromial decompression with acromioplasty, extensive debridement and synovectomy on her left shoulder on May 17, 2018, which has resulted in four (4) keloidal scars measuring ¼ inch to ¾ inch;
>
> Cervical Spine: aggravation and exacerbation of a previously dormant injury with decreased range of motion; disc herniations at C2-C3 and C6-C7 with thecal sac impingement; disc herniations at C3-C4 and C4-C5 with near cord impingement; disc bulge at C7-T1 and C5-C6; and a cervical epidural steroid injection at C4-C5 level, on May 4, 2018;
>
> Lumbar Spine: aggravation and exacerbation of a previously dormant injury with decreased range of motion; disc herniation at L5-S; annular tear at L4-L5; disc bulge at L3-L4; and lumbar epidural steroid injection at L5-Sl level with IVS on June 15, 2018;
>
> Thoracic Spine: disc herniation at T1-T2, T2-T4, T5-T6, and T9-T10.

Defendants now move for summary judgment, dismissing the Complaint, alleging that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5104(a) and 5102(d). Defendants have submitted, among other things, the following: an attorney affirmation; Summons and Verified Complaint; Verified Bill of Particulars; Verified Answer; Plaintiff's deposition transcript; affirmation from Roger Chirurgi, .D.; affirmation from Thomas P. Nipper, M.D., F.A.C.S.; affirmation from Eric L. Cantos, M.D.; police report; and New York - Presbyterian Emergency Room records.

At Defendant's request, Dr. Chirurgi, Board Certified in Emergency Medicine, reviewed the police report. EMS report, and the Emergency Department report. DR. Chirurgi noted that the Emergency Room records found "MSK/EXT: no gross deformities; full range of motion; no lower ext edema". Based upon his review of these records, Dr. Chirurgi opined that the plaintiff did not sustain any significant injury as a result of the motor vehicle accident.

At Defendant's request, Dr. Nipper, Diplomate American Board of Orthopedic Surgery, examined the plaintiff on July 18, 2019. Using a goniometer, Dr. Nipper found that Plaintiff's cervical spine, thoracic spine, lumbar spine, and left shoulder had normal range of motion. Dr.

Nipper found that Plaintiff's injuries have fully resolved. Although the MRI report of Plaintiff's left shoulder from All County, LLC indicated moderate rotator cuff tendinitis and bursitis with associated bursal surface partial thickness posterior distal infraspinatus tendon tear, joint effusion, herniation, and a bulge, Dr. Nipper determined that these findings are consistent with degenerative changes.

At Defendant's request, Dr. Cantos, a Radiologist, examined the MRIs taken of Plaintiff's left shoulder, lumbar spine, and thoracic spine. Based upon his review of the MRI of Plaintiff's left shoulder, Dr. Cantos found subacromial narrowing and degenerative changes with rotator cuff impingement; associated changes of rotator cuff tendinosis/tendinopathy; bursitis; and a small partial tear distal rotator cuff. Dr. Cantos also noted that Plaintiff "is felt to have had an unrelated and pre-existent degenerative condition related to impingement, prior to the accident occurrence". Based upon his review of Plaintiff's MRI of her lumbar spine, Dr. Cantos found disc herniations and/or protrusions at L4-5 and L5-S1 with degenerative changes. Dr. Cantos further noted that these herniations "reflect a pre-existent and unrelated degenerative condition relative to the accident". Finally, based upon his review of Plaintiff's MRI of her thoracic spine, Dr. Cantos found disc bulges and mild degenerative changes, likely attributable to aging.

At Plaintiff's deposition, she testified that she is not making a claim for lost earnings and she stopped receiving medical treatment five to six months after the accident. Plaintiff further testified that there are no activities that she cannot perform due to this accident.

Based upon the foregoing, Defendants argue that Plaintiff's alleged injuries were not sustained as a result of this accident, she did not sustain trauma, and her alleged injuries do not rise to the level of impairment sufficient to qualify under any of the categories of the statute.

In opposition, Plaintiff has submitted the following: New York Presbyterian Emergency Room records; Metro Pain Specialists Physical Therapy and Acupuncture records; All County, LLC Diagnostic Radiology's records; affirmation from Aron Rovner, M.D.; an affirmation from Patricia Kelly, M.D., and Plaintiff's affidavit. Plaintiff argues that Defendants have failed to establish their prima facie burden of demonstrating she has not sustained a serious injury as a result of this accident. In the alternative, Plaintiff argues she has submitted sufficient proof that raises issues of fact as to whether she sustained a serious injury under the statute as a result of the accident.

In his report, dated May 17, 2018, Dr. Rovner, Board Certified in Orthopedc Surgery and Fellowship Trained in Spine Surgery, stated that his range of motion testing on Plaintiff's left shoulder revealed the following: flexion: 130 degrees (normal 180 degrees); abduction: 110 degrees (normal 180 degrees); internal rotation: 30 degrees (normal 45 degrees); and external rotation: 40 degrees (normal 45 degrees). Dr. Rover opined that Plaintiff's severe left shoulder pain is causally related to the subject motor vehicle accident, and recommended Plaintiff undergo left shoulder arthroscopy. In his Operative Report, he stated that on May 17, 2018, he performed a left shoulder arthroscopy on Plaintiff. Dr. Rovner's post-operative diagnosis of Plaintiff was left shoulder labral tear, full-thickness rotator cuff tear, impingement syndrome, synovitis, and bursitis.

In her affirmation, Dr. Kelly stated she initially examined Plaintiff two days after the accident. Thereafter, Plaintiff went for physical therapy and acupuncture treatments for five months, three to four times per week. Dr. Kelly stated that Plaintiff stopped receiving treatment, because additional treatment would have been palliative in nature. Dr. Kelly next examined Plaintiff on February 3, 2020, at which time she conducted range of motion testing using a goniometer on

Plaintiff, which showed decreased range of motion in Plaintiff's left shoulder, cervical spine, and lumbrosacral spine. Based upon this exam, Dr. Kelly opined that these injuries were caused by the subject accident and are permanent in nature. Additionally, Dr. Kelly, in her follow up exam dated March 21, 2018, found up to a 72% decrease in the plaintiff's cervical spine and a 27% in the plaintiff's lumbar spine. On April 25, 2018, Dr. Kelly examined Plaintiff again and found up to a 72% decrease in the plaintiff's cervical spine and a 27% in the plaintiff's lumbar spine.

Plaintiff has also submitted an affidavit, notarized on February 11, 2020, wherein she stated, among other things, as a result of the subject accident she is unable to perform her daily activities including, but not limited to, taking care of her children as she used to, household chores, lifting her arm completely over her head, washing her hair, gong to the grocery store, walking long distances, and lifting heavy objects. Consequently, Plaintiff argues that as a result of the subject accident she has sustained a 90/180 injury.

In reply, Defendants argue that they have established their prima facie burden through the submission of affirmed medical reports showing that Plaintiff did not suffer disabilities or impairments from the subject accident. Defendants further argue, among other things, through the submission of Plaintiff's deposition transcript they established that she did not sustain a 90-180 injury, and her affidavit merely raises feigned issues of fact. Defendants further argue the records/reports Plaintiff submitted Metro Pain Specialists Physical Therapy and Acupuncture, All County LLC, and ENS Medical PC are not admissible pursuant to CPLR 4518(a) because they are nether sworn to nor affirmed.

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 demonstrated their prima facie showing Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra). 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]).

In this regard, the Court finds Plaintiff has raised a triable issue of fact. The records and reports Plaintiff submitted from Metro Pain Specialists Physical Therapy and Acupuncture records, and All County, LLC Diagnostic Radiology were sufficiently sworn to or affirmed pursuant to CPLR 2106 by way of Dr. Kelly's affirmation. As such, Plaintiff has submitted sufficient proof of contemporaneous quantitative assessment of range-of-motion limitations based on objective testing that satisfies causation concerns (see Lopez v Simpson, 39 AD3d 420 [1st Dept. 2017Accordingly, the motion is denied.

Dated: September 25, 2020

ROBERT I. CALORAS, J.S.C.

FILED

9/28/2020
10:41 AM

COUNTY CLERK
QUEENS COUNTY