Ceac v Joseph
2020 NY Slip Op 34587(U)
April 29, 2020
Supreme Court, Rockland County
Docket Number: Index No. 31686/2018
Judge: Robert M. Berliner
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
MARIE Y. CEAC,

Plaintiff,

DECISION & ORDER

-against-

Index No. 31686/2018
Order Date Apr 29, 2020
Motion Seq. 1

BABY JOSEPH, ,

Defendant.
---X
BERLINER, J.

The following papers were read on this Notice of Motion by defendant for an Order pursuant to CPLR 3212 dismissing this action on grounds that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d):

Notice of Motion, Aff. in Support, Exhs. A-E
Aff. in Opposition, Exhs. A-D
Aff. in Reply

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

This action arises from an alleged motor vehicle accident in this venue on September 5, 2015. Plaintiff's complaint alleges that defendant's vehicle struck plaintiff's vehicle, causing plaintiff serious injuries. Defendant joined issue and the parties completed discovery. Plaintiff's bill of particulars alleges injuries that include the left shoulder (rotator cuff and bicep tendon tears), left knee (meniscus tear) and spine (disc bulges, cervical and lumbar radiculopathy). After plaintiffs filed a Note of Issue and Certificate of Readiness, defendant brought this timely CPLR 3212 motion to dismiss on grounds that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d). The parties twice stipulated to adjourn this motion,

then the covid-19 pandemic required the issuance of emergency orders that delayed the determination of this motion. The motion now comes forward for decision.

Party Contentions

In support of their motion, defendants rely on, among other things, the independent medical evaluation by orthopedic surgeon Dr. Ronald Mann (NYSCEF Doc. 12). His report, upon his examination of patient and review of plaintiff's medical file and radiological studies, concluded that plaintiff demonstrated no objective signs consistent with her subjective complaints of pain. Dr. Mann reported that plaintiff's range of motion was normal for the cervical and lumbar spine, nearly normal for the allegedly involved shoulder and knee, and functionally equivalent between the involved and uninvolved shoulders and knees. Dr. Mann also reported that plaintiff exhibited normal gait, flexibility and ability to dress and undress. On the foregoing basis, Dr. Mann concluded that any injury plaintiff sustained were limited to strains of the allegedly affected body parts, and that all of such strains fully resolved.

Defendant also points to plaintiff's deposition, in which plaintiff testified, among other things, that she never missed work as a result of the accident and never reported to a hospital or other emergency department for care. On the basis of foregoing, defendant argues that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d) – and in particular did not sustain either a permanent loss of functionality or a temporary loss meeting the 90/180-day threshold of that statute. Accordingly, defendant concludes that plaintiff's action must be dismissed.

In opposition, plaintiff argues that defendant fails to address, much less dispute, the tendon tears affecting plaintiff's left knee and left shoulder. On this basis, plaintiff insists that defendant never carried the prima facie burden to show entitlement to dismissal. Plaintiff further argues that even if defendant did carry that burden, plaintiff raises triable issues of material fact as to the seriousness of her injuries. She argues, and offers an affidavit to the effect, that she continues to feel pain in the affected body parts that "interferes" with her life and causes her "difficulty" in performing her daily life functions (Pl's Aff [NYSCEF Doc. 28], at ¶ 5). Plaintiff also submits a 2019 medical report of orthopedist Dr. Hank Ross (NYSCEF Doc. 30), who

documented range-of-motion diminution in the affected body parts that, in his opinion, are proximately related to the accident. He also opined that the tendon tears are permanent and likely to result in progressive injury requiring further treatment.

In reply, defendant argues that plaintiff's own affidavit fails to plead much less establish that she was restricted from "substantially all" of her usual and customary life activities for the duration requisite to a 90/180-day "serious injury" claim. As to Dr. Ross's report, defendant argues that it is conclusory based on its failure to consider present medical records and failure to consider radiological evidence of degenerative conditions in the non-subject knee.

Analysis

Insurance Law section 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."

On a defense dismissal motion sounding under this statute, the movant bears the prima facie burden to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d) as a result of the accident (*see Toure v Avis Rent A Car System*., 98 NY2d 345, 352 [2002]). If the movant makes that prima facie showing, the burden then shifts "to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law" (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992] [internal quotations omitted]).

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. Issue finding, not issue determination, is the key to summary judgment" (*Anyanwu v Johnson*, 276 AD2d 572, 572-73

[2d Dept 2000] [internal citations omitted]). In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party (*see Kutkiewicz v Horton*, 83 AD3d 904, 904-905 [2d Dept 2011]). Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law section 5102(d) (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] [internal citations omitted]).

As a prefatory matter, this Court finds that defendant's expert report is not conclusory, speculative or unsupported. Contrary to plaintiff's suggestion, Dr. Mann's report was not based solely on subjective findings; nor was it lacking in factual nexus to plaintiff's radiological studies and medical records. Dr. Mann having opined that plaintiff suffered at most only strains that fully resolved, and plaintiff herself having testified that she missed no work as a proximate result of the accident, this Court concludes that defendant made its prima facie showing. Accordingly, the burden shifts to plaintiff to raise a triable issue of material fact that she sustained a serious injury within the meaning of Insurance Law section 5102(d).

Based on the record, and even giving plaintiff the benefit of every favorable inference, this Court is constrained to conclude that plaintiff failed to carry that burden. Plaintiff's disc bulges and tendon tears, and her subjective pain, are insufficient alone to raise a triable issue of material fact as to permanence. Neither did plaintiff raise any triable issue of material fact that might establish that she was restrained for 90 out of 180 days from performing substantially all of her usual and customary life activities, and her own affidavit is not to the contrary. While plaintiff suggests a battle of the experts, plaintiff's expert affidavit does not raise any material dispute sufficient to survive summary judgment. Dr. Ross's expert affidavit does not establish a sufficient objective metric of injury permanence within the meaning of Insurance Law section 5102(d), and his opinion that tendon tears are permanent and will require future treatment is insufficiently supported and thus impermissibly conclusory as a matter of law. Moreover, nothing in Dr. Ross's evaluation suggests any range of motion diminution that is more than

slight. While Dr. Ross's report mentions the possibility of arthroscopic surgery for the left knee, that mention is altogether speculative and plaintiff's own deposition testimony disclaimed that any medical provider ever had told her that she might need surgery.

This Court has considered the parties' other arguments not explicitly addressed herein, and finds them to lack merit or to be moot based on the foregoing.

Accordingly it is hereby

ORDERED that defendant's motion is granted, and this action is dismissed; and it is further

ORDERED that within 10 days hereof, counsel for defendant shall serve this Decision and Order, with Notice of Entry hereof, on all parties via NYSCEF.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
April 29, 2020

HON. ROBERT M. BERLINER, J.S.C.

To: All counsel via NYSCEF