Scully v Stephens
2020 NY Slip Op 34647(U)
October 9, 2020
Supreme Court, Rockland County
Docket Number: Index No. 035239/2017
Judge: Robert M. Berliner

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 : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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WILLIAM SCULLY,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 035239/2017

MARK STEPHENS and LAURA CASPER,

Defendants.

Motion Sequence # 001

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The following papers, numbered 13 to 39, were read on Defendants' motion for summary judgment dismissing the action on the grounds that Plaintiff did not suffer a "serious injury" as defined in Insurance Law §5102(d):

Notice of Motion/Affirmation in Support/Exhibits(A-P).....13-30
Affirmation in Opposition/Exhibits(A-B).....34-38
Defendants' Reply Affirmation.....39

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action arises out of a motor vehicle accident that took place around 8:18 p.m. on March 15, 2017 in Airmont, New York. Plaintiff was walking southbound along the northbound lane of South Airmont Road when he was struck by an automobile operated by Defendant Mark Stephens and owned by Defendant Laura Casper. Plaintiff alleges that he sustain a host of injuries as a result of the subject accident, including spinal fractures at L2 and L3 and exacerbation of a pre-existing traumatic brain injury from an earlier motor vehicle accident.

Now before the Court is Defendants' application seeking summary judgment on the grounds that Plaintiff did not sustain a "serious injury" as that term is defined under the New York Insurance Law.

In making the instant application, Defendants argue, in substance, that the two injuries that

Plaintiff allege constitute serious injuries within the meaning of Insurance Law are without merit. Regarding Plaintiff's alleged spinal fractures at L2 and L3, Defendants offer a December 2, 2019 report authored by radiologist John T. Rigney, M.D.. Dr. Rigney reviewed, *inter alia*, Plaintiff's medical records, diagnostic studies, and MRI scans and opines that they collectively evidence a long-standing degenerative pathology of the cervical and lumbar spine. Dr. Rigney also compared a MRI scan of the lumbar spine taken on July 25, 2015, approximately 2 years before the Marc h15, 2017 accident in question, to another performed on March 17, 2017, two days following said accident. Dr. Rigney states that his direct visual comparison of the two reveals no interval change, which confirms that Plaintiff suffered no injury to the lumbar spine as a result of the accident in question. Given this, Defendant cite this finding in support of its position that the initial diagnosis of a fracture following an abdominal CT scan was erroneous and not confirmed by a subsequent diagnostic study of the spine. Defendants also direct the Court's attention to the findings of Dr. Denise Shultz, a consulting neurologist, who authored a report to Plaintiff's primary care physician.

In this, Dr. Shultz expresses skepticism at the fracture diagnosis because there was no mention of one in the MRI report. As to Plaintiff's alleged exacerbation of a pre-existing traumatic brain injury, Defendants offer the medical records of psychologist Dr. Brian Quail in which he finds that Plaintiff did not sustain any brain injury as a result of the accident in question. Dr. Quail found that Plaintiff's condition was the same in 2017 as it was in 2015 and that any deficits are attributable to his initial severe brain injury. Lastly, Defendants highlight that Plaintiff was examined by Dr. Robert Hendler, an orthopedist, who authored two reports dated September 26, 2019 and March 3, 2020. In them. Dr. Hendler notes extensive degenerative spinal disease. According to his report, his examination of Plaintiff's hands and wrists revealed no evidence of any carpal tunnel syndrome and EMG testing has ruled out carpal tunnel syndrome. In his later report, Dr. Hendler also concurred with the findings of Dr. Rigney that there was no acute fracture of the left transverse process of L2 and L3.

In opposition, Plaintiff submits an affirmation of his counsel, who offers the certified records of Good Samaritan Hospital documenting Plaintiff's treatment following the accident in question. Counsel directs the Court's attention to pertinent portions thereof, including the discharge summary and radiology report, in support of his client's claim that he suffered a fracture of the left transverse process of L2 and L3 and a traumatic brain injury. Plaintiff's counsel avers that certified records are

routinely admitted into evidence and these records raise questions of fact as to whether Plaintiff suffered a "serious injury".

In reply, Defendants' counsel highlights Plaintiff's inability to obtain an affidavit from either a treating physician or an examining physician. Moreover, Defendants reply that Plaintiff's allegation that the medical records are replete with multiple physicians' diagnoses of spinal fractures are nothing more than references to the same erroneous CT scan report that Drs. Rigney, Shultz and Hendler discredit in their respective submissions.

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."

On a motion for summary judgment, the defendant bears the prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Toure v Avis Rent A Car System*., 98 NY2d 345, 352 [2002]. 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 triable issues of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). *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].

Defendants' submissions and the expert opinions expressed therein collectively establish that Plaintiff did not suffer a "serious injury" as a result of the accident in question, thereby shifting the burden to Plaintiff to demonstrate a triable issue of fact as to whether he suffered a "serious injury" within the meaning of the Insurance Law. Plaintiff's opposition papers, consisting of an affirmation of his counsel and medical records from his hospitalization following the accident in question, fail to raise a triable issue of fact. The Court declines to subscribe to Plaintiff's counsel's interpretations of the medical records or the conclusory assertions contained in his affirmation. Plaintiff did not provide any expert reports for the Court to consider in connection with this application.

Based upon the foregoing, it is

ORDERED that Defendants' motion seeking summary judgment is granted in its entirety and Plaintiff's complaint is hereby dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
October 9, 2020

E N T E R

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

To:
Counsel of Record via NYSCEF