

Marino v List
2020 NY Slip Op 34649(U)
May 4, 2020
Supreme Court, Rockland County
Docket Number: Index No. 35511/2018
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 : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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LAUREN MARINO,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 35511/2018

BROCHA TOVA LIST

Motion Sequence #'s 1, 2, 3

Defendant.

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The following papers, numbered 1 to 6, were read on (1) defendant, Brocha Tova List’s (hereinafter “defendant”) motion pursuant to CPLR §3212 and Insurance Law §§5102 and 5104, granting summary judgment to defendant and dismissing plaintiff’s complaint in its entirety; (2) plaintiff’s motion for an order granting plaintiff partial summary judgment on liability; and (3) plaintiff’s motion for an order granting summary judgment on the issue of serious injury in favor of plaintiff and against defendant, for the relief demanded in the complaint and dismissing all affirmative defenses, and an award of costs, disbursements and reasonable attorney’s fees to abide this motion:

- Notice of Motion (Mot. Seq. 1)/Affirmation in Support/Exhibits (A-E)1-2
- Notice of Cross-Motion (Mot. Seq. 2)/Affirmation in Support/Exhibits (A-C)....3-4
- Notice of Cross-Motion (Mot. Seq. 3)/Affirmation in Support and Opposition to defendant’s motion sequence #1/Exhibits (A-D).....5-6

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This action stems from an accident that occurred on May 13, 2018. Plaintiff alleges that the defendant was negligent in the ownership and operation of her vehicle. Plaintiff states she was walking in the Stop & Shop parking lot located at 180 North Main Street, New City, in the County of Rockland and State of New York when she was struck by defendant’s vehicle.

The action was commenced by the electronic filing of a summons and complaint on September 13, 2018. Issue was joined by the service of an answer on behalf of the defendant on December 4, 2018. Defendant’s answer asserted an affirmative defense that the plaintiff failed to sustain a serious injury as defined under the Insurance Law.

Defendant filed a notice of motion for summary judgment on November 11, 2019 (Motion

Seq. #1). Plaintiff filed a notice of cross-motion granting plaintiff partial summary judgment on liability on January 15, 2020 which is unopposed by defendant (Motion Seq. #2). Plaintiff filed a second unopposed notice of cross-motion on January 30, 2020, granting summary judgment on the issue of serious injury in favor of plaintiff and against defendant (Motion Seq. #3).

Defendant's Motion for Summary Judgment (Motion Seq. #1)

Upon the instant motion for summary judgment, defendant alleges that plaintiff cannot sustain her burden to establish she suffered a "serious injury" as defined in Insurance Law §§5102, *et seq.*

In the instant action, plaintiff was walking in the parking lot of a Stop & Shop grocery store located at 180 North Main Street, New City, in the County of Rockland and State of New York, when she was struck by defendant's motor vehicle that turned into plaintiff. Plaintiff testified she saw no cars until right before being struck by defendant's vehicle that was driving fast. Plaintiff and defendant spoke in the parking lot after defendant struck plaintiff.

Defendant admitted to being the owner and operator of the motor vehicle that she was operating at the time of the subject accident. Defendant testified she did not know she made contact with the plaintiff. She stated that when the incident happened, she was driving towards the Stop & Shop. Defendant was issued a ticket from the police, plead guilty and paid the fine for the violation.

In this action, plaintiff's bill of particulars alleges that she sustained the following injuries:

- Left shoulder tendon tear;
- L5, S1 lumbosacral nerve root irritation;
- Lumbosacral derangement with myofasciitis with underlying radiculopathy and/or herniated discs;
- Left shoulder derangement with impingement;
- Loss of range of motion left shoulder;
- Loss of range of motion left lumbar;
- Limited range of motion in shoulders and arms;
- Strain and sprain of the neck and back;
- Muscle spasms in the neck;
- Cervicalgia;
- Cervical radiculopathy;
- Straightening of cervical spine;
- Lumber strain;
- Concussion;
- Post-concussion syndrome;

- Pins and needles and numbness of the upper extremities;
- Difficulty sleeping due to pain;
- Difficulty standing, sitting and bending;
- Muscle spasms in the lower and upper back;
- Pain in the neck and lower back that radiates into the legs;
- Thoracolumbar spine strain;
- Severe Headaches;
- Difficulty moving head;
- Difficulty concentrating;
- Arthritis to the above stated locations;

All of the above injuries and conditions of plaintiff are accompanied by severe pain, swelling, muscle spasm, tenderness, deformity, inflammation, discoloration, stiffness, weakness, fatigue, atrophy, numbness, sensitivity changes, limitation and restriction of motion and use, with damage, traumatic derangement, injury and both present and future degeneration to bones, muscles, ligaments, cartilages, tendons, nerves, blood vessels, organs and soft tissues in and about the aforementioned areas as well as to the nervous system, muscle system, skeletal system and digestive system.

... Upon information and belief all injuries and their effects are permanent in nature.

Plaintiff's bill of particulars further states that:

Plaintiff sustained serious injury as defined by Section 5102(d) of the Insurance Law of the State of New York in that plaintiff sustained a personal injury which resulted in significant disfigurement; a fracture; 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 August 20, 2019, plaintiff was examined at the request of the defendant by Dr. Steven A. Renzoni, a Diplomate of the American Board of Orthopaedic Surgery. In his affirmed report of that examination, Dr. Renzoni diagnosed plaintiff with (1) cervical spine sprain/strain - resolved; (2) thoracic spine sprain/strain - resolved; (3) lumbar spine sprain/strain - resolved; (4) left shoulder

sprain/strain - resolved; (5) normal examination of the right shoulder. Dr. Renzoni stated that based on the clinical findings of his examination “there is no objective evidence of a disability. Some subjective restrictions of motion and complaints of pain in the resolved body parts were not supported by objective clinical findings of today's examination”. Dr. Renzoni indicated that plaintiff is capable of performing activities of daily living without any restrictions and that based on his physical examination of plaintiff, there is no medical necessity for orthopaedic care including physical therapy. He concluded that there is no permanency to her injuries and no functional impairment. Plaintiff's prognosis is good. In addition, Dr. Renzoni opined that based upon the history provided and the findings upon examination, there is a causal relationship between the current diagnosis and the reported accident. Dr. Renzoni affirmed that his opinions were based upon a reasonable degree of medical certainty.

At her examination before trial on June 7, 2019, the plaintiff testified that she has ongoing pain to her left shoulder and lower back. Plaintiff attended physical therapy multiple times per week for 8 months after the motor vehicle accident. She went to an orthopedist, Dr. Schwartz, soon after the accident of May 13, 2018. Plaintiff also started treating with Dr. Kraushaar, and continues to see him to date. She still has trouble with her employment and completing household chores, such as sweeping the floor, walking the dogs, and lifting things from high shelves because of the excruciating pain to her left shoulder. She can no longer walk long distances or stand after walking long distances due to her lower back pain, and was told by her doctors to no longer attempt to do so. Plaintiff stated that she experiences daily pain, takes over the counter medication daily for pain, and is in the process of having epidural injections and neural blocks prior to having a surgery.

Plaintiff testified she did not return to her employment for 3 weeks after the accident. She received physical therapy to her left shoulder to help relieve the pain and improve range of motion beginning on September 14, 2018 and ending in May. Plaintiff states that she was knocked to the ground by the impact of the defendant's vehicle and was in immediate pain to her shoulder. Plaintiff was confined to her home post-accident. When plaintiff eventually returned to work 3 weeks after the accident, she had an extremely difficult time walking both to and from her place of employment in New York City. She testified that she attempted to work her normal work schedule for one month

following her return, however, due to the excruciating pain to her back and shoulder caused by the motor vehicle accident, she was left no choice but to reduce work to one day a week. This continued for one month until she left her job in New York City due to her injuries. Plaintiff stated that her commute to and from the work location, as well as her work responsibilities were too demanding for her physical circumstances and caused her to reduce work to one day per week and find a job closer to home. Plaintiff testified she continues to have daily pain in her left shoulder, lower back, and down her legs, which started the day after being struck by defendant's motor vehicle. Plaintiff was able to find a closer job with a doctor in Nyack as a dental assistant.

Plaintiff submitted the affirmed report of Dr. Douglas A. Schwartz, D.O., who is Board Certified in Physical Medicine and Rehabilitation. Dr. Schwartz diagnosed plaintiff with lumbrosacral derangement with myofasciitis with probable underlying radiculopathy and/or herniated discs, as well as left shoulder derangement with probable underlying impingement. He recommended "medically necessary" physical therapy, MRI studies for her lumbrosacral spine and left shoulder; electroacupuncture to help control exacerbations of symptomology; over the counter pain medication, and continuation of her full time work as a dental assistant.

Plaintiff further submitted the affirmed report of Dr. Barry Kraushaar, M.D. Dr. Kraushaar is double board certified in orthopedics and sports medicine by the American Board of Orthopedic Surgery. He opined that on May 13, 2018, plaintiff was involved in a motor vehicle accident that resulted in primarily two injuries. The first injury was to her left shoulder and consists of posterior superior instability of the shoulder joint. This is symptomatic and has been painful consistently since May 15, 2018, over a year-and-a-half. She is expected to continue to have these symptoms over time based upon the track record so far. There is no reason the shoulder should stabilize itself without stabilization surgically at this point. She will be indicated for surgery in the future if she remains unacceptably symptomatic.

In addition, Dr. Kraushaar concluded that as a result of the subject accident, plaintiff developed low back and buttocks pain consistent with the term "coccydynia" which lasted at least a year-and-a-quarter after the motor vehicle accident. He stated that no surgical intervention is indicated for this area, and no injection is anticipated; physical therapy would not be helpful. There

is no further treatment expected for this area.

In order to be entitled to summary judgment, it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance law §5102(d) as a serious injury (*Healea v Andriani*, 58 A.D.2d 587 [2d Dept 1990]). As the proponent of this summary judgment motion, the defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in her favor, as a matter of law (Civil Practice Law and Rules § 3212(b); *Giuffrida v Citibank Corp., et al*, 100 NY2d 72 [2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; and *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief (*Judice v DeAngelo*, 272 AD2d 583 [2d Dept 2000]).

To meet her summary judgment burden, plaintiff must then come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether plaintiff suffered a "serious injury" within the meaning of the Insurance Law (*Zoldus v St. Louis Cab Corp.*, 108 A.D.2d 378 [1st Dept 1985]), *Dwyer v Tracey*, 105 A.D.2d 476 [3rd Dept. 1984]). By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident (*Bonner v Hill*, 302 A.D.2d 544 [2d Dept.. 2003]; *O'Neill v O'Neill*, 261 A.D.2d 459 [2d Dept 1999]).

In opposition to defendant's summary judgment motion, plaintiff submitted the affirmed reports of Douglas A. Schwartz, D.O. and Dr. Barry Kraushaar. Based on these reports, plaintiff argues that in response to defendant's motion, plaintiff has demonstrated factual disputes as to her claim of having sustained a personal injury or injuries which resulted in (1) the permanent loss of use of a body organ, member, function or system, (2) the consequential limitation of use of a body organ or member, (3) the significant limitation of use of a body function or system, or (4) 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 following the occurrence of the injury or impairment, and is entitled to be compensated for her non-economic damages.

Where, as here, plaintiff's doctor's findings are set forth in admissible form in sworn statements and are based on the doctor's personal examination and observations, those examinations and observations form an acceptable basis for that doctor's opinion regarding the existence and extent of plaintiff's injuries, including the diagnoses of posterior superior instability of the left shoulder joint and persistent low back and buttocks pain consistent with the term "coccydynia." Where the findings conflict with those of the defendant's examining doctor, issues of fact exist that preclude summary judgment and that require a trial (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]).

In addition, where conflicting medical evidence is offered on the issue of whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD 3d 306 [1st Dept 2008]). Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief (*Judice v DeAngelo*, 272 AD2d 583 [2nd Dept 2000]).

Where, as here, the medical affirmations submitted create a triable issue of fact on the question of whether plaintiff sustained a serious injury as defined in the Insurance Law, defendant's motion should be denied (*Chand v Asghar*, 6 Misc.3d 1010(A), 800 NYS2d 344, 2005 NY Slip Op. 50025[U]). Discrepancies between the competing reports of the treating physicians and the defendant's examining physician create issues of credibility and issues of fact that cannot be resolved on summary judgment and that require a trial (*Francis v Basic Metal, Inc.*, 144 AD2d 634 [2d Dept 1981]; *Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]).

Upon consideration of the foregoing, the defendant's motion for summary judgment is denied.

Plaintiff's Cross-Motion for Partial Summary Judgment on Liability (Motion Seq. #2)

In support of the motion, plaintiff recounts the testimony cited above, to wit, that on the date of the subject accident, plaintiff was walking in the parking lot of a Stop & Shop grocery store located at 180 North Main Street, New City, in the County of Rockland and State of New York when she was struck by defendant's motor vehicle that turned into plaintiff. Plaintiff testified she saw no cars until right before being struck by defendant's vehicle that was driving fast. Plaintiff and defendant spoke in the parking lot after defendant struck plaintiff.

Defendant admitted to being the owner and operator of the motor vehicle that she was operating at the time of the subject accident. Defendant testified she did not know she made contact with the plaintiff. She stated that when the incident happened, she was driving towards the Stop & Shop. Defendant was issued a ticket from the police, plead guilty and paid the fine for the traffic infraction.

In determining this motion, the court hereby incorporates its recitation of the law of summary judgment as cited hereinabove. Based upon the record, plaintiff's motion for partial summary judgment on the issue of liability is denied as a result of her failure to establish a *prima facie* claim of negligence against defendant.

Plaintiff has relied on inadmissible evidence in support of her motion to the extent she cites to defendant's receipt of a traffic ticket as a result of the subject accident to which defendant subsequently plead guilty. Courts have held that a conviction of a traffic infraction is inadmissible against a defendant in a civil suit arising out of the same occurrence. Inclusion of proof of a defendant's conviction for a traffic infraction or violation as evidence in chief to establish some element of a claim of negligence in a civil action has been regarded as likely to impair the right of a defendant to a fair trial on the issue of civil negligence (*Walther v News Syndicate Co.*, 276 AD 169, 175 [1st Dept 1949]; *see also Augustine v Interlaken*, 68 AD2d 705, 711 [4th Dept 1979]; *Cannon v Weissberg*, 22 Misc2d 866 [Sup Ct. Queens County 1959]).

In addition, plaintiff has failed to establish that she is free from comparative fault in connection with the accident. "[E]ven where there is evidence that another driver involved in [a motor vehicle] accident was negligent as a matter of law due to a violation of the Vehicle and Traffic

Law, a plaintiff moving for summary judgment has the burden of establishing freedom from comparative fault (*Pena v Spade*, 145 AD3d 791, 792 [2d Dept 2016]; *Phillip v D&D Carting Co., Inc.*, 136 AD3d 18, 22 [2d Dept 2015]; *Matos v Tai*, 124 AD3d 848 [2d Dept 2015]). Here, the proof submitted by plaintiff makes no such showing.

In light of the foregoing, the plaintiff's motion for partial summary judgment on the issue of liability is denied.

Plaintiff's Cross-Motion for Partial Summary Judgment on the Issue of Serious Injury (Motion Seq. #3)

To the extent plaintiff seeks summary judgment, *inter alia*, on the issue of serious injury in favor of plaintiff and against defendant for the relief demanded in the complaint and dismissing all affirmative defenses, such motion is denied for the reasons previously stated in the court's decision and order on defendants' motion for summary judgment (Motion Seq. #1) above. As noted in the court's prior decision, there are triable issues of fact in this case on the issue of whether plaintiff sustained a "serious injury" within the meaning of the Insurance Law §§ 5012, *et seq.*

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that defendant, Brocha Tova List's motion for summary judgment (Motion Sequence #1) is denied; and it is further

ORDERED that plaintiff, Lauren Marino's cross-motion for partial summary judgment on the issue of liability (Motion Sequence #2) is denied; and it is further

ORDERED that plaintiff, Lauren Marino's cross-motion for partial summary judgment on the issue of "serious injury" (Motion Sequence #3) is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant with notice of entry within 10 days of entry.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
May 4, 2020

E N T E R


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

To:
Counsel of record via NYSCEF