| **Thompson v Swenson** |
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| 2020 NY Slip Op 34678(U) |
| November 9, 2020 |
| Supreme Court, Dutchess County |
| Docket Number: Index No. 2018-52922 |
| Judge: Hal B. Greenwald |
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At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on November 9, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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JOSETTE THOMPSON

Plaintiff

Index No.: 2018-52922

*-against-*

MARK R. SWENSON, JR.

Defendant

DECISION AND ORDER
(Motion Sequence 1)

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Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding **Defendant's** Notice of Motion for Summary Judgment

| Papers | Numbered |
|---|---|
| Defendant's Notice of Motion/ Affirmation of Thomas Mazzaro, Esq./ Exhibits A-H | 1 |
| Plaintiff's Affirmation of Mark Cambareri, Esq. in Opposition/ Exhibits 1-7 | 2 |
| Defendant's Reply Affirmation of Thomas Mazzaro, Esq. | 3 |

## RELEVANT BACKGROUND

On or about September 19, 2018, Plaintiff commenced an action of negligence against the Defendant, alleging that she sustained serious personal injuries and economic loss resulting from a motor vehicle accident on November 15, 2015, which involved a motor vehicle operated by Defendant. *See,* Defendant's Exhibit A

Defendant filed the instant motion asserting that Plaintiff has failed to demonstrate that she sustained a serious injury pursuant to Insurance Law §5102 (d). Defendant argues that the injuries claimed by Plaintiff do not satisfy the serious injury threshold categories within the No-Fault Law.

Defendant contends that Plaintiff has not demonstrated with objective evidence that she sustained death, dismemberment, fracture or loss of fetus as a result of the subject accident, or that her injuries result in a permanent and/or significant loss of use of a body organ, member, function, system, or body part. Defendant declares that any injury Plaintiff sustained from the accident resolved without any disability and did not significantly limit Plaintiff from engaging in her daily functions for ninety of the one hundred, eighty days after the accident. *See,* Affirmation of Thomas Mazzaro, Esq.

Defendant's Independent Medical Examination (IME) was performed by Louis Nunez, M.D. on February 26, 2020. Dr. Nunez reports that he reviewed Plaintiff's Bill of Particulars, an MRI of Plaintiff's lumbosacral spine dated May 23, 2016, an MRI of Plaintiff's cervical spine dated May 23, 2016, an MRI of Plaintiff's left knee dated January 13, 2017, an MRI of Plaintiff's right knee dated February 1, 2017, an MRI of Plaintiff's lumbar spine date March 20, 2019, documentation from Vassar Brothers Medical Center Emergency on August 13, 2014, May 26, 2015 and October 14, 2016; documentation from Westchester Medical Center on November 15, 2015 and a police report of the accident on November 15, 2015. Dr. Nunez states upon review of the abovementioned medical records coupled with Dr. Nunez's physical examination of Plaintiff, that Plaintiff's allegations of serious injury are merely parroted from the findings of the MRIs, and such findings were only demonstrative of either pre-existing conditions or age appropriate degeneration, and such injuries were not causally related to the motor vehicle accident. *See,* Affirmation of Thomas Mazzaro, Esq. at paragraphs 23-53; *see also,* Defendant's Exhibits C-H.

Plaintiff opposes the motion for summary judgment and argues that Defendant has failed to meet its burden of proof, to show that Plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 (d). Plaintiff argues that Defendant's expert makes contradictory conclusions, that indicate that Plaintiff has a loss of range in motion in Plaintiff's spine and knees, but erroneously labels Plaintiff's injuries as only degenerative and/or pre-existing. Plaintiff declares that the Defendant's expert has not shown that Plaintiff's injuries or alleged aggravations or exacerbations to Plaintiff's spine and knees are not causally related to the accident thus Defendant has failed to meet its burden of proof and should not succeed on its motion for summary judgment. Plaintiff argues that it meets the threshold for serious injury pursuant to the statute, stating that her injuries have resulted in significant or permanent limitation of use of a body member or function. Plaintiff seeks to rebut Defendant's expert by submitting additional medical

records of Dr. Dassa, Dr. Datta and Dr. Patel. Plaintiff avers that these medical records, even if unsworn, are admissible objective evidence in support of Plaintiff's claims. *See,* Affirmation of Mark Cambareri, Esq.

In reply, Defendant argues that the supplemental medical records Plaintiff offers in opposition are not admissible objective evidence, as they are uncertified documents and do not add a qualitative assessment, demonstrating that Plaintiff has sustained a serious injury. Defendant states that Plaintiff has failed to raise a triable issue of fact, thus Defendant should succeed on it motion for summary judgment. *See,* Reply Affirmation of Thomas Mazzaro, Esq.

## DISCUSSION

Ordinarily, a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court directing judgment in favor of any party, as a matter of law in. Except as provided in subdivision (c) of this rule, the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. *See,* New York Civil Practice Law and Rule 3212.

Summary judgment is a drastic remedy which should not be granted unless it is clear that there are no triable issues of fact. Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied. In New York, a defendant seeking summary judgment in a negligence action that stems from a motor vehicle accident has the initial burden of presenting evidence in admissible form to establish that plaintiff did not suffer a serious injury as defined by Insurance Law§5102(d) causally related to the accident in question and demonstrate the absence of any material issues of fact. Once a defendant has met their burden, the burden shifts to the plaintiff to come forward with admissible proof, sufficient evidence to overcome defendant's motion by demonstrating the existence of genuine issues of material fact, showing that she sustained a serious injury within the meaning of the No–Fault Insurance Law. The evidence must be viewed in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference in order to determine whether there is any triable issue of fact outstanding. *See,* McKendry v Thornberry, 23 Misc. 3d 707, 709-10 (Rensselaer County Sup. Ct. 2009); *see also,* Ballard v City of New York, 11 Misc. 3d 1014, 1016 (New York County Sup. Ct. 2006) *citations omitted.*

It is well settled that where the medical records and/or physical examination convey that the alleged injured party has significant limitation or loss in range of motion, the expert's opinion, that such limitation or deficiency results from the party's age or pre-existing condition absent a basis or analysis, is deemed conclusory and insufficient to meet the movant's burden of proof on summary judgment. Landman v Sarcona, 63 A.D.3d 690, 690-91 (2nd Dept. 2009).

Here, Defendant has failed to meet its burden of proof, establishing that there are no issues of triable fact as to whether Plaintiff has sustained a serious injury pursuant to the No-Fault Law. Dr. Nunez makes a conclusion that Plaintiff's injuries are solely related to pre-existing conditions and/or age, without any basis or analysis to demonstrate that such loss in range of motions is not causally related to the accident at issue. Defendant fails to show the correlation between the evidence and its conclusion. A pre-existing condition does not null the probability that Plaintiff could have been injured in the motor vehicle accident or that such injury should not be deemed a serious injury under the law. Defendant has not eliminated all issues of triable fact. Since the defendant failed to establish his prima facie burden, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact. *See,* Powell v Prego, 59 A.D. 3d 417, 418-19 (2nd Dept. 2009); *see also,* Pommells v Perez, 4 N.Y.3d 566, 578 (Court of Appeals 2005). Thus, Defendant's application for summary judgment is **denied.**

Accordingly, it is hereby,

ORDERED, that Defendant's motion for summary judgment is denied.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: November 9, 2020
Poughkeepsie, New York

ENTER:

Hal B. Greenwald

Hon. Hal B. Greenwald, J.S.C.

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CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.**

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