

Hencheck v Murphy
2020 NY Slip Op 34812(U)
March 12, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 51164/2018
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 March 12, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
BARBARA HENCHECK

Plaintiff

Index No.: 51164/2018

-against-

JOSEPHINE MURPHY

Defendant

DECISION AND ORDER
(Motion Sequence(s) 1 &2)

-----X
Greenwald, J.

The following papers numbered 1-4 were considered by the Court in deciding Defendant’s Notice of Motions:

<u>Papers</u>	<u>Numbered</u>
<u>Motion Sequence 1</u>	
Notice of Motion for Summary Judgment/ Affirmation of Robert Drummond, Esq./ Exhibits A- F	1
Affirmation of Thomas Yatto, Esq. in Opposition/ Affidavit of Sathish Modugu/Exhibits A-1	2
Reply Affirmation of Robert Drummond, Esq.	3
<u>Motion Sequence 2</u>	
Notice of Motion to Compel and/or Preclude/ Affirmation of Robert Drummond, Esq./ Exhibits A-J	4

RELEVANT BACKGROUND

Plaintiff commenced a negligence action against the Defendant, resulting from a motor vehicle accident which involved the parties on March 20, 2018, whereby Plaintiff alleges that her vehicle was struck by Defendant’s vehicle at the intersection of Pudding Road and the Taconic

State Highway. However, Plaintiff asserts that this was in Putnam County and Defendant asserts this was in Dutchess County. It is noted that there is no police report for this accident. *See*, Affirmation of Robert Drummond, Esq. at paragraphs 3 and Affirmation of Thomas Yatto, Esq. at paragraphs 4-5.

Defendant seeks summary judgment against Plaintiff, arguing that Plaintiff has not provided evidence that she suffered a serious injury as defined by New York Insurance Law §5102(d) demonstrating death, dismemberment, significant disfigurement, sustained a fracture, suffered a loss of a fetus, permanent loss or use of a body organ, member function or system; permanent consequential limitation 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 a person's usual or customary daily activities for not less than ninety (90) days during the one hundred, eighty (180) days immediately following the occurrence of the injury. Defendant also argues that Plaintiff has not shown that any injury sustained by Plaintiff is not a pre-existing condition but causally related to the accident at issue. Defendant declares that the Independent Medical Examination ("IME") conducted by Loren Rosenthal, M.D., and Plaintiff's deposition testimony demonstrate that Plaintiff has not suffered a serious injury pursuant to the law, and thus Defendant is entitled to summary judgment. *See*, Affirmation of Robert Drummond at paragraphs 6-9 and 14-26.

Plaintiff opposes the motion, and argues that Defendant has not met its burden to be granted summary judgment, and alternatively, that even if the burden has been met, Plaintiff's evidence raises a triable issues of fact as to whether Plaintiff sustained a serious injury, alleging that Plaintiff's injury falls within the permanent consequential limitation and significant limitation categories. Plaintiff asserts that even the determination of whether there is significant limitation is a question of fact for the jury. Plaintiff argues that Defendant did not submit or utilize any of Plaintiff's medical records from Dr. Luis Mendoza, Jr., the doctor who initially treated Plaintiff in its analysis of Plaintiff's injury and as such, Plaintiff's complete medical history as to this injury has not been objectively evaluated by the Defendant based on its submission to the Court. Thus, Defendant is not entitled to the relief it has requested. *See*, Affirmation of Thomas Yatto, Esq. at paragraphs 4-7, 9-18 and 23-31.

It is noted that Plaintiff relies on the expert opinion report of Dr. Luis Mendoza, Jr. at Dutchess County Medical, P.C. where Sathish Modugu, M.D. has taken over the medical practice and Defendants rely on the expert opinion report of Loren Rosenthal, M.D., and these reports conflict as to whether Plaintiff sustained a serious injury.

Defendant also filed a Notice of Motion to Compel Plaintiff to comply with discovery demands or preclude Plaintiff from offering any evidence as to damages at the time of trial. Defendant states that after several attempts to obtain discovery, Plaintiff has failed to execute authorization for medical records from Dr. Mancuso, the Chiropractor; execute authorization for medical records from Dr. Marg and a copy of plaintiff's MV-104 report. *See*, Affirmation of Robert Drummond, Esq. on Motion Sequence 2. There was no opposition to the motion.

DISCUSSION

Motion Sequence 2

Pursuant to CPLR 3124 and 3126, if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123; the party seeking disclosure may move to compel compliance or a response. The Court may grant an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party. *See*, CPLR 3124 and CPLR 3126.

Here, there is no opposition to this motion, and as such the motion is granted. To the extent that Plaintiff shall provide the executed authorization for medical records from Dr. Mancuso, the executed authorization for medical records from Dr. Marg and a copy of plaintiff's MV-104 report on or before April 30, 2020. In the event that Plaintiff fails to provide this discovery by said date, Plaintiff shall be precluded from offering any evidence as to damages at the time of trial. Defendant's application to compel discovery is **granted**.

Motion Sequence 1

It is well settled that it is proper to deny a motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident, where there are conflicting expert medical opinions submitted by the parties, which raise triable issues of fact. *See*, Wilcoxon v

Palladino, 122 A.D. 3d 727, 728 (2nd Dept. 2014); *see also*, McIntyre v E. Nassau Med. Group, P.C., 275 A. D. 2d 398, 398 (2nd Dept. 2000). Since summary judgment deprives the litigant of their day in court it is considered a drastic remedy, having res judicata effects, and should only be granted when there is no doubt as to the absence of triable issues. *See*, Andre v Pomeroy, 35 N.Y.2d 361, 364 (1974); *see also*, Ugarriza v Schmieder, 46 N.Y. 2d 471, 474 (1979).

As the medical expert opinion reports conflict, and the parties dispute the sufficiency of the medical records each relied on and submitted, Defendant has failed to show the absence of triable issues as to whether Plaintiff sustained a serious injury pursuant to the law, entitling Defendant to summary judgment in its favor. It would be inappropriate to grant summary judgment in the instant matter. As such, Defendant's application for summary judgment is **denied**.

Accordingly, it is hereby,

ORDERED, that Defendant's Motion for Summary judgment is denied; and it is further

ORDERED, that Defendant's Motion to Compel is granted, and Plaintiff shall have until April 30, 2020, to provide the executed authorization for medical records from Dr. Mancuso, the executed authorization for medical records from Dr. Marg and a copy of plaintiff's MV-104 report; and it is further

ORDERED, that in the event Plaintiff fails to comply with discovery as directed in this decision and order, Plaintiff shall be precluded from offering evidence as to damages at trial; and it is further

ORDERED, that the parties and their respective counsel shall **appear in Court for conference on May 20, 2020 at 9:30 a.m.**

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: March 12 2020
Poughkeepsie, New York

ENTER:



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

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.

cc: Robert Drummond, Esq.
Martyn and Martyn
Attorneys for Defendants
330 Old Country Road, Suite 211
Mineola, NY 11501

Thomas Yatto, Esq.
Attorney for Plaintiff
356 Meadow Avenue
Newburgh, NY 12550