

Holland v Town of Southampton
2020 NY Slip Op 34866(U)
May 15, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 623427/17
Judge: Carmen Victoria St. George
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ORIGINAL

**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

_____ X

TAKISHA HOLLAND,

**Index No.
623427/17**

Plaintiff,

**Motion Seq:
001 MG
Decision/Order**

-against-

**THE TOWN OF SOUTHAMPTON and
ANTHONY VECCHIO,**

Defendants.

_____ X

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	10-23
Answering Papers.....	25-35
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Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained in a motor vehicle accident that occurred on May 22, 2017 near the intersection of Peconic Avenue and NYS Route 25 in Riverhead, County of Suffolk, State of New York. The defendants move this Court 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. This Court grants the defendants' motion.

BACKGROUND

As alleged, on May 22, 2017, at approximately 11:00 pm, the vehicle operated by defendant Anthony Vecchio came into contact with the vehicle operated by plaintiff Holland near the intersection of Peconic Avenue and NYS Route 25. Defendant Vecchio operated that vehicle while employed by the vehicle's owner, defendant Town of Southampton.

Plaintiff commenced this action by filing a summons and complaint on December 6, 2017, seeking money damages for the serious injuries she claimed she sustained in the accident. The defendants' joined issue on January 22, 2018.

Plaintiff's Verified Bill of Particulars lists her injuries as traumatic disc injury including herniation and bulge of multiple discs, bursitis of the left hip and sprain/strain of the lumbar spine. Plaintiff specifically alleges this caused a significant limitation in the use of a body function, a permanent consequential limitation of use of a body function and that she was prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident (90/180 claim).

DISCUSSION

A. CPLR § 3212

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Pursuant to CPLR § 3212, when moving for summary judgment, a party must establish that the cause of the action or the defense "sufficiently [] warrant[s] the courts" directing judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). To oppose a motion for summary judgment, a party must show the existence of a triable issue of fact (*Id.*). Evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

In support of their motion, defendants submit a copy of the pleadings, plaintiff's entire deposition transcript, and the affirmed reports of Dr. Reiser and Dr. Ordway.

B. Insurance Law § 5102(d)

Under Insurance Law § 5102(d), serious injury is defined 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 function or system; 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 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."

The defendant has the initial burden of making a prima facie showing, through admissible evidence, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Gaddy v. Eyster*, 79 NY2d 955 [1992]). A defendant who relies on the findings of their own witnesses in support of a motion for summary judgment based on the lack of serious injury must submit evidence in an admissible form such as affidavits or affirmations (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). A defendant can submit the plaintiff's deposition testimony and the affirmed medical reports of the defendant's own examining physician in order

to satisfy the burden of establishing a prima facie case that the plaintiff did not sustain a serious injury (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]). Once the defendant has made a prima facie showing, the burden then shifts to the plaintiff to produce sufficient admissible evidence that her injuries satisfied the meaning of serious injury, to defeat the defendant's motion (*see Gaddy v. Eyler, supra*).

In order to recover under the permanent consequential loss category, the limitation of use or function needs to be significant or consequential as it relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part (*Dufel v Green*, 84 NY2d 795, 798 [1995]). A minor, mild, or slight limitation of use cannot satisfy the meaning of serious injury as defined by § 5102(d) (*Licari v. Elliott*, 57 NY2d 230 [1982]). To satisfy the definition of serious injury under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically determined injury of a non-permanent nature which prevented them from performing their usual and customer activities for no less than 90 out of the 180 days following the subject accident (*Sainte-Aime v. Suwai Ho*, 274 AD2d 569 [2d Dept 2000]).

Defendants, by submitting an affirmed report from their examining physicians and through the use of the plaintiff's deposition testimony, have established a prima facie case that plaintiff did not sustain a serious injury under any of the categories claimed in her Bill of Particulars (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]); *Gaddy v. Eyler, supra*). At defendants' request, Dr. Ordway examined the plaintiff on February 27, 2019. The doctor states the objective means by which he measured plaintiff's range of motion and sets the standard for normal values as stated in the A.M.A "Guides to the Evaluation of Permanent Impairment", fifth edition and Reider's "The Orthopedic Exam", second edition. The doctor physically examined the plaintiff and found plaintiff's subjective range of motion of the cervical spine was not accompanied by spasms, swelling, atrophy or sensorial defects. The report further noted the thoracic spine has a normal range of motion with no signs of tenderness or swelling. Dr. Ordway found that the lumbar spine revealed no findings of spasm to confirm plaintiff's subjective symptomatology. Complaints of shoulder pain were secondary to a prior fracture. Claimant had x-rays and MRIs performed as a result of the subject accident but no resulting surgery. The plaintiff had two previous accidents including being hit by a car as a pedestrian that resulted in injuries. The doctor upon examination of the hip, back and shoulder found no positive objective findings despite plaintiff's subjective complaint of pain. He concluded that the plaintiff had resolved the hip, cervical, thoracic and lumbar spine and right shoulder. He further concluded that the plaintiff does not have any applicable orthopedic disability, permanency or limitations noted upon her examination.

A neurological examination was conducted on March 15, 2019 by Dr. Reiser at the defendants' request. Based upon the medical records and examination findings, Dr. Reiser affirmed that the plaintiff had not objective ongoing neurological disorder caused by the subject accident despite subjective complaints. After review of the plaintiff's MRIs Dr. Reiser concluded there was no ongoing symptom or neurological finding to suggest radiculopathy or

myelopathy at any spinal level despite herniations and neural impingement. The doctor concluded that the neurological examination was normal and had no objective evidence of an ongoing neurological disorder casually related to the subject accident.

The plaintiff testified that she was able to go back to work on a full-time basis approximately five weeks after the accident where she is a teaching assistant at a group home. Plaintiff further testified that Total Rehab was ready to send her back to work four days after the subject accident. Upon returning to work she switches shifts because there was too much down time essentially requesting more difficulty duty despite the subjective complaints of pain. This includes standing to cook and assist elderly resident with showers and medical appointments.

Also of note is that in accordance with the plaintiff's testimony no air bags deployed as a result of the impact. The plaintiff testified that she was assisted out of the car and presented at Peconic Bay Medical Center where she was diagnosed with a muscle strain and told to attend physical therapy. She did not return to the hospital but began attending physical therapy which cleared her to return to work. Plaintiff has attended treatment at several different physical therapy facilities where treatment includes heat packs and stretching but discontinued treatment in March of 2018.

The plaintiff's continued subjective complaints of pain in her neck, back and hip resulted in her inability to lift. Her inability to lift hinders her ability to vacuum and do laundry but did not prevent her from performing such household functions. These household activities are not the "usual" and "customary" acts the legislature had in mind when it enacted Insurance Law § 5102(d). A plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of her customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Omar v. Goodman*, 295 AD2d 413 [2d Dept., 2002]; *Lauretta v. County of Suffolk*, 273 AD2d 204 [2d Dept., 2000]).

Notably, plaintiff's deposition testimony is devoid of any mention of an inability to perform her daily activities. Accordingly, the defendants have established through the presentation of the plaintiff's own testimony that she did not sustain a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts constituting plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (90/180 claim) (*Kuperberg v. Montalbano*, 72 AD3d 903 [2d Dept 2010]; *Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]).

Based on the affirmed report from Drs. Reiser and Ordway and plaintiff's deposition testimony, defendants have established, prima facie, that plaintiff did not sustain a serious injury as defined by § 5102(d) under the permanent consequential limitation, significant limitation, or 90/180 categories of injury alleged in the Bill of Particulars (*see Curry v. Velez*, 243 AD2d 442 [2d Dept 1997]).

Once defendants establish their prima facie case, the burden shifts to the plaintiff to come forward with evidence in admissible form to raise a triable issue of fact as to whether she

sustained a serious injury as defined by § 5102(d) (*see Gaddy v. Eyler, supra*). Unless an acceptable excuse for failure to comply is furnished, findings of a medical witness must be in the form of affidavits or affirmations to be admissible, which the plaintiff has met and therefore this Court considers Dr. Chughtai's affidavit and annexed reports (*see Pagano v. Kingsbury, supra*). While a plaintiff should not be punished for failing to seek out a doctor who knows how to create a record for litigation immediately after being injured, a contemporaneous medical report is important for proving causation (*see Perl v. Meher*, 18 NY3d 208 [2011]). The doctor's affidavit submitted by the plaintiff does not adequately address causation. Dr. Chughtai does not address the detailed pre-existing medical history of the plaintiff and failed to compare post and pre-accident x-rays and MRIs to see if the injuries remained unchanged. Also, Chughtai does not opine that the accident is a "substantial factor" in causing the plaintiff's injuries, and further fails to specifically causally relate the subject accident and eliminate plaintiff's pre-existing conditions as a factor of plaintiff's present complaints.

Dr. Chughtai uses the normal range of motion from various studies. Notably, the treatment reports contain no recommendation from any medical provider to refrain from engaging in any activities at all. Dr. Chughtai states, "[s]he may continue to work as tolerated."

Bulging or herniated discs must be accompanied by objective medical evidence of the alleged physical limitations resulting from the disc injury and their duration in order to support a claim of serious injury (*see Pommells v. Perez*, 4 NY3d 566 [2005]; *Yakubov v. CG Trans Corp.*, 30 AD3d 509 [2d Dept 2006]; *Kearse v. NYC Transit Auth.*, 16 AD3d 45 [2d Dept 2005]; *Diaz v. Turner*, 306 AD2d 241 [2d Dept 2003]). The doctor's affidavit submitted by plaintiff makes out no objective medical evidence addressing any physical limitations resulting from the alleged aggravation or exacerbation of the previously existing herniations. Without objective medical evidence of the plaintiff's limitations, the mere existence of herniated discs cannot support her serious injury claim (*see Pommells v. Perez, supra*).

Where a plaintiff alleging serious injury has preexisting conditions, the plaintiff must address or contest the existence of such conditions and the role they played in the alleged injury (*see Alvarez v. NYLL Mgmt. Ltd.*, 120 AD3d 1043 [1st Dept 2014]). The affirmed medical report submitted by the defendants states the plaintiff had preexisting conditions secondary to previous motor vehicle accidents. Dr. Chughtai's affidavit submitted by the plaintiff does not acknowledge the plaintiff's preexisting conditions, and therefore it fails to address how the preexisting condition could have affected the plaintiff's alleged injuries. As such, plaintiff's evidence is insufficient to show a triable of fact and therefore summary judgment is proper (*see Camilo v. Villa Livery Corp.*, 118 AD3d 586 [1st Dept 2014]).

CONCLUSION

The defendants made a prima facie showing that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d) through affirmed medical reports and the plaintiff's deposition testimony. After establishing that plaintiff did not sustain a permanent consequential limitation of use of a body function, a significant limitation of use of a body function, and that she was not prevented from performing substantially all of her usual and customary daily

activities for 90 of the first 180 days following the accident, defendant shifted the burden to plaintiff to raise a triable issue of fact (*see Gaddy v. Eyler, supra*).

The plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury under § 5102(d). Therefore, the defendants' motion for summary judgment dismissing the complaint is granted.

Upon the foregoing; it is

ORDERED that defendants' motion seeking summary judgment pursuant to CPLR § 3212 dismissing the complaint on the basis that plaintiff Takisha Holland did not sustain a serious injury as defined by Insurance Law § 5102(d) is granted as detailed above; and it is further,

ORDERED that plaintiff's complaint is dismissed as against the defendant; and it is further,

ORDERED that counsel for defendants is hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

The foregoing constituted the decision of this Court.

Dated: May 15, 2020
Riverhead, NY

15/ Carmen Victoria St. George 
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION []