Government Empls. Ins. Co. v Tomaylla
2020 NY Slip Op 34976(U)
September 1, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 617380/2016
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 617380/2016
CAL. No. 201902213MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 1/28/20
ADJ. DATE 7/14/20
Mot. Seq. # 002 MD

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GOVERNMENT EMPLOYEES INSURANCE COMPANY a/s/o PATRICIA ROMANO and PATRICIA A. ROMANO,

Plaintiffs,

- against -

ISAIAS TOMAYLLA a/k/a ISAIAS TOMAYLIA,

Defendant.

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DELL & DEAN, PLLC
Attorney for Plaintiff Romano
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

HARRIETTE G. ZELMAN, ESQ.
Attorney for Plaintiff Government Employees Insurance Company
225 Roslyn Road
Roslyn Heights, New York 11577

MARTYN MARTYN SMITH & MURRAY
Attorney for Defendant
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated December 31, 2019 ; Notice of Cross Motion and supporting papers_; Answering Affidavits and supporting papers by plaintiff GEICO, dated May 4, 2020, by plaintiff Romano, dated July 7, 2020 ; Replying Affidavits and supporting papers by defendant, dated July 14, 2020 ; Other_; it is

ORDERED that the motion by defendant Isaias Tomaylla seeking summary judgment dismissing the complaint is denied.

This action was commenced by Government Employees Insurance Company, a/s/o of Patricia Romano to recover damages for personal property allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Expressway Drive South and Wheeler Road in the Town of Islip on November 14, 2014. Thereafter, Patricia Romano instituted an action to recover damages for injuries she allegedly sustained as a result of the same motor vehicle accident. Plaintiff, in her complaint, alleges that while she was in the process of making a left turn from Wheeler Road onto the

ramp of the Long Island Expressway her vehicle was struck in the rear by the vehicle owned and operated by defendant Isaias Tomaylla. By her bill of particulars, plaintiff alleges that as a result of the subject collision she sustained various injuries, including mutilevel disc bulges of the spine; L3-L4 facet fracture; disc herniations at level C2 through C7; anterolisthesis at level C7-T1; and an exacerbation of an asymptomatic pre-existing lumbar spine condition. Plaintiff further alleges that she has been confined to her home and incapacitated from her employment due to the injuries she suffered in the subject accident for approximately 79 weeks. Thereafter, defendant moved, unopposed, to consolidate the actions on the grounds that both actions arose out of the same accident and circumstances, and involve common questions of law and fact. By order dated March 23, 2018, this Court consolidated both actions under index number 617380/2016.

Defendant now moves for summary judgment, arguing the injuries plaintiff alleges to have sustained as a result of the subject accident do not come within the meaning of the serious injury threshold requirement Insurance Law §5102 (d). In support of the motion, defendant submits, among other things, copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records concerning the injuries at issue, and the sworn medical reports of Dr. Noah Finkel. At defendant's request, Dr. Finkel conducted an orthopedic examination of plaintiff on August 20, 2019. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits the sworn medical report of Dr. Sunil Butani, and uncertified copies of her medical report regarding the injuries at issue.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants failed to establish that plaintiff did not sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Morafates v Macchia***, 127 AD3d 1150, 7 NYS3d 546 [2d Dept 2015]; ***Galofaro v Wylie***, 78 AD3d 652, 910 NYS2d 524 [2d Dept 2010]). Defendant relies upon the affirmed medical report of Dr. Finkel, which revealed significant limitations in the range of motion of plaintiff's spine, and failed to establish any basis upon which it might be concluded that such limitations were not causally related to or exacerbated by the subject accident (*see* ***Werthner v Lewis***, 120 AD3d 490, 990 NYS2d 267 [2d Dept 2014]; ***Cruz v Advanced Concrete Leasing Corp.***, 101 AD3d 666, 954 NYS2d 491 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]). Indeed, Dr. Finkel concludes that plaintiff sustained strains to her spine, which were superimposed upon pre-existing degenerative disc disease as a result of the subject accident. Thus, the findings of defendant's expert failed to show that the exacerbation and/or aggravation of a pre-existing spine condition or that the limitations noted in her cervical and lumbar regions were not caused by the subject accident (see ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]; ***Keenum v Atkins***, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]; ***Rabinowitz v Kahl***, 78 AD3d 678, 910 NYS2d 166 [2d Dept 2010]; ***Pfeiffer v New York Cent. Mut. Fire Ins. Co.***, 71 AD3d 971 [2d Dept 2010]). In addition, neither Dr. Finkel nor defendant addressed plaintiff's allegation, clearly stated in her bill of particulars that she sustained a facet fracture at level L3-L4 of her lumbar spine (*see* ***Sanclemente v MTA Bus Co.***, 116 AD3d 490, 990 NYS2d 267 [2d Dept 2014]; ***Rodgers v Duffy***, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]). Consequently, the proof submitted by defendant failed to objectively demonstrate that plaintiff did not suffer a serious injury

as defined by Section 5102 (d) of the Insurance Law due to the subject accident (*see* ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; ***Abraham v Bello***, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Since defendant failed to meet her prima facie burden, the Court need not address the sufficiency of whether plaintiff's papers submitted in opposition raised a triable issue of fact as to whether she sustained a serious injury within the meaning of the Insurance Law (*see* ***Smith v Hartman***, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]; ***Quiceno v Mendoza***, 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 9/1/2020

LINDA KEVINS, JSC

_____FINAL DISPOSITION __X__ NON-FINAL DISPOSITION