

**Calderon v Loarca**

2020 NY Slip Op 35094(U)

November 13, 2020

Supreme Court, Westchester County

Docket Number: Index No. 53926/2019

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
INGRID CALDERON,

Plaintiff,

- against -

JOSE GUADALUPE SOTO LOARCA,  
BRUSHWORKS OF RYE, INC. and  
ROBERT P. DIMAGGIO,

Defendants.  
-----X

**INDEX NO. 53926/2019**

**DECISION/ORDER**

**Mot. Seq. 1**

**Return Date: 10/07/2020**

**ECKER, J.**

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF as submitted relative to the motion of defendants JOSE GUADALUPE SOTO LOARCA, BRUSHWORKS OF RYE, INC. and ROBERT P. DIMAGGIO (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment as against plaintiff INGRID CALDERON on the ground that plaintiff did not sustain a serious injury under Insurance Law § 5104.

This is an action seeking damages for personal injuries which plaintiff claims she sustained as a result of having been involved in a motor vehicle accident. Plaintiff alleges that on the afternoon of March 19, 2016, she was driving north on Boston Post Road in the Village of in Port Chester when the vehicle she was operating was hit in the rear driver's side by the vehicle owned by defendants Brushworks of Rye, Inc. (Brushworks) and DiMaggio, and being operated by Loarca. She alleges the impact caused her body to thrust toward the steering wheel and to the left driver's door. Due to pain to both of her legs and lower back, she was transported by ambulance to Greenwich Hospital.

On March 13, 2019, plaintiff commenced this action by filing a summons with notice.<sup>1</sup> Defendants made a demand for a complaint and interposed an answer with 4 affirmative defenses, including culpable conduct on the part of plaintiff and misusing or failure to use a seatbelt, thereby contributing to her alleged injuries.

<sup>1</sup> Plaintiff filed a bill of particulars which was later supplemented.

Defendants now move for summary judgment to dismiss the complaint as against each of them, arguing that plaintiff has not established prima facie that she sustained a serious injury. Plaintiff's bill of particulars asserts that she sustained a serious injury within the meaning Insurance Law 5102 (d), including a herniated disc at the L4-L5 level along with a disc bulge at L5-S1 level and accompanying radiculopathy and nerve impingement. The parties dispute whether plaintiff's subjective complaints are sufficiently corroborated by objective medical findings, such that it can be said that she sustained a serious injury (see *Meher v Perl*, 18 NY3d 208, 219-220 [2011]).

In support of their motion, defendants submitted, among other things, the pleadings, plaintiff's medical records which includes the uncertified emergency room records from Greenwich (Yale-New Haven) Hospital shortly following the accident; an uncertified Magnetic resonance imaging (MRI) report dated January 30, 2016 relative to a prior accident on January 4, 2016 which plaintiff was involved in; and the affirmed independent medical examinations of plaintiff that were performed by M.L. Sobin on September 21, 2016, and of Ji Hoon Kim (a chiropractor and acupuncturist) on May 11, 2017.

As to the Kim's chiropractic report from May 2017, the court declines to consider it because it is affirmed rather than sworn to, in contravention of CPLR 2106 (a) (see *Casas v Montero*, 48 AD3d 728, 729 [2d Dept 2008]). In short, the statements in Kim's report had not been submitted in admissible form (see *Defina v Daniel*, 140 AD3d 825, 825 [2d Dept 2016]; *Austin v McPherson*, 111 AD3d 610, 611 [2d Dept 2013]; see generally CPLR 2106). Likewise, the court declines to consider the MRI reports for lack of certification (see *Vasquez v Doe 1*, 73 AD3d 1033, 1033-1034 [2d Dept 2010]; *Espinosa v Melendez*, 40 AD3d 912, 914 [2d Dept 2007]).

Sobin's report notes that plaintiff had physical therapy, one set of trigger point injections, and prior ankle surgery. As to plaintiff's thoracic and lumbar spine, Sobin states that plaintiff's range of motion is limited; that values are assigned to certain tests but the values are not compared to the norms; muscle strength, hip flexor, knee extension, and foot dorsiflexion are all noted to be 4/5, without reference as to the degree to which this is other than the norm; as to sensation, sensory examination shows diminished light touch sensation of the right L4 and L5 dermatomes, which is not otherwise explained; and as to gait and transfers, plaintiff is noted to rise with hand assist and finds tandem gait to be painful. Sobin notes that since plaintiff had a prior history of ankle surgery, he defers examination of toe and heel walk. His clinical impression is that plaintiff has lumbar sprain and pain, and he ruled out lumbar intravertebral disc pathology and lumbar radiculopathy. Sobin recommends plaintiff's treatment plan to be chiropractic care. Sobin opines that "[c]ausality is established assuming the accuracy of patient's report."

In opposition, plaintiff submitted, among other things, neurological consultation reports of Michael Daras, performed on March 28 and April 25, 2016, both of which are unsworn and unaffirmed, thus rendering them inadmissible and without probative value (see generally CPLR 2106). Plaintiff also submitted MRI reports from April 2016 and

October 2019 from Phelps Hospital which are inadmissible. In addition, plaintiff proffered three reports from Sarala Devi, who performed: (1) a sensory nerve conduction test of plaintiff's lower extremities on April 14, 2016; (2) a segmental somatosensory evoked study of plaintiff's lower extremities on April 14, 2016; and (3) a brainstem auditory evoked response (BAER) study on April 20, 2016. However, each of Devi's reports is uncertified and unauthenticated and, thus, not in admissible form (see CPLR 4518 [c]; *Annan v Abdelaziz*, 68 AD3d 794, 795 [2d Dept 2009]; *Duke v Saurelis*, 41 AD3d 770, 771 [2d Dept 2007]).

Additionally, plaintiff submitted the report of Louis C. Rose, a board-certified orthopedic surgeon, who conducted a comprehensive orthopedic evaluation of her on April 27, 2016, with further examinations on May 25, 2016. Rose is presumably licensed in this State given that his office address is in the City of White Plains. In the absence of Rose's affirmation or jurat, his unsworn medical reports are not be considered. For the same reason, plaintiff's submission of neurological consultation reports of John B. Robbins from October and November 2019 are inadmissible.

Notwithstanding, the affirmed report of Daras, a board-certified neurologist, dated September 21, 2020 is in admissible form. He opines to a reasonable degree of neurological certainty that upon his review of plaintiff's medical records and numerous physical examinations, the subject accident caused plaintiff to suffer from increased lumbar symptoms and aggravated underlying conditions in her spine that may have been present before, that she has muscle spasms and muscle tenderness, that such injuries were directly caused by the underlying accident, and that plaintiff's lumbar spine injuries were traumatically induced due to the impact of the collision. Daras opines with a reasonable degree of medical certainty that plaintiff is permanently disabled and that her limitations and functional disabilities are causally related to the subject accident. He notes that plaintiff continues to need medical treatment and therapy. Daras confirms that the objective findings substantiate plaintiff's subjective complaints, thus resulting in permanent significant limitations and functional disabilities which still persist and prevent her from carrying out normal daily activities. In sum, Daras opines with a reasonable degree of medical certainty that the injuries sustained by plaintiff from the accident have left her "totally disabled."

Based on the foregoing, the court finds that plaintiff has presented sufficient evidence to rebut defendants' claim that she did not sustain a serious injury, thus raising a triable issue of fact (see *Meher v Perl*, 18 NY3d at 219-220; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351-153 [2002]). Accordingly, defendants' motion is denied (see *Zeman v Valenti*, 302 AD2d 593, 594 [2d Dept 2003]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendants JOSE GUADALUPE SOTO LOARCA, BRUSHWORKS OF RYE, INC. and ROBERT P. DIMAGGIO (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment as against plaintiff INGRID CALDERON on the ground that plaintiff did not sustain a serious injury under Insurance Law § 5104, is denied; and it is further

ORDERED that the parties shall appear at the Compliance Conference Part of the Court on a date, time, and manner as hereafter directed.

The foregoing constitutes the decision and order of this court.

Dated: November 13, 2020  
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker  
HON. LAWRENCE H. ECKER, J.S.C.  
November 13, 2020, 12:05 p.m.

**APPEARANCES:**

All parties appearing via NYSCEF.