

**Grijalva v Pyne**

2020 NY Slip Op 35256(U)

August 24, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 613042/2016

Judge: William G. Ford

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**SHORT FORM ORDER**

**INDEX No. 613042/2016**  
**CAL. No. 202000116MV**

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY**

***P R E S E N T :***

**Hon. WILLIAM G. FORD**  
**Justice of the Supreme Court**

**MOTION DATE 7/15/20 (001)**  
**MOTION DATE 7/15/20 (002)**  
**ADJ. DATE 7/16/20**  
**Mot. Seq. # 001 MD**  
**# 002 MD**

-----X  
**ANA GRIJALVA,**

**Plaintiff,**

**- against -**

**NICOLE PYNE,**

**Defendant.**

**COELLO & LORENZOTTI, PLLC**  
**Attorney for Plaintiff**  
320 Carleton Avenue, Suite 2000  
Central Islip, New York 11722

**ROE & ASSOCIATES**  
**Attorney for Defendant/Third-Party Plaintiff**  
59 Maiden Lane, 40th Floor  
New York, New York 10038

**GENTILE & TAMBASCO**  
**Attorney for Third-Party Defendant**  
115 Broad Hollow Road, Suite 300  
Melville, New York 11747

-----X  
**NICOLE PYNE,**

**Third-Party Plaintiff,**

**- against -**

**MARCO GUZMAN PONCE,**

**Third-Party**

**Defendant.**  
-----X

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Nicole Pyne, filed May 27, 2020; by third-party defendant Marco Guzman Ponce, filed June

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12. 2020 ; Notice of Motion/Order to Show Cause and supporting papers \_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_; Other \_\_\_\_; it is

**ORDERED** that the motion by Nicole Pyne and the motion by Marco Guzman Ponce are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendant Nicole Pyne for summary judgment dismissing the complaint against her is denied; and it is further

**ORDERED** that the motion by third-party defendant Marco Guzman Ponce for summary judgment dismissing the complaint against him is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Ana Grijalva as a result of a motor vehicle accident, which occurred on April 17, 2015, on Montauk Highway, at or near its intersection with Washington Avenue, in Sayville, New York. Plaintiff alleges that she suffered various injuries as a result of the accident, including disc herniations in the cervical and lumbar regions of her spine, disc bulges in the lumbar and lumbosacral regions of her spine, tears of the supraspinatus tendon and rotator cuff of her left shoulder, a partial tear of the supraspinatus tendon of her right shoulder, and significant limitations in range of motion of her neck, back, and shoulders.

Defendant Pyne seeks an order granting summary judgment dismissing the complaint on the ground that plaintiff did not suffer a “serious injury” within the meaning of Insurance Law § 5102 (d). She submits, in support of the motion, copies of the pleadings, the bills of particulars, an uncertified police report, the transcript of plaintiff’s deposition testimony, and the affirmed medical reports of Gary Kelman, M.D., and Michael Winn, M.D.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred by the No-Fault Insurance Law bears the initial burden to establish, prima facie, that the plaintiff did not sustain a “serious injury” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in . . . 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

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daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Findings of a defendant’s own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (*Brite v Miller*, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], citing *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and unsworn medical reports and records prepared by the plaintiff’s treating medical providers (*Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Pagano v Kingsbury*, *supra*). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a “serious injury” within the meaning of the statute (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *McLoud v Reyes*, *supra*; *Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Further, an injury under the “90/180-day” category of “serious injury” must be “medically determined,” meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, *supra*). Specifically, plaintiff’s usual activities must have been curtailed to a “great extent” to satisfy the 90/180-day category (*Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant Pyne’s submissions failed to establish a prima facie case that the alleged injuries to plaintiff’s spine and shoulders do not constitute “serious injuries” within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070). Defendants have presented competent medical evidence that none of plaintiff’s alleged injuries fall under the “permanent consequential limitation,” “permanent loss,” or “significant limitation” of use categories of the statute (*see Perl v Meher*, 18 NY3d 208; *Schilling v Labrador*, 136 AD3d 884; *Rovelo v Volcy*, 83 AD3d 1034). However, defendant Pyne failed to submit admissible evidence negating the elements of plaintiff’s 90/180 claim. Plaintiff testified on November 29, 2017 that she did not return to work for six months at the recommendation of her treating physician. Dr. Kelman did not examine plaintiff until almost three years after the accident and did not relate his medical findings that there was “no objective evidence of permanency or residual effects in regards to the injuries sustained” to the 90/180 category of Insurance Law § 5102 (d) (*see Reynolds v Wai Sang Leung*, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; *Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; *Rahman v Sarpaz*, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]). Thus, defendant Pyne failed to make a prima facie showing that plaintiff’s claim for damages due to non-permanent injuries is barred under the No-Fault Insurance Law (*see Reynolds v Wai Sang Leung*, *supra*; *Negassi v Royle*, 65 AD3d 1311, 885 NYS2d 760 [2d Dept 2009]; *Ismail v Tejada*, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; *Takaroff v A.M. USA, Inc.*, *supra*).

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Therefore, as third-party defendant Marco Guzman Ponce relied on the same arguments and evidence as defendant Pyne, he also failed to meet his prima facie showing.

Accordingly, the motions are denied.

Dated: August 24, 2020  
Riverhead, New York



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**WILLIAM G. FORD, J.S.C.**

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION