Razor v Razamwende
2021 NY Slip Op 33058(U)
December 14, 2021
Supreme Court, Bronx County
Docket Number: Index No. 32765/2019E
Judge: Veronica G. Hummel
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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 BRONX IAS PART 31

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RACHEL S. RAZOR,

Plaintiff,

-against-

SIMPORE RAZAMWENDE,

Defendant.

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Index No.32765/2019E
DECISION/ORDER
Motion Seq. 2

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF relevant to the motion of defendant SIMPORE RAZAMWENDE [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff RACHEL S. RAZOR (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on September 30, 2019 . Plaintiff had surgery on the right shoulder on November 26,2019.

In the bill of particulars and opposition papers, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered injuries to the right shoulder, cervical spine and lumbar spine that satisfy the following Insurance Law 5102(d) threshold categories of: permanent consequential limitation, significant limitation, and 90/180 days.[1]

[1] In the opposition, plaintiff does not claim or address the ground of permanent loss of use and the ground is therefore deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not allege or prove a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc*., 96 NY2d 29 [2001]).

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues that plaintiff's claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Bruckner (orthopedics) and Dr. Setton (radiologist).

Dr. Buckner bases his opinion on the details of a physical examination conducted on plaintiff on September 14, 2020 (one year post-Accident).The doctor states that he reviewed, among other things, the bill of particulars, and plaintiff’s medical records. Dr. Buckner conducted objective tests on the cervical spine, lumbar spine, right shoulder and “lower extremities,” finding negative results. The doctor cites ranges of motion, but offers no comparisons. Instead the expert refers to treatises that state, in sum and substance, that range in motion is no longer used as a basis for defining impairment.

The doctor finds no objective evidence of cervical spine, lumbar spine, or right shoulder injury. The surgery on the right shoulder, for a tear, lesion and impingement is unrelated. Plaintiff can work without causally -related restrictions. There is no permanency as a result of the Accident.

Dr. Setton submits his evaluation, dated March 9,2020, of the MRIs of plaintiff’s cervical spine, lumbar spine, right shoulder and brain taken in October and November 2019, about one month post-Accident. In terms of the cervical spine, he finds, in sum and substance, that: there is no fracture; there are bulging discs, but no herniations, from degenerative processes that predate the Accident; no evidence of trauma; no evidence of traumatic injury and no evidence of soft tissue injury from the Accident. He makes similar findings as to the lumbar spine.

As for the right shoulder, the expert finds no evidence of osseous or soft tissue injury from the Accident. There is no evidence of a tear, or any acute traumatic rotator cuff injury.. There is no evidence of joint injury. There is no evidence of trauma joint injury and no other abnormal findings to indicate any more substantial traumatic injury to the right shoulder.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; *see Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an affidavit, an attorney affirmation, and medical records/reports of Dr. Abramov, Dr. Winter, Dr. Ashraf, Dr. Kwan, Dr. Katzman, and Dr. Pranevicius.

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the right shoulder, cervical spine, and lumbar spine (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injuries after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident, and at the recent examination by plaintiff's expert in February 2021 (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, plaintiff suffered loss of ranges of motion. Furthermore, the injuries to the right shoulder were casually connected to the Accident, not degenerative , and the injury required shoulder surgery. The experts opine that the relevant injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the right shoulder, cervical spine and lumbar spine. Of course, if a jury determines that plaintiff has met

the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]).

In contrast, defendant establishes *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony and plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra).*

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

ORDERED that the motion of defendant SIMPORE RAZAMWENDE [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff RACHEL S. RAZOR has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: December *14* 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 12/14/2021
Hon. Veronica G. Hummel, A.J.S.C.

1. CHECK ONE.....	CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT