

Alcenat v Giordano
2021 NY Slip Op 33226(U)
July 1, 2021
Supreme Court, Orange County
Docket Number: Index No. EF008376-2018
Judge: Maria S. Vazquez-Doles
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At a term o-f the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 1st day of July, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

MARIE D. ALCENAT,

PLAINTIFF,

-AGAINST-

SAMANTHA A. GIORDANO and
STEPHANIE A. ARNOLD,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

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, on all
parties.

DECISION & ORDER
INDEX #EF008376-2018
Motion date: 4/30/2021
Motion Seq. #1

The following papers were read on this motion by defendants for summary judgment,
dismissing the complaint alleging plaintiff's failure to meet the serious injury threshold:

Notice of Motion/Affirmation in Support/Exhibits A - I 1 - 11

This personal injury action arises out of a motor vehicle accident that occurred on August
22, 2015 near an intersection at Wisner Avenue in Wallkill. Plaintiff commenced this action by
filing a Summons and Verified Complaint on August 8, 2018. Defendants filed a Verified
Answer on November 15, 2018. Defendants move here for summary judgment pursuant to CPLR
§3212 against plaintiff for failure to sustain a serious injury under Insurance Law §5102(d).

Plaintiff has failed to file opposition papers.

Defendants argue that plaintiff's injuries are pre-existing conditions and degenerative in
nature, and are thus not causally related to the subject accident. According to the medical records,
plaintiff was only treated with chiropractic therapy for one month after the subject accident, and
did not seek treatment after September 2015. In support of their motion, defendants offered

plaintiff's Verified Bill of Particulars, deposition transcript, and medical records (Exhibits C, D, E, and F). Defendants also submitted an independent orthopedic medical examination report by Dr. Robert C. Hendler, dated March 9, 2021 (Exhibit G). Defendants further avers that plaintiff did not sustain a serious injury under the 90/180 threshold.

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" (*Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]). Issue finding, not issue determination, is the key to summary judgment (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party (*Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]).

Defendants move for summary judgment, claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102 because she has not provided proof that she sustained a serious injury. As defined by that section, "'serious injury' means 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" (*D'Iorio v. Brancoccio*, 115 AD2d 634 [2d Dept 1985]). Defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury (*Toure v. Avis Rent-A-Car Sys.*, 98 NY2d 345 [2002]).

This Court finds that plaintiff did not satisfy the serious injury threshold. Dr. Hendler performed an independent orthopedic medical examination on February 15, 2021. Although a decreased range of motion was provided for in plaintiff's cervical and lumbar spine, Dr. Hendler indicated that the range appeared voluntary as there were no spasm of the cervical and lumbar paravertebral musculature. In addition, the thoracic spine displayed normal range of motion. X-rays were taken on February 16, 2021, showing degenerative changes of the cervical, thoracic, and lumbar spine. Dr. Hendler stated that plaintiff may have sustained a cervical sprain, with temporary exacerbation of pre-existing degenerative joint and disc disease, at the time of the accident. However, such sprain and degenerative changes are insufficient to meet the serious injury meaning under Insurance Law §5102 (*Washington v. Cross*, 48 AD3d 457 [2d Dept 2008]; see *Khan v. Finchler*, 33 AD3d 966 [2d Dept 2006]).

Plaintiff also failed to meet the 90/180 threshold. Plaintiff testified at her deposition to missing only couple months of work and according to the medical records plaintiff requested three days off (Exhibit D, p 69-71 and Exhibit E, p 2). In addition, Dr. Hendler's report indicated that plaintiff was able to perform usual and customary daily activities (Exhibit G). Plaintiff failed to submit opposition to raise a triable issue of fact (*Omar v Bello*, 13 AD3d 430 [2d Dept 2004];

see Coscia v 938 Trading Corp., 238 AD2d 538 [2d Dept 2001]; *see also Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]).

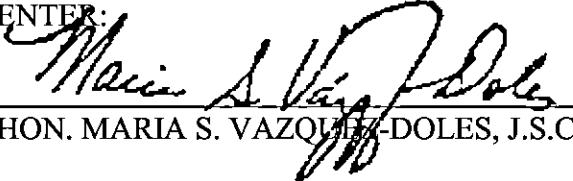
Based upon the foregoing it is hereby

ORDERED that defendants motion for summary judgment against plaintiff is
GRANTED.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 1st, 2021
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.