

Russell v Hinkson

2021 NY Slip Op 33392(U)

July 9, 2021

Supreme Court, Orange County

Docket Number: Index No. EF003314-2019

Judge: Maria S. Vazquez-Doles

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This opinion is uncorrected and not selected for official publication.

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 9th day of July, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

DAIJA RUSSELL,

PLAINTIFF,

-AGAINST-

EDWARD W. HINKSON,

DEFENDANT.

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 #EF003314-2019
Motion date: 4/30/2021
Motion Seq. #1

The following papers were read on this motion by defendants for summary judgment, pursuant to CPLR §3212, dismissing the complaint alleging plaintiff's failure to satisfy Insurance Law §5102(a) and (d):

- Notice of Motion/Statement of Material Facts/Affirmation in Support/Exhibits A - P;
- Affirmation in Opposition/Exhibit 1;
- Reply Affirmation/Exhibit Q;

This personal injury action arises out of a motor vehicle accident that occurred on May 22, 2018 on Bear Mountain Road in Cortlandt, New York. Plaintiff commenced this action by filing a Summons and Verified Complaint on April 25, 2019 (Exhibit A to moving papers). Defendants filed a Verified Answer on June 13, 2019 (Exhibit B). Defendants move here for summary judgment pursuant to CPLR §3212 against plaintiff for failure to sustain excess of basic economic loss and serious injury under Insurance Law §5102(a) and (d).

Defendants argue that plaintiff fails to satisfy the serious injury threshold. Plaintiff was allegedly involved in a motor vehicle accident in June 2013, where her complaints and treatments

were similar to that of the instant accident. In support of their motion, defendants offered plaintiff's Verified Bill of Particulars, deposition transcript, and medical records (Exhibits C, D, F, G, H, I, M and N). Defendants also submitted an Affirmation by Dr. Ira A. Neustadt, Board Certified Neurologist, dated February 22, 2021, where plaintiff displayed full cervical and lumbar range of motion (Exhibit O). Defendants further claims that plaintiff did not sustain a serious injury under the 90/180 threshold. As for excess of basic economic loss, plaintiff only incurred out of pocket expenses in the amount of \$2,158.92.

Plaintiff asserts that the movant has failed to sustain his initial burden of proof. That defendant has failed to show, *prima facie*, lack of a serious injury which results in a permanent consequential limitation of use of a body organ or member or the significant limitation of a body function or system. Plaintiff claims to have sustained cervical disc herniations and lumbar disc protrusions and herniations. Plaintiff submitted a narrative report, by Dr. Gabriel Dassa, Board Certified Orthopedic Surgeon, dated May 5, 2020, displaying limited cervical and lumbosacral range of motion (Exhibit 1). Plaintiff argues that a triable issue of fact exists on serious injury.

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]).

Here, Dr. Dassa’s orthopedic report provided limitations of the range of motion in plaintiff’s cervical and lumbosacral spine (Exhibit 1). Defendants have failed to meet their initial burden of establishing a *prima facie* case. Plaintiff’s papers in opposition are sufficient 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]). Upon view of the foregoing, defendants motion for summary judgment as to

“permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system” under Insurance Law §5102(d) is denied. Plaintiff concedes the permanent loss of use claim and fails to address the 90/180 threshold in its opposition. In any event, Dr. Neudtadt stated in his report, “Plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days following the May 22, 2018 accident” (Exhibit O). In addition, plaintiff testified that she missed only one day of work after the subject accident (Exhibit D, p 55). Thus, defendants motion for summary judgment as to “permanent loss of use of a body organ, member, function or system” and the 90/180 threshold is granted.

Although a claim for economic loss does not require the plaintiff to have sustained a serious injury (see generally *Montgomery*, 38 NY2d at 47–48; *Colvin v Slawoniewski*, 15 AD3d 900 [4th Dept 2005]; *Barnes v. Kociszewski*, 4 A.3d 824 (4th Dept 2004), plaintiffs here “failed to produce any evidence in admissible form which supports such a claim” (*Watford v. Boolukos*, 5 AD3d 475 [2d Dept 2004]; see Insurance Law §§ 5102[a][1]–[3]; 5104[a]). Plaintiff failed to establish that plaintiff’s total economic losses here did actually “exceed basic economic loss” (*Watkins v. Bank of Castile*, 172 AD2d 1061 [4th Dept 1991] [emphasis added]; see *Diaz v. Lopresti*, 57 AD3d 832 [2d Dept 2008]). Thus, defendants motion for summary judgment as to basic economic loss under Insurance Law §5102(a) is granted.

Accordingly, it is hereby

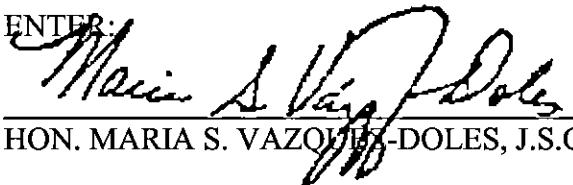
ORDERED that defendants motion for summary judgment is **DENIED** as to “permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system” under Insurance Law §5102(d); and it is further

ORDERED that defendant's motion for summary judgment is **GRANTED** as to "permanent loss of use of a body organ, member, function or system" and the 90/180 threshold; and it is further

ORDERED that defendant's motion for summary judgment is **GRANTED** as to basic economic loss under Insurance Law §5102(a).

The foregoing constitutes the Decision and Order of this Court.

Dated: July 9th, 2021
Goshen, New York

ENTER:

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