

Milien v Village of Suffern

2021 NY Slip Op 33500(U)

October 27, 2021

Supreme Court, Rockland County

Docket Number: Index No. 032584/2019

Judge: Robert M. Berliner

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory time period 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.

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SOFIA MILIEN,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 032584/2019

VILLAGE OF SUFFERN, VILLAGE OF SUFFERN DEPARTMENT OF PUBLIC WORKS, and WILLIAM J. BARISH,

Motion Sequence #2

Defendants.
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The following papers, filed on NYSCEF, were read on Defendants’ motion for summary judgment dismissing Plaintiff’s Complaint:

Notice of Motion/Affidavit in Support/Statement of Material/Exhibits(A-G)/Memorandum of Law in Support	NYSCEF Doc. Nos. 33-43
Counter Statement of Material Facts/Affirmation in Support/Affidavit in Support/Exhibits(A-J)	46-57
Response to Counter Statement of Material Facts/Reply Affirmation	59-60

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action arises out of a motor vehicle accident on October 18, 2018, between Plaintiff and Defendant Willian Barish. Plaintiff commenced this action against Defendants for her alleged injuries sustained as a result of the accident. By Decision and Order dated May 4, 2020, this Court granted Plaintiff’s motion for partial summary judgment on the issue of liability. Now before the Court is Defendants’ motion for summary judgment dismissing the Complaint on the ground that Plaintiff did not a serious injury within the meaning of the New York Insurance Law § 5102(d).

In support of their motion, Defendants submit, *inter alia*, Plaintiff’s examination before trial (“EBT”) transcript, independent medical examination (“IME”) report by Dr. Barry Kraushaar, M.D., and certain medical records of Plaintiff. Defendants heavily rely on Dr. Kraushaar’s IME

Report to establish that Plaintiff did not suffer a serious injury. Specifically, Dr. Kraushaar opines that Plaintiff did not need the left shoulder arthroscopic surgery she underwent after the accident, that she can perform her usual daily activities as well as her job, and that there is no object evidence of permanency, residuals, or disability resulting from the accident. Defendants allege that Plaintiff's medical records, the IME Report, and her deposition testimony establish that she did not suffer a serious injury as required under Insurance Law § 5102(d).

In opposition, Plaintiff argues that Defendants failed to carry their prima facie burden of establishing their entitlement to summary judgment. She argues that, *inter alia*, Dr. Kraushaar's IME report is insufficient to establish Defendants' prime facie burden for summary judgment because it fails to address whether she had a medically determined injury or impairment immediately following the accident that affected her activities during the 180 days immediately following the accident. Moreover, Plaintiff submitted medical reports by: (1) Dr. Kevin Haggerty, D.C., Plaintiff's treating chiropractor subsequent to her accident; (2) various doctors at Citi Med who treated Plaintiff, which includes Dr. Raed Hattab, M.D., Dr. Larisa Bruma, M.D., and Dr. Mark L. Goodstein, M.D.; and (3) Dr. Ronald A. Daly, M.D., who performed left shoulder arthroscopic surgery on Plaintiff on February 15, 2019. She also submitted a narrative report of Dr. Gabriel Dassa, D.O., who performed an orthopedic evaluation of Plaintiff on April 15, 2021 and reviewed her records. Additionally, Plaintiff submitted the narrative report of Dr. Scott Gottlieb, M.D., an anesthesiologist, who performed an anesthesiology and pain management examination on Plaintiff on September 17, 2019. According to Plaintiff, these medical records and narrative reports raise a triable issue of fact as to whether Plaintiff sustained a serious injury as a result from the accident.

"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. Issue finding, not issue determination, is the key to summary judgment." *Anyanwu v Johnson*, 276 AD2d 572, 572-73 [2d Dept 2000][internal citations omitted]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904, 904-905 [2d Dept 2011]. Insurance Law § 5102(d) defines serious injury as

"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.”

On a motion for summary judgment, the defendant bears the prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Toure v Avis Rent A Car System.*, 98 NY2d 345, 352 [2002]. The burden then shifts “to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law.” *Gaddy v Eycler*, 79 NY2d 955, 957 [1992][internal quotations omitted]. Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise triable issues of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). *Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]. “However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact.” *Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019][internal citations omitted].

Here, the Court finds that Defendants' submissions are insufficient to establish, prima facie, that Plaintiff did not sustain a serious injury, within the meaning of Insurance Law § 5102(d), as a result of the subject motor vehicle accident. Defendants' submissions fail to adequately address Plaintiff's claim that she sustained an injury or impairment preventing her from performing substantially all of the material acts, which constitute her usual and customary daily activities, within the 180 days immediately following the accident. Although they heavily rely on the IME Report of Dr. Kraushaar who examined Plaintiff nearly two years after the accident, “he did not relate his medical findings to this category of serious injury for the period of time immediately following the accident.” *Yung v Eager*, 51 AD3d 638 [2d Dept 2008]; *see also See Joseph v Hampton*, 48 AD3d 638 [2d Dept 2008]. Indeed, Plaintiff testified at her examination before trial that she missed work due to the pain and restricted mobility from her injuries as a result of the accident, for over five months. Additionally, Dr. Haggerty provided her with disability notes for her employer during that period of time she missed work while he was treating her. Accordingly, Defendants failed establish that Plaintiff did not suffer a serious injury as a result of the accident.

As such, the Court does not need to determine whether Plaintiff's submissions in opposition are sufficient to raise a triable issue off fact. *See Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Based upon the foregoing, it is

ORDERED that Defendants motion for summary judgment dismissing the Complaint is denied in its entirety; and it is further

ORDERED that the parties are hereby advised of the **virtual pre-trial conference** scheduled for **November 9, 2021 at 10:00 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
October 27, 2021

ENTER



HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of Record (via NYSCEF)