

Dribusch v Decicco
2021 NY Slip Op 33528(U)
August 19, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035825/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
CHRISTIAN H. DRIBUSCH, as Trustee as the
successor in interest to the Debtor as the
party plaintiff in the personal injury action of
Rosa M. Hagen,

Plaintiff,

-against -

THERESA A. DECICCO,

Defendant.

-----X
HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 035825/2018

(Motion #1)

The following papers, numbered 1-3, were read in connection with Defendant Theresa A. Decicco's ("Defendant") motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-F

1-2

AFFIRMATION IN OPPOSITION/EXHIBITS A1-A4

3

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on March 16, 2018, at or near the entranceway of State Route 376, at its intersection with Hillside Lake Road, in the Town of East Fishkill, New York. Plaintiff, 53 years old at the time of the accident, alleges that as a result of the accident she sustained an interval increase in size of a right paracentral disc herniation at L1-2 with an increase in the annular tear; severe aggravation of her prior asymptomatic lumbar spine condition; right L5 radiculopathy; low back pain, lumbar radiculitis; and multiple cervical disc herniations necessitating multiple steroid injections. Defendant moves for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by

Insurance Law Sections 5104(a) and 5102(d).

In support of her summary judgment motion, Defendant annexes Plaintiff's examination before trial transcript; Plaintiff's medical records; and an affirmed medical report from Dr. Jeffrey W. Degen, Board Certified physician in Neurological Surgery, who examined Plaintiff on behalf of Defendant on July 7, 2020. Upon examination, Dr. Degen found Plaintiff to have full range of motion in her cervical and lumbar spine. He notes that Plaintiff had a prior accident in 2014 in which sustained cervical disc protrusion at C3/4, C4/5, C5/6 and C6/7 with multilevel disc degeneration. In 2016, Plaintiff's treating physician noted that MRIs revealed herniations at L5/S1 "with associated annular tear", L4/5 bulging "superimposed on a small disc herniation with an annular tear" and disc desiccation at L3/4 and L2/3 desiccation and herniation, and L1/2 with disc desiccation and an annular tear. Plaintiff also had a subsequent automobile accident in 2019. It is Dr. Degen's opinion that there is no objective medical proof that plaintiff suffered different and/or aggravated injuries as a result of the subject accident.

In opposition to the instant motion, Plaintiff submits the affirmed report of Plaintiff's treating physician, Dr. Douglas J. Spiel, as well as her medical records. Dr. Spiel had treated Plaintiff for her cervical and lumbar issues since 2014 through present, and his medical report addresses both prior and subsequent accidents, as well as the subject accident. In comparing Plaintiff's 2016 MRI and her MRI following the accident of 3/16/18, he opines that as a result of the subject accident, Plaintiff sustained an increase in size of the right paracentral herniation at L1-2, with an increase in the annular tear. Dr. Spiel noted that the EMG evidences lumbar radiculopathy and he opines that the compromise of the structural integrity of the cervical and lumbar spine as a result of the subject accident results in vulnerability to exacerbation and additional injury, requiring significant limitations to Plaintiff's activities.

With regard to the prior accident, Dr. Spiel notes that at the time of her discharge on 5/18/2017, she had some residual pain but that it was manageable, she had normal range of motion with the exception of lumbar flexion and extension, and she did not require additional

treatment. After the subject accident, she had significant low back and neck pain and required additional medical treatment including multiple lumbar epidurals, multiple cervical epidurals and surgical neurotomy. Thus, Dr. Spiel opines that Plaintiff sustained a severe aggravation of her cervical and lumbar spine conditions as well as the worsening of L1-2 disc pathology as a result of the accident.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). In the instant matter, Defendant's examining physicians found full range of motion in Plaintiff's cervical and lumbar spine and opined that she suffered no additional injury nor aggravation of her prior injuries as a result of the subject accident. As such, Defendant has met her burden on summary judgment with respect to the categories of significant limitation of use and permanent consequential limitation of use and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon her cervical and lumbar spine limitations, which the Court finds sufficiently significant. Dr. Spiel addresses both Plaintiff's prior and subsequent injuries and explains the basis for his finding that Plaintiff's injuries were aggravated and increased as a result of the subject accident. Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2d 518 (1st Dept 1996). As such, the triable issues of fact require denial of

Defendant's summary judgment.

Accordingly, it is hereby

ORDERED that Defendant Theresa DeCicco's motion for summary judgment, pursuant to CPLR § 3212, is DENIED in its entirety; and it is further

ORDERED that this matter is scheduled for a settlement conference on **October 25, 2021 at 10:00 a.m. via Microsoft Teams.** Link to be provided the day prior. The parties are directed to have full settlement authority and be able to contact their client and/or adjuster during the conference, upon request of the Court.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion #1.

Dated: New City, New York
August 19, 2021



HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)