

Michel v Antoine

2021 NY Slip Op 33579(U)

October 14, 2021

Supreme Court, Rockland County

Docket Number: Index No. 037293/2018

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
MARIE ROSE MICHEL,

Plaintiff,

-against -

JOEL ANTOINE and IRLINE BELIZAIRE,

Defendants.
-----X

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

DECISION/ORDER

Index No. 037293/2018

(Motion #2)

The following papers, numbered 1-8, were read in connection with Defendants Joel Antoine and Irline Belizaire’s (“Defendants”) 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):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS 1-12/ MEMORANDUM IN SUPPORT	1-3
AFFIRMATION IN OPPOSITION/AFFIDAVIT OF MARIE ROSE MICHEL/ AFFIDAVIT OF DARLENE LAUTURE/EXHIBITS	4-6
AFFIRMATION IN REPLY/EXHIBITS A-C/MEMORANDUM OF LAW IN REPLY	7-8

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on December 20, 2018, on Route 59, at or near its intersection with Dutch Lane, in the Village of Spring Valley, New York. Plaintiff, a 73 year old woman at the time of the subject occurrence, claims that as a result of the accident she was caused to sustain the following injuries: post traumatic headache disorder; vestibular disorder with recurrent vertigo; tiny central disc protrusion at C4-5; lumbar sprain/strain and cervical sprain/strain. Defendants move 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 their summary judgment motion, Defendants annex Plaintiff's medical records from a prior car accident in May of 2011, at which time she complained of "recurrent headaches" and cervical tenderness, both injuries claim in the instant action. They also attach the medical records of Dr. Sandra Costley, starting in 2003, which note a history of chronic headaches and dizziness; swelling in both legs for arthritic pain in 2012; arthroscopic surgery in 2012 on her shoulder; and chronic low back pain in 2015, also injuries claimed in the instant action. The records of Earl Zeitlin, M.D., neurologist, who started treating plaintiff in 2011 are also submitted. Defendants submit the expert affidavit of Jeffrey Salkin, Board Certified Orthopedist, who reviewed Plaintiff's extensive medical records and although he finds limitations in her cervical and lumbar spine, he opines that Plaintiff has pre-existing cervical and lumbar degenerative disease and prior left shoulder arthroscopy. Also submitted is the expert affidavit of Board Certified Neurologist, Michael Weintraub, M.D. Dr. Weintraub summarizes Plaintiff's extensive neurological history and opines that the neurological injuries alleged are pre-existing and there is no objective evidence of aggravation or exacerbation arising from the accident.

In opposition thereto, Plaintiff submits her own affidavit and affidavit of her daughter who both contend that as a result of the accident, Plaintiff was unable to undertake her customary and usual duties after the accident and has been out of work since that time. It is clear from the opposition papers that Plaintiff has abandoned all categories of serious injury with the exception of the 90/180 day category. The only other evidence submitted in opposition to the motion is a copy of "Notice of Proof of Disability Benefits" signed by a physician who may be Dr. Zeitlin and dated December 31, 2015; a document which purports to be a disability note dated January 5, 2016 from Dr. Costly which states the patient was out of work from 12/202015 through January 5, 2016; a note dated April 26, 2016 from Dr. Zeitlin that Plaintiff has been unable to resume work and un-affirmed medical reports Highland Medical ranging from May of 2016 through November 2, 2016 . None of these documents are certified.

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, Defendants have met their burden with respect to all categories through submission of Plaintiff's medical records, including records of pre-existing injuries and their expert affidavits in which Dr. Salkin and Dr. Weintraub opine that Plaintiff did not suffer any causally related injury as a result of the subject occurrence.

In opposition thereto, Plaintiff has abandoned all categories of the no-fault law with the exception of the 90/180 day category. With respect to the remaining "serious injury" category, Plaintiff has failed to establish, through admissible evidence, a triable issue of fact that she was disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. A 90/180 day serious injury requires both objective evidence of a medically determined injury or impairment causally related to the accident, as well as proof that such impairment prevented the plaintiff from performing substantially all of his or her

regular activities for the requisite period of time. Howard v. Espinosa, 70 A.D.3d 1091, 1092, 898 N.Y.S.2d 267 (3d Dept. 2010). See Creech v. Walker, 11 A.D.3d 856, 857, 784 N.Y.S.2d 655 (3d Dept. 2004)(The medical proof submitted, consisting only of selected medical records, failed to sufficiently set forth objective evidence linking the alleged curtailment of Plaintiff's activities following the accident to an injury or exacerbation of a pre-existing condition sustained in the accident.)

Moreover, although qualitative testing of an injury made years after an accident may be relevant to ascertain the severity of a permanent injury suffered by a plaintiff, contemporaneous findings of injury are highly relevant to causation and to establish the 90/180 day category of serious injury. Crawford-Reese v. Woodard, 95 A.d.3d 1418, 1420, 944 N.Y.S.2d 333 (3d Dept. 2012). Unaffirmed medical reports and uncertified medical records are without any probative value. Malave v. Basikov, 45 A.D.3d 539, 540, 845 A.D.3d 529 (2d Dept. 2007); Verette v. Zia, 44 A.D.3d 747, 844 N.Y.S.2d 71 (2d Dept. 2007). Here, none of Plaintiff's medical records is in admissible form, as the medical reports and records are neither certified nor affirmed. Thus, Plaintiff has failed to submit contemporaneous medical proof that she was unable to perform all of her usual and customary activities for 90 out of the first 180 days due to a causally related injury.

Accordingly, it is hereby

ORDERED that Defendant Kylie Rose Priest and Christopher J. Priest's summary judgment motion for failure to sustain a "serious injury" as defined in New York Insurance Law Sec. 5102(d), is GRANTED and the action is dismissed.

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

Dated: New City, New York
October 14, 2021



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

TO:

All Parties (by e-file)