Gonzalez v Presume
2021 NY Slip Op 33655(U)
August 19, 2021
Supreme Court, Rockland County
Docket Number: Index No. 037255/2019
Judge: Robert M. Berliner

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.

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

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ANA GONZALEZ,

Plaintiff,

-against-

BEDJINALD PRESUME,

Defendant.

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DECISION AND ORDER

Index No.: 037255/2019

Motion Sequence # 1

The following papers, filed on NYSCEF, were read on Defendant Bedjinald Presume's motion for summary judgment dismissing Plaintiff's Complaint:

Notice of Motion/Statement of Material Facts/Affirmation in Support/
Exhibits(A-J).....NYSCEF Doc. Nos. 19-31
Affirmation in Opposition/Exhibits(A-B)..... 32-34
Reply Affirmation.....36

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

This action arises out of a motor vehicle accident between Plaintiff Ana Gonzalez and Defendant Bedjinald Presume on June 6, 2017. Plaintiff commenced this case against Defendant for her alleged injuries sustained as a result of the accident. She alleges pain in her lower back and right knee resulting from the alleged injuries. Now, before the Court is Defendant's summary judgment motion on the ground that Plaintiff did not sustain a "serious injury" within the meaning of the New York Insurance Law § 5102(d).

In support of his motion, Defendant submitted, *inter alia*, Plaintiff's medical records from various medical providers who have examined her: the Nyack Hospital on the day after the accident occurred, Community Medical & Dental Care, Good Samaritan Hospital about six months after the accident, Dr. Gabriel Mattel, M.D., and New City Chiropractic. Defendant also relies on

the independent medical evaluation of Plaintiff by James R. Dickson, M.D. Based upon his evaluation of Plaintiff, Dr Dickson opined that:

> "The motor vehicle accident of June 5, 2017 exacerbated but did not create the conditions which became symptomatic. Currently she is only minimally symptomatic (according to her own history) in her lumbar spine and right knee. There was no objective findings in her cervical spine on exam. She continues to work, she walks well, and shows no objective signs of disability. Based on the history of losing little if no work, the consultations by her healthcare providers which identify chronic degenerative conditions of her neck, back and knee, as well as essentially negative findings on physical examination with reasonable medical certainty I feel that the accident of June 5, 2017 was not responsible disability and was only associated with temporary short-lived discomfort in the immediate pos-accident period."

Affirmation in Support, Exihibit F, IME Report of James R. Dickson, M.D. at 5-6. Additionally, Defendant highlights that Plaintiff's medical records demonstrate a significant gap in her medical treatment as she did not seek treatment again until six months after her accident. Defendant also relies on Plaintiff's deposition testimony, wherein she stated that she missed one week of work immediately after the accident and returned to work thereafter, that her back and right knee pain comes and goes, that while she can no longer hike she has not tried doing so after the accident, and that while she can no longer dance she has only done so once after the accident. Defendant alleges 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 Defendant failed to establish his prima facie burden entitlement to summary judgment. She argues that Dr. Dickson's IME Report is insufficient to establish Defendant's prime facie burden for summary judgment because it acknowledges that Plaintiff had limited range of motion with respect to her lumbar spine and cervical spine, and that the motor vehicle accident exacerbated her pre-existing spinal conditions. Moreover, Plaintiff submitted a narrative report of Mark S. McMahon, M.D., which states that Plaintiff sustained an anterior wedge compression fracture of the T6 vertebral body as a result of the subject accident. Therefore, according to Plaintiff, this creates a triable issue of material fact as to whether she sustained a serious injury resulting from the motor vehicle 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 Eyler*, 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 Wilcoxen 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 Defendant established his prima facie burden of showing 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. to judgment as a matter of law. Specifically, Defendant established, through competent medical evidence, that Plaintiff's alleged injuries did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories. While Dr. Dickson opined that Plaintiff had some limited range of motion, this does not suffice to raise a question of fact as to whether she suffered permanent or significant limitation of use of a body function or organ. Rather, he found that she was only minimally

symptomatic in her lumbar spine and right knee, and that "the accident of June 5, 2017 was not responsible disability [sic] and was only associated with temporary short-lived discomfort in the immediate pos-accident period." Additionally, Defendant demonstrated, prima facie, that Plaintiff, who admitted at her deposition testimony that the accident caused her to miss only one week of work, did not sustain a serious injury under the 90/180-day category. Indeed, she testified at her deposition that after missing a week of work as a result of the subject accident, she returned to work in some capacity thereafter, then two months thereafter, she returned to work full-time. While Dr. Dickson opined that the subject accident exacerbated her pre-existing conditions, which then became symptomatic, Plaintiff nonetheless failed to submit competent medical evidence that her injuries allegedly sustained resulting from the subject accident rendered in permanent or significant limitation of use of a body function or organ, or rendered her unable to perform substantially all of her daily activities not less than 90 of the first 180 days thereafter. *See Dutka v Odierno*, 145 AD3d 661, 663-64 [2d Dept 2016]. Moreover, the mere certified letter dated August 29, 2019 from Dr. McMahon, who did not even examine Plaintiff but rather concluded that she suffered an anterior wedge compression fracture as a result of the subject accident based upon his review of a CT scan from June 7, 2017, is conclusory and unsupported by the record. Based upon the foregoing, Plaintiff failed to raise a triable issue of material fact in opposing Defendant's motion.

Based upon the foregoing, it is

ORDERED that Defendant's motion for summary judgment dismissing the Complaint is hereby granted, and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
August 19, 2021

ENTER

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

To:

Counsel of record via NYSCEF