SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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NICOLE MCNAIR-MOULTRIE,

Plaintiff,

- v -

IGOTRU, LLC, EMETERIO LOPEZ

Defendant.

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INDEX NO. 157579/2019

MOTION DATE 01/04/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants' motion pursuant to CPLR 3212 for summary judgment in favor of defendants on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold of Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on August 13, 2018.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once movant has demonstrated prima facie negligence, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Zuckerman v City of New York*, 49 NYS2d 557, 560 [1980]). In order to satisfy their burden under Insurance Law 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v. Avis Rent a Car Systems, Inc.*, 98 NYS2d 345, 352 [2002] [finding that in order to establish a prima facie case that a plaintiff in a negligence action arising from a

motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system."]).

Defendant contends that plaintiff has failed to demonstrate the existence of a "serious injury" as defined by Section 5102(d) of the Insurance Law. Defendant contends that the plaintiff's injuries are not casually related to the underlying accident because they are the result of degenerative changes. Defendant attaches an independent medical examination report of Dr. Sean Lager, M.D. (Exhibit F) who examined the plaintiff on February 9, 2021. Dr. Lager's report concluded that there is no objective evidence of permanency of the plaintiff's injuries in regard to the August 13, 2018 accident (*id.*, at 6).

In opposition, plaintiff contends that her medical records raise a triable issue of fact as to whether plaintiff's injuries are degenerative. In *Rosa v Delacruz*, 32 NY3d 1060 (2018), the Court of Appeals found that where a plaintiff's doctor opined that the tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's findings. Instead, it relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (See *Id.*).

Here, moving defendant, in contrast to the defendant in *Rosa*, has not submitted any findings of degeneration by the plaintiff's own doctor (see *Rosa* at 571; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014] [finding that where plaintiff's own medical records show a degenerative condition, plaintiff's doctor must address or contest the findings that were acknowledged in reports of the plaintiff's own physicians]).

In this case, defendants base their findings on the report of the examination conducted by defendants' expert, Dr. Lager, not by the plaintiff's own doctors. Plaintiff's opposition includes the report of Dr. Nicky Bhatia who conducted an independent review of the plaintiff's MRI films of her cervical and lumbar spine, as well as the plaintiff's medical records relating to the August 13, 2018 motor vehicle accident and radiologist Dr. Lager's conclusion that the plaintiff's injuries were due to degeneration. (Exhibit C). Dr. Bhatia disagreed with Dr. Lager's findings that the cervical and lumbar spinal injuries are due to degeneration. Dr. Bhatia noted that while the plaintiff does have "normal age-related degeneration in her spine," Dr. Bhatia was of the opinion that the "herniated and bulging disc in the cervical and lumbar spines are causally related to her motor vehicle accident of 8/13/18… due to her lack of any prior cervical and lumbar spine injuries before the subject accident and her acute onset of pain in the cervical and lumbar spines directly after the accident" (*Id.*).

The plaintiff also submits the report of Dr. Viviane Etienne, who examined the plaintiff on September 10, 2018, following her accident a month earlier (Aff in Opp, Exhibit D). Dr. Etienne determined that the plaintiff had a loss of range of motion to both the cervical and lumbar spines and that there was a 48% loss of motion to the cervical spine and a 62% loss of motion to the lumbar spine which are causally related to the accident. (*id.* pg. 4). Dr. Bhatia also corroborated Dr. Etienne's findings that the plaintiff's injuries were causally related to the accident. Furthermore, Dr. Bhatia determined that the plaintiff's injuries are permanent. (Aff in Opp, Exhibit C). As such, the plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in Section 5102(d) of Insurance Law.

Plaintiff sufficiently explained that the gap in her treatment from 2019 to the present is caused by her inability to afford continued treatment after the expiration of her no-fault benefits.

Defendants contend that plaintiff did not sustain a serious injury under the 90/180-day category based upon her testimony that she left her dental employment several months prior to the accident and that within the first three months after the accident she was still able to engage in activities such as sweeping, mopping, washing the bathtub, laundry, walking up and down stairs and running, but plaintiff's testimony that she missed approximately three months of work as a driver for Uber after the accident raises a triable issue of fact as to whether plaintiff sustained a serious injury under the 90/180 category. Therefore, defendants' the motion is denied.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment to dismiss plaintiff's complaint on the grounds that the plaintiff allegedly has not sustained a "serious injury" as defined by Section 5102(d) of the Insurance Law is denied; and it is further

ORDERED that within 20 days, plaintiff shall serve a copy of this Decision and Order upon defendant with notice of entry.

This constitutes the Decision and Order of the Court.

8/26/2022
DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE