Flores v Burgos
2022 NY Slip Op 34483(U)
July 20, 2022
Supreme Court, Westchester County
Docket Number: Index No. 58846/2020
Judge: Nancy Quinn Koba
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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 OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---------------------------------------X
MARISOL FLORES,

Plaintiff,

- against-

RUTH CASTRO BURGOS and EDDIE H. RIVERA,

Defendants.
--X

DECISION & ORDER
Index No.: 58846/2020
Mot. Seq. No. 3

QUINN KOBA, J.

By Notice of Motion (the "Motion"), defendant RUTH CASTRO BURGOS ("Burgos") seeks an order, pursuant to CPLR Section 3212, granting her summary judgment against plaintiff MARISOL FLORES ("Flores").

The following papers were considered in determining the Motion:

Papers	NYSCEF DOC. No.
Notice of motion, affirmation in support, statement of material facts exhibits A-O	103-121
Affirmation in opposition, response to statement of material facts, supplemental affirmation in opposition, exhibits 1 - 12	124-138, 140-141
Reply affirmation,	143

NYSCEF file

Upon the foregoing papers, the Court determines the Motion as follows:

RELEVANT FACTUAL AND PRCEDURAL BACKGROUND

This case involves a two-car accident on Bedford Park Boulevard near the entrance ramp to Southern Boulevard in Bronx County. On October 4, 2017, Burgos struck in the rear a car which was being operated by defendant EDDIE RIVERA ("Rivera") and in which plaintiff was a front-seat passenger. On the day of the accident, plaintiff went to the hospital. An X-ray of her back was taken that revealed a compression fracture of the thoracic spine. Magnetic resonance imaging scans taken after the accident revealed disc bulges in plaintiff's lumbar and cervical spine.

On November 18, 2019, plaintiff commenced this action by filing a summons and verified complaint in Supreme Court, Kings County. On April 3, 2020, Burgos joined issue with service of her answer. On June 16, 2020, Rivera joined issue with service of his answer. Meanwhile, on August 12, 2020, the Honorable Dawn Jimenez-Salta granted Rivera's motion to change venue and transferred this case to Supreme Court, Westchester County. On June 2, 2021, the Honorable Sam D. Walker granted the motions for summary judgment filed by plaintiff and Rivera on the grounds that they were not liable for the rear-end collision caused by Burgos.

Defendant Burgos now moves for summary judgment on the ground that plaintiff cannot establish that the car accident caused her to sustain a serious injury within the meaning of Insurance Law § 5102(d). In support of this contention, Burgos relies on defense experts who opine that plaintiff's pre-existing injuries were not caused by the accident and have since resolved. Burgos also argues that plaintiff cannot demonstrate that she suffered a threshold injury because her complaints of pain are subjective; she missed only two days of work after the accident; she stopped treatment for her injuries after six months; and on August 14, 2018, she reported to one of her own treating physicians, Dr. Mark Gladstein, that she was no longer in pain and could perform all her usual daily activities.

In opposition, plaintiff relies on the opinion of her treating physicians attributing her injuries to the subject car accident. Their opinions are based on their physical examination of plaintiff

as well as their review of the X-rays of her thoracic spine revealing the compression fracture, and the MRIs revealing the disc bulges. Although plaintiff admits she stopped treatment in March 2018, her attorney affirms that this was due to the cessation of her no-fault insurance coverage. Plaintiff also acknowledges that on August 14, 2018 she reported no complaints of pain to Dr. Gladstein. However, she claims this was because it had been less than six months since he had administered trigger point injections and an epidural to her lumbar spine. Plaintiff also submits a report prepared by Dr. Gladstein after Burgos filed the instant motion, which chronicles more recent complaints of pain and physical limitations.

In reply, Burgos contends that based on plaintiff's failure to cite specific evidence in her response to Burgos's statement of material facts, as required by 22 NYCRR § 202.8-g(d), plaintiff admitted to the facts therein, thus entitling her to summary judgment.

ANALYSIS

As an initial matter, effective July 1, 2022, the revised provision of 22 NYCRR § 202.8-g(c) states that when a paragraph in a statement of material facts is unopposed, it "may be deemed to be admitted." This rule does not mandate that a fact be deemed admitted simply because a party's response does not contain citations to evidence, as required by 22 NYCRR § 202.8-g(d). Here, plaintiff's response to the statement of material facts clearly denies facts salient to deciding the instant motion. Accordingly, the facts will not be deemed admitted simply because the response did not contain citations to evidence. However, the parties are advised that compliance with 22 NYCRR § 202.8-g(d) is expected for all future motions.

"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 demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). The court views the evidence in the light most favorable to the non-movant (*Vega v*

Restani Const. Corp., 18 NY3d 499, 503 [2012]).

"Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for noneconomic loss, except in the case of a serious injury, or for basic economic loss" (Insurance Law § 5104[a], *see Aetna Health Plans v Hanover Ins. Co.*, 27 NY3d 577, 582 [2016]). "'Serious injury' means 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" (Insurance Law § 5102[d], *see Perl v Meher*, 18 NY3d 208, 215 [2011]).

In these threshold injury cases, competing opinions regarding the causal relationship of an alleged injury to an accident raise issues of fact that render summary judgment inappropriate (*see Perl v Meher*, 18 NY3d at 219; *Gavira v Alvardo*, 65 AD3d 567, 568-69 [2d Dept 2009]). Moreover, when a defendant cannot establish prima facie that the car accident did not cause plaintiff's injuries, the burden does not shift to plaintiff to raise an issue of fact regarding causation or to explain a gap in treatment (*see Pommells v Perez*, 4 NY3d 566, 573 [2005]; *Reyes v Kashem*, 187 AD3d 1080, 1081 [2d Dept 2020]); *Torres v Rettaliata*, 171 AD3d 829, 830 [2d Dept. 2019]).

In this case, it is undisputed that the hospital X-ray taken on the day of the accident revealed a compression fracture of the thoracic spine, which could qualify as a serious injury within the meaning of Insurance Law § 5102(3) (*see Ciccarella v Graf*, 116 AD2d 615 [2d Dept 1986]). However, according to the X-ray report submitted in support of the Motion, plaintiff's compression fracture was "age indeterminate" and the physician should "correlate clinically for pain in this region" (NYSCEF Doc. No. 115; Exhibit I at 3). The report further notes plaintiff was involved in a motor vehicle collision and "complains of upper back

pain" (*id.*). The defense experts' opinion that the car accident did not cause the compression fracture merely raises an issue of fact as to whether the compression fracture was caused by the accident or was a pre-existing and/or unrelated condition (*see Straussberg v* Marghub, 108 AD3d 694, 695 [2d Dept 2013]; *Snyder v Rivera*, 98 AD3d 1104, 1105 [2d Dept 2012]). Notable, the opinion of the defense experts regarding the cause of plaintiff's injuries is at odds with plaintiff's experts, thus constituting an issue of fact for a jury to decide (*see Perl v Meher*, 18 NY3d at 219).

Based on Burgos's inability to establish, prima facie, that the accident did not cause injuries to plaintiff (*see Straussberg v Marghub*, 108 AD3d 694 at 695; *Kearney v Garrett*, 92 AD3d at 726), the burden did not shift to plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment (*see Pommells v Perez*, 4 NY3d at 573; *Reyes v Kashem*, 187 AD3d 1080 [2d Dept 2020]); *Torres v Rettaliata*, 171 AD3d 829 [2d Dept. 2019]). Accordingly, summary judgment is not appropriate at this stage (*id.*).

Accordingly, it is hereby

ORDERED that the Motion is denied; and it is further

ORDERED that within five (5) days of the date of this decision and order, defendant Burgos shall serve a copy of this decision and order on all parties with notice of entry; and it is further

ORDERED that proof of service of this decision and order with notice of entry shall be filed with the court within five (5) days after service has been completed; and it is further

ORDERED that any remaining branches of the Motion not expressly addressed herein are without merit and are therefore denied.

ORDERED that the parties shall appear for a settlement conference with the Court on August 2, 2022 at 2:00 p.m. in Courtroom 1801. The parties are expected to timely comply with this Part's rules regarding settlement conferences.

The foregoing shall constitute the Decision and Order of the

Court in this matter.

Dated: White Plains, New York
July 20, 2022

ENTER

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HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF