

**Losquadro v Brizill**

2022 NY Slip Op 34495(U)

October 3, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 609451/2020

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 609451/2020  
CAL. No. 202200764MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. MARTHA L. LUFT  
Acting Justice of the Supreme Court

MOTION DATE 7/22/22  
ADJ. DATE 7/26/22  
Mot. Seq. # 003 MG; CASEDISP

-----X  
PAMELA C. LOSQUADRO,  
  
Plaintiff,

- against -

DARIAN A. BRIZILL and VIDA A. BRIZILL,  
  
Defendants.  
-----X

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motions/Order to Show Cause and supporting papers by defendants, dated June 8, 2022 ; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers by plaintiff, dated July 11, 2022 ; Replying Affidavits and supporting papers by defendants, dated July 18, 2022 ; Other   ; it is

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle was rear-ended by a vehicle owned by defendant Vida Brizill and operated by defendant Darian Brizill. The accident allegedly occurred on October 10, 2019, on the eastbound Long Island Expressway, near Old Nichols Road in Islandia, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including herniated discs and radiculopathy in the cervical region and sprains and strains in the left shoulder.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit, inter alia, the pleadings, the bill of particulars, the affirmed medical report of Dr. Dorothy Scarpinato, and the transcript of plaintiff’s deposition testimony.

As the party moving for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff

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did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Gonzalez v Krumholz*, 192 AD3d 1086, 141 NYS3d 715 [2d Dept 2021]). The defendant may satisfy this burden by submitting the plaintiff’s deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Ocasio v New York City Tr. Auth.*, 134 AD3d 789, 20 NYS3d 655 [2d Dept 2015]; *Pamphile v Bastien*, 61 AD3d 659, 877 NYS2d 137 [2d Dept 2009]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the moving defendants’ examining physician (see *Reyes-Mendez v City of New York*, 192 AD3d 464, 139 NYS3d 818 [1st Dept 2021]; *Wettstein v Tucker*, 178 AD3d 1121, 112 NYS3d 557 [2d Dept 2019]). On June 4, 2021, approximately one year and eight months after the subject accident, the moving defendants’ examining orthopedist, Dr. Dorothy Scarpinato, examined plaintiff and performed certain orthopedic and neurological tests, including the impingement sign. Dr. Scarpinato found that all the test results were negative or normal. Dr. Scarpinato performed range of motion testing on plaintiff’s cervical region and left shoulder, using a goniometer to measure her joint movement. Dr. Scarpinato found that plaintiff exhibited normal joint function in her cervical region and left shoulder.

Further, at her deposition, plaintiff testified that following the accident, she did not miss any time from work. She testified that there is no activity that she is unable to perform because of the accident, although she has difficulty in cooking, lifting a laundry basket, and sitting and standing for a long period of time. Plaintiff’s deposition testimony established that her injuries did not prevent her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (see *Narvaez-Reyes v Palomino*, 186 AD3d 492, 126 NYS3d 390 [2d Dept 2020]; *Toussaint v Zomah*, 183 AD3d 657, 658, 121 NYS3d 615 [2d Dept 2020]; *Knijnikov v Mushtaq*, 35 AD3d 545, 827 NYS2d 198 [2d Dept 2006]).

Thus, defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (see *Narvaez-Reyes v Palomino*, *supra*).

The burden, therefore, shifted to plaintiff to come forward with objective medical evidence sufficient to raise a triable issue of fact regarding the existence of a serious injury (see *Mesiti v Knight*, 190 AD3d 1141, 138 NYS3d 740 [3d Dept 2021]; *Burns v Childress*, 189 AD3d 1939, 138 NYS3d 270 [3d Dept 2020]; *Valera v Singh*, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the “qualitative assessment” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose, and use of the body part (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Rosenblum v Irby*, 194 AD3d 1147, 148 NYS3d 268 [3d Dept 2021]). A minor, mild or slight limitation of use is considered insignificant within the

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meaning of the statute (*see Burns v Childress, supra; Black v Gordon*, 172 AD3d 580, 101 NYS3d 310 [1st Dept 2019]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

Plaintiff argues that defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by her treating physicians raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d).

In opposition, plaintiff submits, *inter alia*, the unaffirmed report, dated October 21, 2019, of plaintiff's treating physician assistant, Michelle Bimonte, the sworn medical reports of her treating physician, Dr. Gregory Lieberman, from November 8, 2019 to May 28, 2021, the unsworn operative report of her treating physician, Dr. Marco Palmieri, and the unsworn magnetic resonance imaging (MRI) examination reports of Dr. Joseph Hanono. The uncertified records and unsworn physician reports submitted by plaintiff are insufficient to raise a triable issue of fact, as they are not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Dr. Lieberman's reports indicate that he treated plaintiff from November 2019 to May 2021. His reports set forth plaintiff's complaints and the findings at his initial consultation on November 8, 2019, approximately three weeks after the subject accident. Dr. Lieberman administered range of motion testing on plaintiff's cervical region and left shoulder on the same day and found that although plaintiff exhibited normal joint function in her cervical region, she had significant range of motion restrictions in her left shoulder: 150 degrees of active forward flexion, 165 degrees of passive forward flexion, and 50 degrees of external rotation. However, Dr. Lieberman failed to compare these findings to the normal range of motion (*see Olivare v Tomlin*, 187 AD3d 642, 131 NYS3d 159 [1st Dept 2020]; *Sanchez v L.R.S. Cab Corp.*, 169 AD3d 733, 91 NYS3d 708 [2d Dept 2019]). Moreover, Dr. Lieberman failed to identify the objective tests that were utilized to measure plaintiff's ranges of motion (*see Cho v Demelo*, 175 AD3d 1235, 108 NYS3d 159 [2d Dept 2019]; *Zavala v Zizzo*, 172 AD3d 793, 794, 99 NYS3d 354 [2d Dept 2019]). Dr. Lieberman also administered range of motion testing on plaintiff's cervical region and left shoulder from November 2019 to May 2021 and found that there were significant range of motion restrictions in plaintiff's left shoulder. Again, however, Dr. Lieberman failed to compare these findings to the normal range of motion (*see Olivare v Tomlin, supra; Sanchez v L.R.S. Cab Corp., supra*). In view of the foregoing, Dr. Lieberman's reports are insufficient to establish a prima facie case that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d).

Further, even assuming that plaintiff was entitled to rely on the unaffirmed MRI reports prepared by Dr. Hanono, those reports are insufficient to warrant denial of defendants' motion for summary judgment. The MRI reports revealed a herniated disc in plaintiff's cervical region. However, the mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see McLoud v Reyes*, 82 AD3d 848, 849, 919 NYS2d 32 [2d Dept 2011]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Byrd v J.R.R. Limo*, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]). Nor did plaintiff offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of her normal daily activities for at least 90 of the 180 days

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immediately following the accident (*see Chung v Reed*, 178 AD3d 661, 115 NYS3d 366 [2d Dept 2019]; *John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Il Chung Lim v Chrabaszc*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]).

Accordingly, the motion is granted.

Dated: October 3, 2022

Martha L. Luft  
A.J.S.C.

HON. MARTHA L. LUFT

FINAL DISPOSITION     NON-FINAL DISPOSITION