Ferman v 31 N. Blvd. Inc.

2022 NY Slip Op 34630(U)

January 20, 2022

Supreme Court, Queens County

Docket Number: Index No. 708294/2019

Judge: Lourdes M. Ventura

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED: QUEENS COUNTY CLERK 02/17/2023 09:43 AM
NYSCEF DOC. NO. 45
INDEX NO. 708294/2019
RECEIVED NYSCEF: 02/17/2023

AMENDED SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

FILED
2/17/2023
COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

---X

RUTH FERMAN,

Plaintiff,

-against

31 NORTHERN BOULEVARD, INC.,
and SOHAIL AHMED

Defendants.

---X

IAS Part 37

Index Number: 708294/2019

Motion Date: September 27, 2021

Motion Seq. No.: 1

This Court sua sponte recalls the above-entitled action and upon recalling this action, this Court hereby amends its Short Form Order dated January 11, 2022 solely to the extent that the second to last sentence of this Court's prior decision which states: " Plaintiff's Complaint is dismissed as to all categories." is stricken as it was erroneously stated.

The following electronically filed (EF) papers read on this motion by the defendants, for an Order: pursuant to CPLR 3212 granting defendants' summary judgment and dismissing the complaint of the plaintiff on the grounds 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); and granting such other further relief as the Court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits…..……….….....	EF 58-68
Affirmation in Opposition - Affirmation - Exhibits…........	EF 71-74
Affirmation in Reply……………..………………………	EF 77

Upon the foregoing papers, it is Ordered that defendants' motion is determined as follows:

Plaintiff commenced this personal injury action seeking to recover damages allegedly sustained in a motor vehicle collision that occurred on or about August 26, 2016 in the County of Nassau. Plaintiff alleges that as a result of the collision it sustained serious injuries as defined New York Insurance Law ("NYIL") § 5102.

Defendants filed this summary judgment motion pursuant to CPLR 3212 seeking summary judgment and dismissing the complaint of the plaintiff, on the grounds that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of NYIL § 5102(d). In support of defendants' motion, they submit the following evidence: summons and complaint, bill of particulars, defendants' answer, plaintiff's examination before trial ("EBT") testimony transcript,

a medical report from Thomas P. Nipper, M.D. (hereinafter "Dr. Nipper"), and a medical report from Jessica F. Berkowitz, M.D. (hereinafter "Dr. Berkowitz").

Plaintiff opposes defendants' motion and avers that plaintiff did sustain serious injuries as defined pursuant to NYIL § 5102(d) warranting denial of defendants' motion. In support of plaintiff's opposition papers, it submits the following evidence: plaintiff's affidavit, medical reports from Alan B. Greenfield, M.D. (hereinafter "Dr. Greenfield"), a medical report from Aron D. Rovner, M.D. (hereinafter "Dr. Rovner"), a medical report from Hank Ross, M.D. (hereinafter "Dr. Ross") and medical reports.

"It is well settled that 'the proponent of a summary judgment motions must make *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'" (*see Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp*., 68 NY2d 320 [1986]). Failure to make such a prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez,* 68 NY2d 320; *Winegrad*, 64 NY2d 851). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon the plaintiff, in opposition to the defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott,* 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (*see Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]). Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to NYIL § 5102(d), "'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."

The Court of Appeals has long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*see Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345, 350 [2002] *citing* (*Dufel v Green,* 84 NY2d 795 [1995]); *see also Licari,* 57 NY2d at 234-235). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel,* 84 NY2d at 798; *Lopez,* 65 NY2d 1017); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler,* 79 NY2d 955 [1992]; *Scheer v Koubek,* 70 NY2d 678 [1987]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure,* 98 NY2d at 345). "As such, [courts require] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" [citations omitted] (*see Toure,* 98 NY2d at 350). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*).

DISCUSSION

According to the bill of particulars, plaintiff alleges it sustained injuries to its right shoulder, and cervical and lumbar spine under the following categories: permanent consequential limitation, significant consequential limitation of use of a body organ or member, and 90/180-day.

I. Permanent Consequential Limitation and Significant Limitation of Use of a Body Function or System

"Only a total loss of use is compensable under the 'permanent loss of use' exception to the no-fault remedy." (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). Without any evidence within the record, this Court will only address the issue of a significant limitation of use of a body function or system.

Defendants argues that plaintiff's injuries do not qualify as a serious injury under the permanent consequential limitation category of NYIL § 5102(d).

On a motion for Summary Judgment alleging plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), the defendant bears the burden of establishing that plaintiff did not sustain a serious injury caused by the accident. (*Gardner v Spitz*, 2021 N.Y. Misc. LEXIS 4023, at *5-6 [Sup Ct, Queens County May 21, 2021, No. 715199/2018]). Defendant's burden may be satisfied by presenting affirmations by medical experts reciting that "the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion." (*Id.*). Upon making this showing, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*Grossman v Wright*, 268 AD2d 79, 83–84 [2d Dept 2000]).

To determine whether an injury is a "serious injury" under NYIL § 5102(d), the movant must show the injury's duration and its extent, or the degree of limitations associated with it. (*Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]). Furthermore, "any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based on recent examination of the plaintiff" [citations omitted]. (*Id.*).

Here, defendants submit *inter alia* a medical report dated December 26, 2020 from Dr. Nipper who examined the plaintiff on October 27, 2020. The medical report in relevant part, reads as follows:

> "Based on the Police accident report, there was an independent witness to the accident who stated that a second vehicle changed lanes, running into the claimant's vehicle. There is no disability or permanency. The claimant is able to perform her activities of daily living. The objective test results do not support the claimant's subjective complaints as related to the reported accident. The objective findings noted in my examination do not correlate with the claimant's subjective complaints. There is no causal relationship between the claimant's alleged injury and the accident noted above. MRI report of the cervical spine submitted from Metro Radiology, P.C. noted straightening of the cervical lordosis. Shallow central disc herniation at C6-7 indenting the dural sac. Inflammatory sinus changes within both maxillary sinuses where mucoperiosteal thickening is seen. MRI report of the lumbar spine submitted from Metro Radiology, P.C. noted straightening of mid to upper lumbar lordosis. Schmorl's nodes at L1-L2 and L2-3. Downwardly extruded disc herniation near the midline at L4-5 associated with a torn annulus fibrosus, deformity of the dural sac, left greater than right foraminal encroachment and central spinal canal stenosis. No evidence of fracture.
>
> Today's examination indicates that the claimant's injuries have fully resolved. There are no indications for further Orthopaedic treatment including physical therapy. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident."

Defendants' evidence, specifically, Dr. Nipper's medical report, affirming that plaintiff's goniometer readings were normal and that plaintiff is able to perform her activities of daily living is *prima facie* evidence that the plaintiff did not suffer permanent consequential limitation, permanent loss, or significant limitation use of a body organ, member, function, or system in accordance with NYIL § 5102(d). The burden now shifts to the plaintiff (*see Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009][finding that an orthopedist's affirmation that plaintiff's goniometer readings were normal, and that the plaintiff could live his daily activities without restrictions was prima facie evidence that the plaintiff's injury was not serious]). The burden now shifts to plaintiff to rebut defendant's prima facie showing and raise a triable issue of fact.

In opposition, the plaintiff submits *inter alia* an affirmation from Dr. Ross , who examined the plaintiff on July 22, 2021. Dr. Ross' affirmation in relevant part reads, as follows:

> "Cervical spine
> Paraspinal muscle tenderness

Trapezial muscle tenderness, spinous process of C7
No clear dermatomal sensory or motor deficit
Deep tendon reflexes are 2+ and equal bilaterally
Range of motion
Flexion 35/40
Extension 40/45
Rotation right 60/80
Rotation left 60/80

Right shoulder
Wounds well healed

No sign of infection or drainage
Tender anterior acromion and lateral deltoid
Positive impingement sign Positive obrian sign
Reproducible clicking

Range of motion
Abduction 100/150
Forward flexion 160/180
External rotation 80/90
Internal rotation 70/90

Lumbar spine Paraspinal muscle tenderness
Trigger point tenderness right PSIS
Straight leg raise limited
No clear dermatomal sensory or motor deficit
Deep tendon reflexes are 2+ and equal bilaterally

Range of motion
Extension 10/30
Flexion 50/80

I have discussed the risks, alternatives, and benefits of all forms of treatment with the patient. We have reviewed her MRI findings and physical findings, and I have explained her conditions to her using models, pictures and drawings. I have explained that she suffered injuries to the soft tissues that support her cervical and lumbar spines, including the intervertebral discs, and that this is responsible for her persistent pain, weakness and loss of function. I have explained that these conditions are permanent in nature, and that she is likely to continue to suffer these symptoms, as well as suffer exacerbations of variable intensity and severity. We have disscussed treatment alternatives including physical therapy, oral medication, corticosteroid injections, epidural steroid injection, chiropractic care, and surgery. Concerning her shoulder, I have explained that she suffered tears of the rotator cuff muscles, and cartilage in her shoulder, and that at the time of surgery, portions of these tissues were permanently removed and will not grow back. This is responsible for her persistent pain and loss of function. I have explained that

> this condition is permanent in nature, and likely to progress over time, requiring future treatment. We have discussed treatment alternatives including oral medication, corticesteroid injections, physical therapy and arthroscopic surgery. Subsequently, following my review of the medical records and physical examination of the patient, I do believe that these injuries are causally related to the motor vehicle accident described above and that they are permanent in nature."
>
> Dr. Ross reported all of his finding using a goniometer.

The Court finds that in opposition plaintiff raised triable issues of fact regarding plaintiff's cervical spine, lumbar spine and right shoulder injuries through the submission of the affirmation of Dr. Ross who examined the plaintiff and concluded that plaintiff's injuries are permanent in nature and directly related to the subject accident.(See *Himmelburger v Buchris,* 117 AD3d 801, 802 [2d Dept 2014]; *Khaimov v Armanious*, 85 AD3d 978, 979 [2d Dept 2011]; *Abdelaziz v Fazel*, 78 AD3d 1086, 1086 [2d Dept 2010]; *Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]).

In addition, the conflicting medical reports submitted by the parties raises triable issues of fact as to whether plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Wilcoxen v. Palladino*, 122 AD3d 727, 728 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]; See also *Cariddi v. Hassan,* 45 A.D.3d 516 [2007]; *Gaviria v. Alvardo*, 65 A.D.3d 567 [2009]).

Accordingly, defendants' summary judgment motion dismissing plaintiff's claim of a permanent consequential limitation of use and substantial limitations of use of a body function or system to plaintiff's cervical and lumbar spine, and right shoulder under NYIL § 5102(d) is denied.

II. 90/180

Defendants aver that plaintiff did not sustain a medically determined injury or impairment that prevented him from performing substantially all of the material acts constituting him customary daily activities during at least 90 of the first 180 days following the alleged accident.

To establish a serious injury under the 90/180 category of NYIL § 5102(d), a "plaintiff must establish that he or she 'has been curtailed from performing his [or her] usual activities to a great extent'" rather than "some slight curtailment" (*Lanzarone v Goldman,* 80 AD3d 667, 669 [2d Dept 2011]; *DeFilippo v White*, 101 AD2d 801, 803 [2d Dept 1984]).

Here, defendants failed to establish, *prima facie*, that plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). While defendants rely on plaintiff's deposition testimony to establish, there *prima facie*, entitlement to judgment as a matter of law under the 90/180 category, plaintiff's testimony did not address his usual and customary daily activities "during the specific relevant time frame" and "did not compare . . . [her] pre-accident and post-accident activities during that relevant time frame" (*see, Hall v Stargot,* 187 AD3d 996, 996 [2d

Dept 2020]; *Reid v Edwards-Grant,* 186 AD3d 1741, 1742 [2d Dept 2020]; Jong Cheol Yang v Grayline N.Y. Tours, 186 AD3d 1501, 1502 [2d Dept 2020]).

As defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law as to plaintiff's claim of a serious injury under the 90/180 category, the Court "need not consider the sufficiency" of plaintiff's opposition papers (*see, Hall*, 187 AD3d at 996, *supra; Owens-Stephens v PTM Mgmt. Corp*., 191 AD3d 691 [2d Dept 2021]; *Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the 90/180 of NYIL § 5102(d) is denied *(see, id.).*

CONCLUSION

Based upon the foregoing, defendants' summary judgment motion dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" under NYIL § 5102(d) is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied. ~~Plaintiff's Complaint is dismissed as to all categories.~~

This shall constitute the Decision and Order of the Court.

Date: January 20, 2022

LOURDES M. VENTURA, J.S.C.

FILED
2/17/2023
COUNTY CLERK
QUEENS COUNTY