

Holland v Persaud
2022 NY Slip Op 35196(U)
October 4, 2022
Supreme Court, Queens County
Docket Number: Index No. 717008/2019
Judge: Lourdes M. Ventura
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

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

IAS Part 37

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MARYANNE HOLLAND,

Index

Number: 717008/2019

Plaintiff(s),

-against-

Motion

Date: February 14, 2022

RAJENDRA PERSAUD,

Motion

Defendant(s).

Seq. No.: 1

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The following electronically filed (EF) papers read on this motion by defendant for an Order: pursuant to CPLR 3212 granting summary judgment dismissing all claims based upon plaintiff's failure to meet the serious injury requirements of Section 5102(d) of the Insurance Law of the State of New York; and for such other and further relief as the Court deems just, necessary and proper.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 17-30
Affirmation in opposition - Affirmation - Exhibits.....	EF 32-41
Reply Affirmation.....	EF 42

Upon the foregoing papers it is Ordered that this motion is denied as follows:

This is an action for personal injuries arising from a claimed motor vehicle accident which occurred on June 4, 2018, on the roadway in front of the premises located at 143-39 Glassboro Avenue, Queens, New York.

Rajendra Persaud ("defendant") filed this motion seeking an Order pursuant to CPLR 3212 granting summary judgment dismissing all claims based upon plaintiff's failure to meet the serious injury requirements of Section 5102(d) of the Insurance Law of the State of New York.

Plaintiff opposes defendant's motion and avers that triable issues of fact exist warranting denial of this motion.

DISCUSSION

According to the bill of particulars, plaintiff alleges she sustained injuries to her lumbar and cervical spine, and right hip pursuant to NYIL § 5102(d), under the following categories: permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or member; a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all the material acts which constitute his usual and customary activities for 90 of the first 180 days after the accident.



“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.*).

I. Permanent Consequential Limitation of Use of A Body Organ Or Member and Significant Limitation of Use of A Body Function Or Member Categories

Defendant argues that plaintiff has not suffered a permanent loss of any body part, member or system as a result of the alleged accident to qualify as a serious injury under NYIL § 5102(d). To qualify as a serious injury under the permanent loss category of NYIL § 5102(d), a plaintiff must submit evidence to establish “a total loss of use” of the injured body part (*Oberly*, 96 NY2d at 296, *supra*; *Nesci v Romanelli*, 74 AD3d 765, 766 [2d Dept 2010]; *Albury v O’Reilly*, 70 AD3d 612 [2d Dept 2010]).

Defendant also argues that plaintiff’s injuries do not qualify as a serious injury under the permanent consequential limitation of use of a body organ or member category of NYIL § 5102(d).

To establish a serious injury under the permanent consequential limitation category of NYIL § 5102(d), plaintiff’s medical evidence “must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff’s present limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003] citing *Toure*, 98 NY2d at 353, *supra*). Therefore, a defendant is entitled to summary judgment where “plaintiff’s evidence is limited to conclusory assertions tailored to meet statutory requirements” (*Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]; see also, *Kivelowitz v Calia*, 43 AD3d 1111 [2d Dept 2007]).

In support of defendant’s motion, it submits a report affirmed by Arnold T. Berman M.D. (“Dr. Berman”). Dr. Berman examined plaintiff on March 24, 2021, and found there were no objective finds on the exam, that plaintiff does not require further medical treatment and that plaintiff can participate in all activities of daily living. Dr. Berman was retired at the time of the accident. She did not sustain any permanent injury and has no disability.

This court finds based upon the evidence submitted in support of defendant’s motion, defendant has established *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)(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 support of plaintiff's motion, plaintiff submits a report affirmed by William B. Jones M.D. ("Dr. Jones"). Dr. Jones examined plaintiff on September 24, 2021 and Dr. Jones affirmed that plaintiff's injuries to her lower back are permanent. Dr. Jones further affirmed that plaintiff suffers a partial musculoskeletal disability and significant loss of use and function to her lower back and lower extremities and that it was opinion that the patient's physical injuries and my diagnoses as well as the need for the treatment she has received and the treatment that she will receive in the future are all causally related, traumatically aggravated and induced by the accident on June 4, 2018.

The Court finds that in opposition plaintiff raised triable issues of fact regarding plaintiff's lumbar spine injury through the submission of the affirmation of Dr. Jones who concluded that plaintiff's lumbar spine injury was permanent, 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 *Wilcoxon 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. Alvarado*, 65 A.D.3d 567 [2009]).

Defendant's contentions that plaintiff's injuries are preexisting and/or degenerative in nature are rebutted by Dr. Jones' affirmation which states that based upon her physical examination of the plaintiff and her opinion that based upon her review reports and conclude that the results are casually related to the motor vehicle accident (see *Greenberg v Macagnone*, 126 AD3d 937, 938 [2d Dept 2015]).

Based upon the foregoing, the branch of defendant's motion seeking summary judgment on plaintiff's claims of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or member are denied as there are issues of fact.

II. 90/180 Category

Defendant avers that plaintiff did not sustain a medically determined injury or impairment that prevented her from performing substantially all of the material acts constituting her 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, defendant has failed to establish, *prima facie*, that plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). While defendant relies on plaintiff's deposition testimony to establish, *prima facie*, his entitlement to judgment as a matter of law under the 90/180 category, plaintiff's testimony did not address her 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]).

To the extent that Dr. Berman concludes that plaintiff can perform her activities of daily living as she was doing prior to the accident, his opinion was based upon an examination performed on March 4, 2021, over two years after the alleged accident and did not relate her findings to the relevant period of time following the alleged accident (see, *Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501, *supra*; *Daddio v Shapiro*, 44 AD3d 699, 700 [2d Dept 2007]; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 1110 [2d Dept 2007]).

As defendant has failed to establish his *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 defendant's 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, defendant's motion for summary judgment 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.

This shall constitute the Decision and Order of the Court.

Date: October 4, 2022



LOURDES M. VENTURA, J.S.C.

