

Crean v Mariani
2022 NY Slip Op 35224(U)
July 15, 2022
Supreme Court, Erie County
Docket Number: Index No. 802320/2020
Judge: Henry J. Nowak
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

TERESA M. CREAN,

Plaintiff,

vs.

MEMORANDUM DECISION

INDEX NO. 802320/2020

ELIZABETH A. MARIANI and
ROBERTO PETRILLO,

Defendants.

HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

In this personal injury action arising out of an April 10, 2017 motor vehicle accident, defendants Elizabeth A. Mariani and Roberto Petrillo move for summary judgment on the ground that injuries allegedly sustained by plaintiff Teresa M. Crean fail to meet the serious injury threshold defined by Insurance Law § 5102 (d). Crean opposes the motion and cross moves for summary judgment on the issues of negligence, culpable conduct and the serious injury threshold. Defendants oppose the cross motion. The court has considered the papers filed as Document Nos. 12-32 in the New York State Courts Electronic Filing (NYSCEF) system.

Under New York's No-Fault Law, to recover for non-economic loss as a result of a motor vehicle accident, a plaintiff must demonstrate that he or she sustained a serious injury as defined by Insurance Law § 5102 (d) or economic loss exceeding the statutory amount of basic economic loss (*Licari v Elliott*, 57 NY2d 230, 235 [1982]; Insurance Law § 5102 [a]; *see also Rulison v Zanella*, 119 AD2d 957, 958 [3d Dept 1986]). To prevail on a motion for summary judgment, a defendant bears the burden of showing no serious injury by the "proffer of competent medical evidence" (*Raucci v Hester*, 119 AD3d 1044, 1044 [3d Dept 2014]; *see also Mulhauser v Wood*,

107 AD2d 1019, 1019 [4th Dept 1985]). Upon that showing, the burden shifts to the plaintiff to submit evidence that raises a question of fact or else the motion for summary judgment shall be granted (*Mulhauser*, 107 AD2d at 1019; *see also Pollard v Brown*, 127 AD2d 882, 883 [3d Dept 1987]).

Plaintiffs can claim serious injury under one or more categories listed in Insurance Law § 5102 (d). In this action, Crean alleges that her injuries from the accident qualify under four categories:

- (1) permanent loss of use of a body organ, member, function or system, specifically in her neck and back;
- (2) permanent consequential limitation of use of a body organ or member, specifically in her neck and back;
- (3) significant limitation of use of a body function or system, specifically in her neck, back, right knee and right shoulder; and
- (4) 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 90/180 Rule).

When a plaintiff claims that she has sustained a "permanent loss of use of a body organ, member, function or system," plaintiff must establish that the injury sustained has caused a "total loss of use" of the affected body part (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 297 [2001]). Defendants have met their burden for summary judgment as to this category, insofar as Crean's medical records do not reflect that she suffered a total permanent loss of use of the claimed portions of her neck and back. Crean's opposing papers do not raise an issue of fact and for that reason, defendants' motion is granted with respect to the permanent loss of use category.

For the permanent consequential or significant limitation of use categories, a plaintiff's injuries must be supported by "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing [the] 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]; *see also Maurer v Colton*, 180 AD3d 1371, 1373 [4th Dept 2020]). The limitations must be "more than mild, minor or slight" (*Licari*, 57 NY2d at 236).

Defendants' expert acknowledged that Crean's MRI's taken on July 12, 2017 show disc protrusions at C3-4, C5-6 and C6-7, and disc bulges at L4-5 and L5-S1. On physical examination on September 9, 2021, nearly four and a half years after the accident, the expert recorded diminished range of motion in both the cervical and lumbar areas, including ranges of motion of only 30 degrees for cervical flexion and extension, with the normal range being 45 degrees. The expert claimed that such findings "are not associated with signs of trauma" and are not related to the motor vehicle accident (NYSCEF Doc. No. 19, p. 8).

As in *Gaughan v Censeo Health, LLC* (201 AD3d 1350, 1351 [4th Dept 2022]), "the expert failed to account for the absence of pain in plaintiff's spine prior to the accident," and thus, this court finds her opinion to be "conclusory and therefore 'insufficient to establish that plaintiff's pain might be . . . unrelated to the accident' " (*id.*, quoting *Ashquabe v. McConnell*, 46 AD3d 1419, 1419 [4th Dept. 2007]; *see also Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019]). On her cross motion, Crean met her initial burden of establishing that she sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories through the affidavits of her treating chiropractor and orthopedic spine surgeon. Defendants failed to raise an issue of fact. As a result, this court denies defendants motion and

grants Crean's cross motion for summary judgment on the permanent consequential or significant limitation of use categories under Insurance Law § 5102 (d).

To maintain a claim under the 90/180 Rule, a plaintiff must demonstrate objective medical evidence of an injury as well as "evidence that plaintiff's activities were curtailed to a great extent" for at least 90 of the 180 days following the accident (*Cummings v Jiayan Gu*, 42 AD3d 920, 921 [4th Dept 2007]). If a defendant is successful in showing that a plaintiff's injuries do not meet that criteria, New York courts do not accept plaintiffs' "self-serving assertions" on their limitations, but plaintiffs may raise triable issues of fact by citing restrictions in their medical records, presenting expert testimony on their limitations, or providing other evidence that their daily activities were substantially limited due to pain or impairment (*Clausi v Hall*, 127 AD3d 1324, 1327 [3d Dept 2015]; *see also Howell v Holloway*, 17 AD3d 1117, 1119 [4th Dept 2005]).

While Crean has presented objective medical evidence of an injury, defendants have met their prima facie burden under this category, demonstrating that she missed only one week of work following the accident. Nonetheless, Crean has raised an issue of fact, having testified that she was unable to lift her arms over her head, walk her dog, do laundry, wash dishes, mow the lawn, sit for greater than 15 minutes and dance ballet (which was part of her customary activities) for at least three months after the accident. Therefore, the court denies both defendants' motion and plaintiff's cross motion for summary judgment as to serious injury pursuant to the 90/180 Rule.

On the issues of negligence and culpable conduct, Crean has met her prima facie burden on her cross motion for summary judgment by testifying that:

- she traveled southbound on Starin Avenue within the speed limit;

- she had no traffic control device at the upcoming intersection with Morris Avenue;
- she saw defendants' vehicle traveling eastbound on Morris Avenue, approaching the same intersection;
- defendants' vehicle had a stop sign but did not stop, going into the intersection; and
- she (Crean) slammed on her brakes and jerked her vehicle to the left but was not able to avoid impacting defendants' vehicle.

The only issue of fact raised by defendants in opposition to Crean's cross motion is defendant Mariani's claim that she stopped at the stop sign before proceeding into the intersection. That issue is not material, however, as Mariani did not see Crean's vehicle prior to the collision and did not yield the right of way as required by Vehicle and Traffic Law § 1142 (a). By failing to provide a non-negligent explanation for the accident, defendants are liable as a matter of law (*see Lowes v Anas*, 195 AD3d 1579, 1582 [4th Dept 2021]).

Therefore, the court grants defendants' motion only with respect to the permanent loss of use category of Insurance Law § 5102 (d). The remaining portions of defendants' motion are denied. The court grants plaintiff's cross motion as to negligence, culpable conduct and serious injury under the permanent consequential and significant limitation categories of Insurance Law § 5102 (d). Submit order.

DATED: July 15, 2022



HON. HENRY J. NOWAK, J.S.C.