

Germosen v Thompson

2023 NY Slip Op 34904(U)

January 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 527181/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At Part DJMP, at the Kings County Courthouse, 360 Adams St., Brooklyn, NY 11201, on the _____ day of _____ 2023

JAN 13 2023
DECISION
and
ORDER

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 99

-----X
 CLAUDIA ISABEL CASTRO GERMOSEN,

Plaintiff,
 -against-

KIA L. THOMPSON and TIME WARNER CABLE,

Defendants.
 -----X

Index No.: 527181/2019
 Motion Date: 12/21/2022
 Motion Cal. No.: 2
 Mot. Seq. 2

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Defendants' motion for summary judgment pursuant to C.P.L.R. § 3212 and to dismiss the complaint with prejudice based on the "serious injury" threshold of the Insurance Law, dated 7/25/2022; Statement of material facts; Attorney affirmation of John A. Anselmo, affirmed on May 8, 2022, Report of Howard A. Kiernan, M.D., affirmed on 7/25/2022; Exhibits A-F; Memorandum of law in support.....	29-38
Plaintiff's attorney affirmation of Mark Alfisi in opposition, affirmed on 9/27/2022; Response to statement of facts; Exhibits 1-5.....	40-46
Defendants' attorney affirmation of John A. Anselmo in reply, affirmed on 10/4/2022.....	47

This is an action to recover damages from personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on October 2, 2019. The action was commenced by filing the summons and complaint on December 13, 2019. Issue was joined on January 8, 2020. Plaintiff was granted summary judgment on the issue of liability against defendants on November 6, 2020, pursuant to an order by Justice Edgar G. Walker. (NYSCEF #18).

Defendants now move for summary judgment on the basis that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Specifically, defendants argue that, through the IME report of defendants' physician, Dr. James M. Kipnis, M.D., defendants establish that plaintiff did not suffer a total loss of use of a body organ, member function, or system to fall under the "permanent loss of use" category of Insurance Law § 5102(d); that plaintiff did not sustain a "permanent consequential limitation of use of a body function or system" because all of plaintiff's injuries were resolved; and that plaintiff did not suffer a "significant limitation of use of a body function or system" because defendants claim that plaintiff's range of motion, motor strength, and reflexes are normal. Defendants also argue that plaintiff did not sustain a "serious injury" under the 90/180-day category of Insurance Law § 5102(d) because plaintiff testified that she returned to work two days after the accident and was able to perform all job duties. Finally, defendants point out that plaintiff was last treated in August 2020 and that plaintiff's gap in treatment for over a year is fatal to her claim of serious injury.

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Dr. Kipnis examined plaintiff on November 30, 2021 and found, in short, spinal disc herniations, bulges, and degenerations; moderate to mild decrease in lumbar spine range of motion; mild loss of range of motion in the cervical spine; and cervical and lumbar strains that Dr. Kipnis concluded were pre-existing and due to a degenerative condition. Dr. Kipnis ultimately concluded that plaintiff's "functional impairment to the cervical or lumbar spine" are not causally related to the accident.

Particularly relevant in Dr. Kipnis's report is the discussion regarding plaintiff's loss of range of motion. Dr. Kipin's reported:

Forward flexion of the lumbar spine was 30 degrees with reported discomfort (normal 70 degrees). Extension was 20 degrees (normal 20 degrees). Left lateral bending was 20 degrees (normal 30 degrees), right lateral bending was 20 degrees (normal 30 degrees). Right rotation was 30 degrees (normal 30 degrees). Left rotation was 30 degrees (normal 30 degrees).

...

Examination of the cervical spine demonstrated extension to 30 degrees (normal 50 degrees). Flexion was 40 degrees (normal 40 degrees). Left rotation 70 degrees with reported discomfort left trapezius (normal 80 degrees), right rotation 80 degrees (normal 80 degrees).

However, even if the court considered defendant's physician's findings, which it cannot because Dr. Kipnis failed to identify the objective methods used to measure the range of motion, plaintiff's limitation of range of motion is significant. There is a dispute as to the causation of these limitations.

In opposition, plaintiff submitted unsworn and uncertified medical records (NYSCEF #45-46) that are not in admissible form. See *Pagano v. Kingsbury*, 182 A.D.2d 268, 270 (2d Dep't 1992). Plaintiff also submitted a medical report from Dr. James Liguori, D.O., affirmed pursuant to CPLR 2106 on April 8, 2020. Dr. Liguori examined plaintiff on April 8, 2020, and found that "[r]ange of motion testing with inclinometer revealed limitation of the lumbar spine in flexion-extension - extension to 50°, normal 90°." Dr. Liguori concluded that plaintiff "will be left with a permanent partial disability" and that "[i]t is with a high degree of medical certainty that the patient's injuries are directly related to the previously mentioned accident."

Legal Standard and Analysis

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (Ct. of Ap. 1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (Ct. of Ap. 1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 57 (2d Dep't 1999).

To recover under Insurance Law § 5102(d), a plaintiff must have sustained a serious injury that falls within the meaning of the statute as a result of the motor vehicle accident. A serious injury must be a personal injury "which results in death; dismemberment; significant disfigurement; a fracture; loss of

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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 constitutes 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).

On a motion for summary judgment, "a defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim." *Grossman v. Wright*, 268 A.D.2d 79, 83-84 (2d Dep't 2000). Once the defendant meets its *prima facie* burden, "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 . . . The plaintiff in such a situation must present objective evidence of the injury." *Id.*

Here, defendants established, through Dr. Kipnis's report, that plaintiff did not suffer a "permanent loss of use of a body organ, member function or system." To qualify under this provision of the Insurance Law, the "permanent loss of use" must be total. *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 298 (Ct. of Ap. 2001). The burden shifted to plaintiff, who failed to show, through medical evidence or testimony, that she suffered the total loss of a body organ, member function, or system.

Defendants also established, through the transcript of the plaintiff's deposition testimony, that plaintiff missed only a few days of work following the accident and, therefore, he did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102(d). See *John v. Linden*, 124 A.D.3d 598, 599 (2d Dep't 2015); see also *Marin v. Ieni*, 108 A.D.3d 656, 657 (2d Dep't 2013). In response, plaintiff failed to show a "medically determined" injury which prevented her from engaging in her usual activities of daily living, as required by Insurance Law § 5102(d).

However, defendants failed to establish that they are entitled to summary judgment under the "permanent consequential limitation" and "significant limitation" sections of the Insurance Law. Where a plaintiff suffers a loss of range of motion of 30% or more in the lumbar spine or cervical spine, a triable issue of fact exists as to whether a plaintiff suffered a "serious injury" within the meaning of Insurance Law § 5102(d). *Adetunji v. U-Haul Co. of Wisconsin*, 250 A.D.2d 483, 483 (1st Dep't 1998); see also *Ramirez v. L-T. & L. Enter., Inc.*, 189 A.D.3d 1636, 1637 (2d Dep't 2020) (holding that restrictions up to 33% in the plaintiff's cervical spine, and up to 27% in the plaintiff's left shoulder, created an issue of fact as to whether the plaintiff sustained serious injuries under the significant limitation of use category).

The portion of Dr. Kipnis's report addressing plaintiff's range of motion, *supra.*, cannot be considered as it failed to identify the objective tests that were utilized to measure plaintiff's range of motion. *Cho v. Demelo*, 175 A.D.3d 1235, 1237 (2d Dep't 2019). However, even if the court did consider this portion of the report, it establishes that plaintiff suffered a 57.1% loss in the forward flexion of the lumbar spine, a 33.33% loss in the left lateral bending of the lumbar spine, a 33.33% loss in the right lateral bending of the lumbar spine, and a 40.0% loss the extension of her cervical spine. These measurements support a finding that plaintiff suffered a "serious injury" under the Insurance Law. *Adetunji*, 250 A.D.2d 483; see also *Ramirez*, 189 A.D.3d 1636, 1637.

Dr. Liguori examined plaintiff and measured her range of motion using an inclinometer, which is an

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objective and quantified method used to measure range of motion. *See Geliga*, 56 A.D.3d 518, 520. Dr. Liguori's report only addresses the lumbar spine flexion-extension, but shows that plaintiff suffered a 45% loss of extension in her lumbar spine ("lumbar spine in flexion-extension - extension to 50°, normal 90°"). While Dr. Kipnis opined that plaintiff "has no current causally related functional impairment to the cervical or lumbar spine," Dr. Liguori concluded that plaintiff's injuries are permanent and casually related to the motor vehicle accident. Dr. Liguori's report documenting plaintiff's permanent, casually related loss of range of motion of 45% is sufficient to create a question of fact as to whether plaintiff suffered a "permanent consequential limitation" and "significant limitation" under the Insurance Law. *See Adetunji*, 250 A.D.2d 483; *see also Ramirez*, 189 A.D.3d 1636, 1637.

Finally, since defendants failed to establish, *prima facie*, that they are entitled to summary judgment under the "permanent consequential limitation" and "significant limitation" categories, the burden never shifted to the plaintiff to address any gaps in her treatment. *See Confredo v. Moore*, 210 A.D.3d 1050, 1050-51 (2d Dep't 2022).

Based on the foregoing, it is

ORDERED that defendants' motion for summary judgment is **GRANTED** with respect to plaintiff's claims under the permanent loss of use category and the 90/180-day category of Insurance Law § 5102(d), and these causes of action are dismissed; and it is further

ORDERED that defendants' motion for summary judgment is **DENIED** with respect to plaintiff's claims under a permanent consequential limitation of use category and the significant limitation of use category of Insurance Law § 5102(d).

This constitutes the decision and order of the Court.

ENTER


Hon. Richard J. Montelione

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