

Gillman v Amana Ins. Brokerage, Inc.

2023 NY Slip Op 34915(U)

March 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 502437/2020

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the ____ day of _____ 2023

MAR 06 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

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

DECISION/ORDER

-----X
ROBIN GILLMAN,

Plaintiff,

-against-

AMANA INSURANCE BROKERAGE, INC.,
DOUNYA ZAYER, POINT RECYCLING, LTD
and ADAM NOWAK,

Defendants.

-----X

Index No.: 502437/2020
Motion Date: 2/8/2023
Motion Cal.: 6-7
Mot. Seq.: 1-2

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Motion Sequence #1	
Defendants Amana Insurance Brokerage, Inc. and Dounya Zayer's Motion for Summary Judgment, dated 9/2/2022 (NYSCEF #22), Statement of Material Facts (NYSCEF #23), Attorney Affirmation of Keri A. Wehrheim, Esq., affirmed on 9/2/2022 (NYSCEF #24), Exhibits (NYSCEF #25-27), Memorandum of Law (NYSCEF #28).....	22-28
Plaintiff's Attorney Affirmation of Thomas Cleere, Esq. in Opposition, affirmed on 12/29/2022 (NYSCEF #42), Memorandum of Law (NYSCEF #43), Statement of Material Facts (NYSCEF #44), Exhibits (NYSCEF #45-47).....	42-47
Defendants Amana Insurance Brokerage, Inc. and Dounya Zayer's Attorney Affirmation of Keri A. Wehrheim, Esq. in Reply, affirmed on 12/29/2022 (NYSCEF #56).....	56
Motion Sequence #2	
Defendants Point Recycling, LTD and Adam Nowak's Motion for Summary Judgment, dated 9/15/2022 (NYSCEF # 30), Attorney Affirmation of Heidi M. Weis, Esq., affirmed on 9/15/2022 (NYSCEF #31), Statement of Material Facts (NYSCEF #32), Exhibits (NYSCEF #33-38).....	30-38
Plaintiff's Attorney Affirmation of Thomas Cleere, Esq. in Opposition, affirmed on 12/29/2022 (NYSCEF #49), Memorandum of Law (NYSCEF #50), Statement of Material Facts (NYSCEF #51), Exhibits (NYSCEF #52-54).....	49-54
Defendants Point Recycling, LTD and Adam Nowak's Attorney Affirmation of Heidi M. Weis, Esq. in Reply, affirmed on 12/30/2022 (NYSCEF #58).....	58

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This action involves a claim for personal injuries sustained in a three-car motor vehicle accident. Plaintiff commenced this action by filing a summons and complaint on January 25, 2020. Plaintiff alleges that on January 31, 2019, a motor vehicle owned by defendant Point Recycling, LTD. and operated by defendant Adam Nowak, and another motor vehicle owned by defendant Amana Insurance Brokerage Inc. and operated by defendant Dounya Zayer, came into contact with plaintiff's vehicle, causing plaintiff to sustain serious injuries as defined by Insurance Law § 5102(d). Defendants move for summary judgment on the issue of threshold under Insurance Law § 5102(d).

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, 520 N.E.2d 512 (Ct. of Ap. 1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718 (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 577, 686 N.Y.S.2d 446 (2d Dep't 1999).

Under Insurance Law § 5104(a) "in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury." Insurance Law § 5102(d) defines a serious injury as:

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.

Defendants move for summary judgment on the basis that plaintiff did not suffer a serious injury under the following categories: 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 the 90/180-day category.

In support, defendants provided an orthopedic report of Pierce J. Ferriter, M.D. The orthopedic report, dated February 7, 2022, was affirmed under penalty of perjury by Dr. Ferriter. Dr. Ferriter examined plaintiff on January 13, 2022 and found normal range of motion of the cervical spine using a goniometer. The report also stated, "Cervical spine sprain / strain – superimposed on pre-existing degenerative changes – resolved," and noted that plaintiff was involved in a previous motor vehicle accident in 2003 but plaintiff stated that she did not sustain any injury. Dr. Ferriter's report concluded:

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In my medical opinion, there is no objective evidence of a causally related disability, permanency, or residuals as it relates to the accident of record. The claimant is able to work without restrictions or limitations. The claimant is able to perform normal activities of daily living without restrictions or limitations. Currently, the claimant is working full time at a new job.

Defendants also argue that plaintiff's cessation of treatment warrants dismissal of the complaint. Plaintiff stopped treatment at the end of 2019, but testified and provided proof that on August 9, 2019, she was denied no fault benefits (NYSCEF #46), and that the COVID-19 pandemic further prevented her from seeking treatment in 2020. This is an adequate explanation for her cessation of treatment and the complaint will not be dismissed on this basis. *See Delorbe v. Perez*, 59 A.D.3d 491, 492, 873 N.Y.S.2d 198, 199 (2d Dep't 2009); *see also Pommells v. Perez*, 4 N.Y.3d 566, 574, 830 N.E.2d 278, 283 (Ct. of Ap. 2005) ("While a cessation of treatment is not dispositive . . . a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so").

Nonetheless, defendants have satisfied their *prima facie* burden of showing that the plaintiff did not sustain a serious injury under the permanent loss of use category, the permanent consequential limitation category, or the significant limitation category through Dr. Ferriter's report. *Kearse v. New York City Transit Auth.*, 16 A.D.3d 45, 49-50, 789 N.Y.S.2d 281, 285 (2d Dep't 2005) ("A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs").

With respect to the 90/180-day category, defendants argue that plaintiff's own deposition testimony negates a claim under this category. Plaintiff testified that she missed three days from work immediately following the accident, and then returned part-time for two weeks, and then took off another two weeks, and ultimately resigned for a bookkeeping job with another employer in March 2019. (NYSCEF #27, pages 12-16). While plaintiff testified that she has trouble sitting, lifting, gardening, performing housework, jet skiing and water skiing, she did not establish that she is unable to perform "substantially all" daily activities as required for the 90/180-day category. *Griffiths v. Munoz*, 98 A.D.3d 997, 950 N.Y.S.2d 787, 789 (2d Dep't 2012). The court finds that defendants have sustained their *prima facie* burden of showing that the plaintiff did not suffer a serious injury under the 90/180-day category.

Accordingly, the burden has shifted to the plaintiff to demonstrate a question of fact as to whether the plaintiff sustained a serious injury under Insurance Law § 5102(d).

In opposition, plaintiff argues that she provided objective evidence of a decreased range of motion and herniated discs, caused by the subject motor vehicle accident, sufficient to create a question of fact. Plaintiff submitted an uncertified MRI Report, dated February 6, 2019. The MRI exam took place on February 4, 2019, less than a week after the motor vehicle accident. While this MRI report would typically be without probative value, because defendant's doctor,

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Dr. Ferriter, reviewed the same record in writing his report, plaintiff may rely on the contemporaneous MRI exam, and it is admissible at the summary judgment stage. *Irizarry v. Lindor*, 110 A.D.3d 846, 847, 973 N.Y.S.2d 296 (2d Dep’t 2013).

Plaintiff also provided a medical report of Ali E. Guy, M.D., affirmed under penalty of perjury on November 8, 2022. Dr. Guy examined plaintiff on November 8, 2022 and found limited range of motion using a goniometer, as well as disc bulges and herniations. In his report, Dr. Guy concluded that plaintiff “has clearly sustained a permanent partial disability causally related to the accident of January 31, 2019. These injuries are permanent and progressive.” Defendants argue that Dr. Guy’s report should not be considered because it relies on medical documents not in the record. The court notes that defendants’ doctor’s report also relies on medical reports not in the record. Moreover, both Dr. Guy and Dr. Ferriter set forth objective medical tests that they performed to arrive at their conclusions regarding range of motion.

Accordingly, through Dr. Guy’s report and the MRI report, plaintiff has demonstrated that a question of fact exists as to whether she suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

However, plaintiff failed to create a question of fact with respect to the 90/180-day category. Defendants met their *prima facie* burden with respect to this category, and plaintiff failed to submit a physician’s affidavit substantiating the existence of a medically determined injury producing the alleged impairment of plaintiff’s activities under the 90/180-day category. *Ryan v. Xuda*, 243 A.D.2d 457, 457–58, 663 N.Y.S.2d 220, 221 (2d Dep’t 1997). Additionally, plaintiff failed to submit evidence that creates a question of fact as to whether she suffered a serious injury under the permanent loss of use category of the insurance law. *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 299, 751 N.E.2d 457, 460 (Ct. of Ap. 2001) (“[A] serious injury within the meaning of the statute, ‘permanent loss of use’ must be total”).

Based on the foregoing, it is

ORDERED that defendants’ motion for summary judgment is granted in part and denied in part; it is

- 1) **DENIED** to the extent that a question of fact exists as to whether plaintiff suffered serious injury under the permanent consequential limitation of use of a body organ or member category or the significant limitation of use of a body function or system category of Insurance Law § 5102(d); and it is
- 2) **GRANTED** to the extent that plaintiff did not suffer a serious injury under the permanent loss of use of a body organ, member category or the 90/180-day category of Insurance Law § 5102(d); and therefore, these causes of action are dismissed.

This constitutes the decision and order of the Court.

ENTER

[Signature]
Hon. Richard J. Montelione, J.S.C.

2023 MAR 13 PM 2:23
FILED
KINGS COUNTY CLERK
[Signature]