Bajwa v Davydov
2023 NY Slip Op 35063(U)
December 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 702385/2020
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

IAS Part - 42

NAFAL BAJWA AND FATIMA HAMID,

Plaintiff,

-against-

ROBERT DAVYDOV AND HIBBA HUSSAIN,

Defendants.

Index No.: 702385/2020

Motion Date: 7/20/23

Motion Cal. No. 4

Motion Seq. No. 2

The following electronically filed ("EF") documents read on this motion by Hibba Hussain ("Ms. Hussain") for an order: 1) pursuant to CPLR § 3212, granting summary judgment and dismissing plaintiffs', Nafal Bajwa and Fatima Hamid, complaint and any and all cross-claims against Defendant, Hibba Hussain in their entirety; 2) pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's, Nafal Bajwa, claims against Defendant, Hibba Hussain, in their entirety for failure to meet the "serious injury" threshold pursuant to Insurance Law § 5102(d); and 3) granting such other and further relief as the Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits-Memo of Law.....	EF 40 - 50
Affirmation in Partial Opposition.....	EF 51
Affirmation in Opposition-Exhibits-Service.....	EF 59 - 63
Reply Affirmation.....	EF 64

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Nafal Bajwa ("Ms. Bajwa") and Fatima Hamid ("Ms. Hamid") (collectively, the "plaintiffs") allegedly sustained in a motor vehicle collision. In particular, the plaintiffs allege that on March 12, 2019, they were

passengers in Hibba Hussain ("Ms. Hussain") motor vehicle when Robert Davydov ("Mr. Davydov") reversed his motor vehicle and struck their vehicle -- on Kissena Boulevard at or near its intersection with 75th Avenue, in the County of Queens and State of New York ("subject accident"): Ms. Bajaw was sitting in the front and Ms. Hamid was sitting in the rear of Ms. Hussain's motor vehicle when the accident occurred. As a result, Ms. Bajaw alleges that she sustained severe and permanent personal injuries to her cervical spine, lumbar spine, and thoracic spine, etc. As a result, on February 11, 2020, the plaintiffs commenced the instant action; and March 19, 2020, issue was joined wherein, Mr. Davydov interposed an answer. Now Ms. Hussain seeks summary judgment on the ground that Ms. Bajaw did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law; and she was not the proximate cause of the subject accident.

It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

> … 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 held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured

plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]). However, if the defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84).

Here the court finds that summary judgment is not appropriate in this action, because Ms. Hussain failed to meet her prima facie burden of showing that Ms. Bajwa did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. In fact, Ms. Hussain failed to satisfy her burden by submitting its affirmed medical report of Ms. Bajwa demonstrating that she did not serious injury from the subject accident. (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). Rather, the defendants submitted the independent medical examination ("IME") report of Ms. Hamid, which was performed by Regina O. Hillsman, M.D. ("Dr. Hillsman"). Notwithstanding the same, in opposition to the instant motion, Ms. Bajwa provides the

affirmation of Steven Ross, M.D. ("Dr. Ross"), who affirmed to a reasonable degree of medical certainty the following:

> As Ms. Bajaw continues to have complaints of neck pain, mid back pain and low back pain nearly 4 years post-trauma with positive diagnostic test results. She has sustained significant injuries to the cervical spine, thoracio spine and lumbar spine.
>
> With the above stated continued complaints, positive examination findings, positive diagnostic test results and significantly diminished range of motion, she has sustained permanent injuries to the cervical spine, thoracic spine and lumbar spine and the prognosis for a full and complete recovery is poor.
>
> The notion that Ms. Bajwa's symptoms are wholly or even partly due to a finding of scoliosis on an x-ray approximately three years prior to the accident is nonsensical. Prior to the accident of March 12, 2019, the patient was completely asymptomatic and had no limitations or restrictions with regards to her spine. The patient received no treatment for her diagnosis of scoliosis; this is within the standard of care for mild cases, which is what was found with Ms. Bajwa. The MRIs of the cervical, thoracic, and lumbar spine revealed the presence of multi-level disc herniations and disc bulges, which were not found on any previous diagnostic testing and are causally related to the motor vehicle accident of March 12, 2019. The patients history of scoliosis is not a factor whatsoever in the patients current complaints of pain and limitations or abnormal physical exam findings, which, again, are solely related to the motor vehicle accident of March 12, 2019.

As such, the court finds that summary judgment is not appropriate in this action, because the defendant failed to meet her prima facie burden of showing that Ms. Bajwa did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955, 956-957 [1992]). The papers submitted by the defendants failed to eliminate triable issues of fact regarding Ms. Bajwa's claim, set forth in her bill of particulars, that she sustained a serious injuries to her cervical spine, thoracic spine and lumbar spine, pursuant to Insurance Law § 5102 (d). (*see Fanfan v. Sowacki,* 202 AD3d 922 [2d Dept 2022]; *Che Hong Kim v. Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Rouach v. Betts*, 71 AD3d 977 [2d Dept 2010]). Since the defendant failed to meet her prima facie burden, it is unnecessary to determine whether the submissions by Ms. Bajwa in opposition were sufficient to raise a triable issue of fact (*see Fanfan v. Sowacki,* 202 AD3d 922 [2d Dept 2022]; *Che Hong Kim v. Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Now, the court will turn to that branch of Ms. Hussain's motion to dismiss the instant action on the basis that she was not the proximate cause of the subject accident. It is well settled law that "[a] defendant moving for summary judgment in a negligence action has the burden of

establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident" (*Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]; *see Aponte v. Vani*, 155 AD3d 929 [2d Dept 2017]; *Baulete v. L & N Car Serv., Inc.,* 134 AD3d 753 [2d Dept 2015]; *Miron v. Pappas*, 161 AD3d 1063 [2d Dept 2018]; *see also Chan Pok Kim v. Jurado*, 203 AD3d 694 [2d Dept 2022]; *Lopresti v. Estate of Galante*, 221 AD3d 798 [2d Dept 2023]). It must be remembered that "[t]here can be more than one proximate cause of an accident." (*Lopez v. Reyes–Flores,* 52 AD3d 785, 786 [2d Dept 2008] quoting *Cox v. Nunez*, 23 AD3d 427 [2d Dept 2005]; and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v. Hungry Habor Assoc., LLC*, 84 AD3d 889 [2d Dept 2011]). Here, the evidence proffered in support of Ms. Hussain's motion presented varying accounts of how the accident occurred. Assuming the facts to be as set forth in Mr. Davydov's deposition testimony, which was submitted in support of the instant motion, triable issues of fact exist as to whether Ms. Hussain was negligent at all in the happening of the accident. As such, the court finds that Ms. Hussain's submissions failed to eliminate all triable issues of fact as to whether she was free of fault in the happening of the subject accident. (*see e.g., McPhaul-Guerrier v. Leppla*, 201 AD3d 920 [2d Dept 2022]; *Maher v. Vargas-Bonilla*, 191 AD3d at 868; *Poon v. Nisanov*, 162 AD3d at 807- 808 and whether she is free from comparative negligence (*see generally Ramirez v. Wangdu,* 195 AD3d 646 [2d Dept 2021]; *see generally Flores v. Rubenstein*, 175 AD3d 1490, 1491 [2d Dept 2019]; *Aponte v. Vani*, 155 AD3d 929, 930 – 931 [2d Dept 2017]).

It is well settled law that a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Walker v. Ryder Truck Rental & Leasing*, 206 AD3d 1036 [2d Dept 2022] citing *Ruiz v. Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks omitted]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Charlery v. Allied Tr. Corp.,* 163 AD3d 914, 915 [2d Dept 2018] [internal quotation marks omitted]; *see Chimbo v. Bolivar*, 142 AD3d 944, 945 [2d Dept 2016]). Moreover, issues of fact and credibility are presented, which cannot be resolved on a motion for summary judgment. Accordingly, the Court must deny Ms. Hussain's motion, which seek summary judgment on the issue of liability. (*Colletti v. City of New York*, 208 AD3d 749 [2d Dept 2022]; *Gall v. Schwed*,

119 AD3d 804, 808 [2d Dept 2018]; *Poon v. Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]; *An v. Abbate*, 213 AD3d 891 [2d Dept 2023]).

Accordingly, it is hereby

ORDERED that Defendant Hibba Hussain motion for summary judgment on the issue of liability, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

ORDERED that Defendant Hibba Hussain's motion to dismiss Nafal Bajwa claims for failure to meet the "serious injury" threshold pursuant to Insurance Law § 5102(d) is denied; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon defendant, via certified mail and NYSCEF, on or before January 30, 2024.

The foregoing constitutes the decision and order of the court.

Dated: December 28, 2023
Long Island City, NY

Maurice E. Muir
MAURICE E. MUIR, J.S.C.