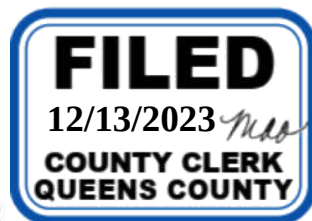


Aragon v Hossain
2023 NY Slip Op 35124(U)
December 12, 2023
Supreme Court, Queens County
Docket Number: Index No. 724533/2021
Judge: Carmen R. Velasquez
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice-----x
CECILIA C. ARAGON,

Index No. 724533/21

Plaintiff,

Motion

Date: October 2, 2023

-against-

M# 1

ABIR HOSSAIN,

Defendant.
-----x

The following papers numbered EF 11-38 read on this motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury pursuant to Insurance Law § 5102(d); and cross motion by the plaintiff for summary judgment on the issue of liability, dismissing the second affirmative defense of culpable conduct and for summary judgment on the issue of 'serious injury.'

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 11-19
Notice of Cross Motion - Affidavits - Exhibits.	EF 22-35
Affirmation in Opposition - Exhibits.....	EF 36
Replying Affirmation	EF 38

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment and cross motion by the plaintiff for summary judgment are decided as follows:

The plaintiff allegedly sustained serious injuries when the vehicle she was operating was struck by defendant's vehicle as she was entering the driveway to her home on the service road of the Grand Central Parkway on January 16, 2019. This action was subsequently commenced to recover damages for negligence. Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff cross moves for summary judgment on the issue of liability, the issue of "serious injury" and also seeks to dismiss the affirmative defense of culpable conduct.

The issue of whether plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined in the first instance by the court. (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481, 481 [2d Dept 1988].) A defendant can establish that the 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. (see *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]; *Turchuk v Town of Wallkill*, 255 AD2d 576, 576 [2d Dept 1998].) With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. (see *Gaddy v Eyler*, 79 NY2d 955, 957 [1992].) A plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. (see *Carroll v Jennings*, 264 AD2d 494, 495 [2d Dept 1999]; *Kauderer v Penta*, 261 AD2d 365, 366 [2d Dept 1999].)

Defendant failed to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (*Toure v Avis Rent-A-Car Sys., Inc.*, 98 NY2d 345, 350 [2002].) The papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*Despinos-Cadet v Stein*, 209 AD3d 978, 980 [2d Dept 2022]; *Yampolskiy v Baron*, 150 AD3d 795, 796 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969, 969 [2d Dept 2011].) Plaintiff testified at her deposition that she missed four months of work as a result of the subject accident.

Under these circumstances, it is not necessary to consider whether plaintiff's papers submitted in opposition to the defendant's motion are sufficient to raise a triable issue of fact. (*Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140, 1140 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d at 969 [2d Dept 2011].)

The court will now address plaintiff's cross motion for summary judgment.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." (*Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2d Dept 2016]; see Vehicle and Traffic Law § 1129[a].) A rear end collision establishes a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that driver to come forward with an adequate, non-negligent explanation for the accident. (see *Balgobin v McKenzie*, 213 AD3d 893, 893-894 [2d Dept 2023]; *Finney v Morton*, 127 AD3d 1134, 1134 [2d Dept 2015]; *Foti v Fleetwood Ride, Inc.*, 57 AD3d 724, 724 [2d Dept 2008]; *Ahmad v Grimaldi*, 40 AD3d 786, 787 [2d Dept 2007].) If the operator of the rear vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment. (see *Dileo v Greenstein*, 281 AD2d 586, 586 [2d Dept 2001]; *Lopez v Minot*, 258 AD2d 564, 564 [2d Dept 1999].)

Plaintiff submits an affidavit in which she avers that as she was pulling into the driveway of her home, the defendant's vehicle struck the rear of her vehicle. Plaintiff states that she was in the right lane with her turn signal on. In addition, plaintiff has established that she did not cause or contribute to the subject accident. Thus, plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability. In addition, plaintiff has established that she did not cause or contribute to the subject accident, and, thus, has also demonstrated her entitlement to summary judgment dismissing the affirmative defense of culpable conduct.

Defendant has failed to produce any admissible evidence raising a triable issue of fact as to the branch of plaintiff's cross motion on the issue of liability or with respect to the second affirmative defense.

With respect to the branch of the cross motion for summary judgment on the issue of serious injury, plaintiff argues that she is entitled to summary judgment since she was unable to work for 90 days during the 180 days immediately following the subject accident.

As the proponent of the motion for summary judgment, the plaintiff has the burden of making a prima facie showing that she sustained a serious injury within the meaning of Insurance Law § 5102(d) and that the injury was causally related to the accident. (*Dembowski v Morris*, 184 AD3d 741, 741 [2d Dept 2020]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 881 [2d Dept 2010].) At bar, plaintiff testified that she missed four months

of work as a result of the subject accident. However, in support of the cross motion, plaintiff submits the affirmed report of Dr. Andrew Miller, who examined the plaintiff on April 10, 2019. Dr. Miller avers that plaintiff "was out of work for two weeks." He also avers that "[s]he is currently working on a full time basis, performing light duty." These averments conflict with plaintiff's testimony as well as her averment in her affidavit that she "could not get a 'light duty' position." As such, plaintiff fails to make a prima facie showing of entitlement to summary judgment on the issue of "serious injury."

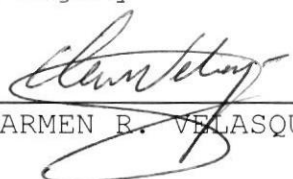
Accordingly, this motion by defendant for summary judgment is denied.

The branch of the cross motion by the plaintiff for summary judgment on the issue of liability is granted, and an assessment of damages against the defendant shall be held at the time the case is called for trial.

The branch of the cross motion by the plaintiff for summary judgment dismissing the affirmative defense of culpable conduct is granted, and the second affirmative defense of culpable conduct, set forth in the Answer, is dismissed.

The branch of the cross motion by the plaintiff for summary judgment on the issue of serious injury is denied.

Dated: December 12th, 2023


CARMEN B. VELASQUEZ, J.S.C.

