

Ryer v Venture Leasing LLC
2023 NY Slip Op 35141(U)
January 4, 2023
Supreme Court, Bronx County
Docket Number: Index No. 35294/2019E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

-----X
TANAE CRYSTAL RYER,

Index No. 35294/2019E

Plaintiff,

-against-

Hon. BIANKA PEREZ

VENTURE LEASING LLC and JORDAN NUNEZ

Justice Supreme Court

TAVAREZ,

Defendants.
-----X

The following papers were read on this motion and cross-motion (**Seq. No. #1**) for **SUMMARY JUDGMENT** submitted on September 15, 2022.

Notice of Motions – Affirmation in Support - Exhibits Annexed	No(s). 12-20
Affirmation in Opposition and Exhibits	No(s). 34-57
Notice of Cross-Motion-Affirmation in Support-Exhibits Annexed	No(s). 33-57
Affirmation in Opposition to Cross-Motion and Exhibits	No(s) 58-61
Replying Affidavit and Exhibits	No(s). N/A

Upon the foregoing papers, defendants Venture Leasing LLC and Jordan Nunez Tavarez move for summary judgment, dismissing the complaint of the plaintiff for his alleged failure to satisfy the “serious injury” threshold as defined by New York Insurance Law §5102(d). Plaintiff opposes and cross-moves for an order granting plaintiff summary judgment a) on the issue of liability against defendants b) on the issue of “serious injury” pursuant to Insurance Law §5102(d) and 3) granting plaintiff leave to file the Note of Issue.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on October 25, 2019, near the intersection of Bronx River Parkway and Story Avenue, Bronx, New York.

Defendants’ Motion and Plaintiff’s Cross-Motion for Summary Judgment on Threshold

Insurance Law §5102(d) defines the term “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.”

When a defendant seeks summary judgment alleging that plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Palmeri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

Permanent Consequential or Significant Limitation

In this case, Defendants established that Plaintiff's alleged injuries were not permanent or significant in nature. Defendants accomplished this by submitting a sworn report from orthopedic surgeon Dr. Louis McIntyre who found normal or near-normal ranges of motion in the allegedly injured body parts, and all diagnostic testing was either normal or negative. Dr. McIntyre opined within a reasonable degree of medical certainty that the plaintiff has no orthopedic disability permanency or residuals as to plaintiff's cervical, thoracic, and lumbar spine as well as her right and left shoulders, right arm and right hand (*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]).

In opposition to the motion and in support of her cross-motion, Plaintiff raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of allegedly injured body parts. She submits affirmed treatment records showing that she sustained a fracture in her cervical spine, a laceration to her forehead, and has had significant range-of-motion limitations in her injured body parts shortly after the accident and recently. In a narrative summary, Dr. Mark McMahon reports persisting limitations in the plaintiff's cervical, thoracic, and lumbar spine as well as her right and left shoulders causally related to the subject accident. The above submission is sufficient to raise fact issues as to whether Plaintiff sustained a "permanent consequential" or "significant" limitation of use of her cervical, thoracic, and lumbar spine as well as both shoulders as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]).

90/180 Claim

Defendants, however, established their entitlement to dismissal of Plaintiff's "90/180 day" injury claim. Plaintiff testified at her deposition that she was only confined to bed or to home for month after the accident, which is fatal to her "90/180 day" injury claim. (see *Williams v. Perez*, 92 A.D.3d 528 [1st Dept. 2012]). The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof, see *Sanchez v. Oxcin*, 157 A.D.3d 561, 69 N.Y.S.3d 623 (1st Dept. 2018).

Fracture

Plaintiff cross-moves for summary judgment on the issue of "serious injury," alleging plaintiff sustained a "fracture" within the meaning of the Insurance Law. Plaintiff established prima facie entitlement to summary judgment through the affirmation of Dr. McMahon. Dr. McMahon reported that plaintiff's CT scans from Jacobi Medical Center of plaintiff's cervical spine showed a cervical spine fracture of the right anterior transverse process of C4. A fracture constitutes a "serious injury" under Insurance Law § 5102(d) and here plaintiff has established that she sustained a fracture through the affirmation of Dr. McMahon (*Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489, 490, [1st Dept 2013]). Further, the role of the Court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tollman*, 278 A.D.2d 811 [4th Dept. 2000]). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). In the instant case plaintiff's submissions confirm the existence of plaintiff's cervical spine fracture as a result of the accident, and Insurance Law §5102(d) dictates that fractures constitute a "serious injury."

In opposition defendant failed to raise a triable issue of fact. In their opposition, defendants' experts failed to address the findings of Dr. McMahon relating to the plaintiff's cervical spine fracture. Therefore, defendants failed to establish a question of fact as to the existence of a fracture within the meaning of the Insurance Law. Accordingly, this branch of Plaintiff's motion is granted.

Significant Disfigurement

Plaintiff also cross-moves for summary judgment on the issue of "serious injury" alleging plaintiff

sustained a significant disfigurement from the subject accident. Plaintiffs failed to establish prima facie that Plaintiff's scar constitutes a significant disfigurement under Insurance Law § 5102(d) (see *Galindo v. Hodminson*, 190 A.D.3d 483 [1st Dept. 2021]; *Petty v. Dumont*, 77 A.D.3d 466[1st Dept. 2010]). Although the scar is in a prominent location on her forehead and is a little more than 5 centimeters long, it is well healed and not discolored or raised (see *Abdulai v. Roy*, 232 A.D.2d 229 [1st Dept. 1996]). Contrary to Plaintiff's contention, the length and the permanence of the scar are not dispositive as to whether the scar is a significant disfigurement. The photographs show a slightly depressed scar near the middle of Plaintiff's forehead that a reasonable person may or may not find objectionable. Such determination must be made by a factfinder at trial (see *Dumont*, 77 A.D.3d at 470).

Since the plaintiff failed to meet her prima facie burden, it is unnecessary to determine whether the papers submitted by the defendant in opposition were sufficient to raise a triable issue of fact (see *Johnson v. Salaj*, 130 A.D.3d 502, 503 [1st Dept 2015]; *Che Hong Kim v Kossoff*, 90 A.D.3d 969 [2d Dept 2012]).

Finally, there is no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

Plaintiff's Cross-Motion for Summary Judgment on the Issue of Liability

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In this case, the Plaintiff established a prima facie case of negligence on the part of defendant by annexing her affidavit and a certified copy of the police report which provide the facts necessary to trigger the prima-facie-case principle in this case. Plaintiff submits her affidavit and certified copy of the police report establishing a prima facie showing that she was a passenger within Defendant Jordan Nunez Tavarez's vehicle and that Defendant was solely responsible for the subject accident in colliding with the light pole. Thus, the burden shifts to defendant to raise a triable issue of fact.

In opposition, Defendants failed to submit any non-negligent explanation for the accident, submitting only an attorney's affirmation in opposition to summary judgment on liability. A mere "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance," and is thus incapable of raising a triable issue of fact (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

With respect to plaintiff's branch of the cross-motion asking this Court for leave to file the Note of Issue, the Court denies that branch of the cross-motion as, per the part rules, the parties have not stipulated as to the completion of discovery. If necessary, the parties are directed to request a virtual conference with the Court to resolve all outstanding discovery issues at BxSupCiv-IA14@nycourt.gov.

The Court finds the parties remaining arguments unavailing.

Accordingly, it is hereby

ORDERED, that the branch of defendant's motion for summary judgment on the issue of threshold is granted only to the extent of dismissing Plaintiff's claims that she sustained a "permanent loss of use" and "90/180 day" claim, and it is further

ORDERED, that the branch of plaintiff's cross-motion on the issue of "serious injury" under the fracture category pursuant to Insurance Law 5102(d) is granted, it is further

ORDERED, that the branch of plaintiff's cross-motion on the issue of "serious injury" under the significant disfigurement category pursuant to Insurance Law 5102(d) is denied, it is further

ORDERED that the branch of plaintiff's cross-motion on the issue of defendant's liability is granted, it is further

ORDERED, that the branch of plaintiff's cross-motion for leave to file the Note of Issue is denied, and it is further

ORDERED, that defendant's motion and plaintiff's cross-motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: January 4, 2023

Hon. 
BIANKA PEREZ, J.S.C.

1. CHECK
ONE.....

☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL
ACTIVE

2. MOTION
IS.....

☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐
OTHER

3. CHECK IF
APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE
APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT