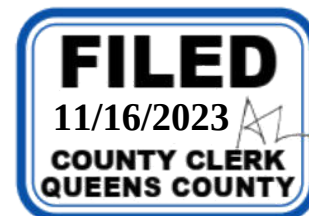


Sirgiovanni v Quartiere
2023 NY Slip Op 35300(U)
November 15, 2023
Supreme Court, Queens County
Docket Number: Index No. 721376/2019
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE KARINA E. ALOMAR
JUSTICE

IAS PART 23

-----X
LORI SIRGIOVANNI,

Plaintiff,

Index No.: 721376/2019
Motion Date: 11/09/2023
Motion Seq. No.: 2

-against-

VALERIE QUARTIERE,

Defendant.
-----X

The Following numbered papers 43 to 69 read on this motion by defendant Valerie Quartiere for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint in as much as plaintiff allegedly fails to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d)

PAPERS

NUMBERED

Notice of Motion, Affidavit, Exhibits.....	EF No: 43 – 53
Affirmation in Opposition, Affidavit, Exhibits.....	EF No:56 – 67
Affirmation in Reply, Exhibit.....	EF No: 68 – 69

Upon the foregoing papers, it is ordered that defendants' motion pursuant to CPLR §3212 for an order granting summary judgment in favor of movants is decided as follows:

Plaintiff commenced the instant action on December 23, 2019, to recover for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on March 24, 2019, at 158 Avenue at or near its intersection with 91 Street, Queens, New York. Plaintiff was the owner and operator of a certain 1995 BMW motor vehicle bearing New York State license plate number CCK8899. Defendant was the owner and operator of a certain 2012 Subaru motor vehicle bearing New Jersey State license plate number X67EYA. Defendant now moves for a threshold motion pursuant to CPLR §3212 dismissing plaintiff's complaint.

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 (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also 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" (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8,[1960]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

Pursuant to 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, or for basic economic loss. As provided in Insurance Law §5102(d), a serious injury means personal injury which results in, inter alia, “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.”

In support of their motion, defendant submits, inter alia, plaintiff's deposition transcript dated July 12, 2021, the independent medical examination conducted on June 30, 2022, and the MRI examination conducted by Dr. Scott S. Coyne.

With respect to plaintiff's deposition. Plaintiff testified that she was traveling on 158th Avenue with no obstruction of his view of the approaching intersection. She observed defendant's vehicle for the first time while already in the intersection when it was too late to avoid the accident. The front of defendant's vehicle hit the front quarter panel of plaintiff's vehicle. Plaintiff's vehicle was then pushed onto the eastbound lane. As a result of the impact, plaintiff's head hit the windshield and the rear-view mirror, her knees struck the dashboard, her right-hand ring fingernail was removed, and her right hand slammed against the gear changer. Plaintiff stated that she did not exit her vehicle until she was placed in an ambulance.

At the hospital, plaintiff complained about her head, cheek, right arm, hand, chest and knees. Plaintiff testified that she was informed by hospital staff that she did not sustain any fractures or broken bones, but also informed her that “there were some issues” and was given a neck brace. A week after the accident, plaintiff sought medical treatment at City Med as she was still experiencing pain in her back, neck, shoulders, hand, knees, and right arm. Plaintiff began physical therapy at City Med at an interval of three times a week up until about March of 2020 during the COVID-19 pandemic. Plaintiff further testified that within a month after the accident plaintiff also sought treatment with a Dr. Zenetos, pain management doctor, for the same complaints she made at City Med. Plaintiff had also sought treatment with other doctors up until the COVID-19 pandemic. However, after the shutdown had lifted, plaintiff did not return for physical therapy.

Plaintiff also stated that prior to the accident she suffered from Complex Regional Pain Syndrome (CRPS) which was exacerbated by the accident, and which began affecting the right side of her body. Plaintiff also testified that as a result of the accident she was confined to her home up until the covid shutdown but was not confined to her bed because “laying down [was] very uncomfortable.” At the time of the deposition, July 12, 2021, plaintiff also testified that as a result of the accident: she is still confined to her home and hardly ever leaves her home; she still experiences pain in her neck; she experiences pain in her right shoulder and arm a couple times a week; she experiences pain in her knees at least once a week; she is unable to sit for long period of times because of pain in her right hip. Plaintiff further stated that she finds it difficult to move around, cook, clean, sit down, and can no longer have a social life.

With respect to the MRI examination conducted by Dr. Scott S. Coyne. Dr. Coyne's examination state that all degenerative changes "of the cervical spine, thoracic spine and lumbosacral spine, bilateral shoulders, bilateral knees, and right hip are certainly chronic and very long-standing, and clearly preexisted and were not causally related to the accident approximately 1 to 2 months earlier on March 24, 2019." Dr. Coyne further states that the MRI studies show no "no evidence of any osseous or soft tissue abnormality or trauma causally related to the March 24, 2019, accident."

With respect to the independent medical examination conducted on June 30, 2022, by Dr. Saran S. Rosner. Dr. Rosner's evaluation provides the following:

"[T]he disc bulges/herniations, which were subsequently evidenced on her MRI imaging of her spinal column were small in size and resulted only in thecal sac impression without impingement of the neural elements at any spinal level. Moreover, the right upper and right lower extremity pain of which Ms. Sirgiovanni primarily complained after the accident was not clearly of a radicular type. Not only was there no findings of correlative nerve root compression radiologically, electrodiagnostic testing showed no evidence of radiculopathy or neuropathy in Ms. Sirgiovanni's more symptomatic right upper or lower extremity. Further, the minor disc abnormalities which were demonstrated on Ms. Sirgiovanni's MRI examinations of the cervical, thoracic, and lumbar spine were all of uncertain age, cause, and consequence. Ms. Sirgiovanni's spinal complaints which followed the accident of record were clinically consistent with a cervical sprain/strain type injury, which is generally self-limited and resolves over time. [In addition]...Ms. Sirgiovanni's right lower extremity does not objectively show signs of CPRS..."

Dr. Rosner further states in her evaluation that she could not find evidence of a spinal injury resulting from the subject accident and any injuries complained about are subjectively based and reflect multiple factors including CRPS, Lyme disease, fibromyalgia, and symptom magnification/embellishment. However, the examination took place outside of the scope of the first 180 days following the subject accident, and the doctor failed to address the claim, clearly set forth in the bill of particulars, that the plaintiff sustained a medically determined injury which prevented her from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see e.g. Mugno v Juran*, 81 AD3d 908, 908 [2d Dept 2011]; *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 654 [2d Dept 2009]). A physician's normal examination results, coupled with deposition testimony that plaintiff had no restriction in activity, can sometimes overcome this obstacle (*see Kouros v Mendez*, 41 AD3d 786, 788 [2d Dept 2007]).

Here, plaintiff testified, inter alia, that she is still confined to her home and hardly ever leaves her home. Plaintiff further testified that she still experiences pain in her neck, right shoulder, right arm, both knees, is unable to sit for long period of times because of pain in her right hip, her CPRS was exacerbated, and stated that she can no longer "go out" and have a social life as a result of the accident. As such, there is an issue of fact as to whether plaintiff suffered a serious injury as defined under Insurance Law §5102(d) that is better left to a jury to determine. In as much as the movant failed to meet their prima facie burden, it is unnecessary to examine the sufficiency of plaintiff's opposition papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Wallace v Adam Rental Transp. Inc.*, 68 AD3d 856, 857 [2d Dept 2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2d Dept 2009]).

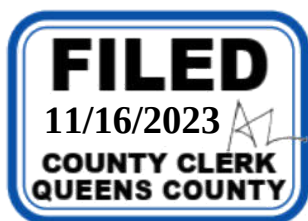
Accordingly, it is hereby

ORDERED that, defendants' motion pursuant to CPLR §3212 seeking summary judgment on the issue of damages is denied in its entirety, it is further

ORDERED that, defendants shall serve a copy of this order upon the plaintiff, together with notice of entry, within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: November 15, 2023




HON. KARINA E. ALOMAR, J.S.C.