Bhagwanani v Silva
2024 NY Slip Op 34796(U)
November 22, 2024
Supreme Court, Queens County
Docket Number: Index No. 711187/2020
Judge: Maurice E. Muir

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

YASHAAS DEEPAK BHAGWANANI and IAN MILLAR,

Plaintiffs,

-against-

LUIS AMADEO SILVA and LUIS B. SILVA,

Defendants.

IAS Part - 42

Index No.: 711187/2020

Motion Date: 5/30/24

Motion Cal. No. 7

Motion Seq. No. 3

The following electronically filed ("EF") documents read on this motion by Luis Amadeo Silva and Luis B. Silva (collectively, the "defendants") for an order: a) pursuant to CPLR § 3212, granting the moving defendants summary judgment as plaintiffs Yashaas Deepak Bhagwanani ("Mr. Bhagwanani") and Ian Millar ("Mr. Millar") (collectively, the "plaintiffs") have failed to breach the threshold requirement of Insurance Law section 5102(d); or b) pursuant to CPLR § 3212, dismissing any/all sub-portions of Insurance Law section 5102(d) which are not viable as a matter of law.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits-Service.....	EF 45 - 54
Affirmation in Opposition-Exhibit.....	EF 59 - 73
Reply Affirmation-Exhibit-Service.....	EF 74 - 76

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

This is an action to recover damages for personal injuries the plaintiffs allegedly sustained in a motor vehicle collision. According to the complaint, on July 2, 2019, Mr. Millar was occupant in a motor vehicle owned and operated by Mr. Bhagwanani, who was lawfully

stopped at a red light at Hempstead Turnpike at its intersection with Cunningham Avenue in Uniondale, New York, when they were struck in the rear by a motor vehicle operated by Mr. Amadeo and owned by Mr. Silva ("subject accident"). As a result, Mr. Bhagwanani sustained injuries, *inter alia*, to his right shoulder, left elbow, left wrist, cervical spine, thoracic spine, and lumbar spine; and on October 18, 2019, Mr. Bhagwanani underwent arthroscopy surgery to his right shoulder. Moreover, Mr. Millar sustained injuries to his right shoulder, left shoulder, cervical spine, thoracic spine, and lumbar spine as a result of the accident caused by the Defendants; and on September 23, 2020, Mr. Millar underwent arthroscopy surgery to his right shoulder. As a result, on July 24, 2020, the plaintiff commenced the instant action; and on October 5, 2020, issue was joined. Moreover, on July 14, 2023, this court granted the plaintiffs' motion for summary judgment on the issue of liability. Now, the defendants seek summary judgment on the ground that the plaintiff did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law.

It has long been established that the "legislative intent underlying th e 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]). Once 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 the defendants failed to meet their prima facie burden of showing that the plaintiffs 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 the plaintiffs' claim that they sustained a serious injuries – 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 defendants failed to meet their prima facie burden, it is unnecessary to determine whether the submission by the plaintiffs in opposition is 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]). Furthermore, the court finds that the parties adduce conflicting medical expert opinions; and such conflicting expert opinions has raised credibility issues, which can only be resolved by a jury. (*Cerrone v. North Shore-Long Island*, 197 AD3d 449 [2d Dept 2021]; *Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cummings v. Brooklyn Hosp. Ctr.*, 147 AD3d 902 [2d Dept 2017]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]).

Accordingly, it is hereby

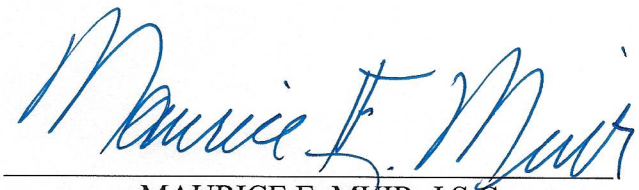
ORDERED that defendants' motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

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 all parties, via first class mail and NYSCEF, on or before December 5, 2024.

The foregoing constitutes the decision and order of the court.

Dated: November 22, 2024
Long Island City, NY



MAURICE E. MUIR, J.S.C.