SHORT FORM ORDER

INDEX No. 200286/2022
CAL. No. 202301951MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1/25/24; 5/2/24
SUBMIT DATE 1/25/24; 6/13/24
Mot. Seq. # 001 MG
Mot. Seq. # 003 MD

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CYNTHIA J. GRAF,

Plaintiff,

- against -

SCOTT M. PIETROWSKI.,

Defendant.

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Upon the following papers read on these e-filed motions to enforce and for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendant, dated December 21, 2023 and April 3, 2024 ; ~~Notice of Cross-Motion and supporting papers~~ ; Answering Affidavits and supporting papers By plaintiff, dated January 17, 2024 and June 5, 2024 ; Replying Affidavits and supporting papers by defendant, dated January 25, 2024 and June 10, 2024 ; ~~Other~~ ; it is

ORDERED that the motions by defendant are hereby consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant for an order enforcing an agreement to arbitrate this dispute and directing plaintiff to proceed to arbitration is granted; and it is further

ORDERED that the motion by defendant for summary judgment dismissing the complaint is denied.

Plaintiff Cynthia Graf commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on June 1, 2021, on the Long Island Expressway, approximately .25 miles west of Exit 58, in the Town of Islip. It is alleged that the accident

occurred when the vehicle owned and operated by defendant, Scott Pietrowski, struck the rear of plaintiff's vehicle while it was stopped in traffic. By her bill of particulars, plaintiff alleges that she sustained various injuries as a result of the subject accident, including disc herniations at levels C2 through T1, L2 through L5, and T8 through T10; disc bulges at level L1 through L4; supraspinatus tendon tendinosis/tendinopathy of the right shoulder; and a rotator cuff tear of the right shoulder.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Mark Zuckerman. At defendant's request, Dr. Zuckerman conducted an independent neurologic examination of plaintiff on August 14, 2023. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject collision. In opposition, plaintiff submits the affirmations of plaintiff's treating physicians, Dr. Matthew Kalter and Dr. Raj Tolat.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Van Nostrand v Froehlich***, 44 AD3d 54, 844 NYS2d 923 [2d Dept 2007]).

Insurance Law § 5102(d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). 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, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept

2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900; ***Irizarry v Lindo***, 110 AD3d 846, 973 NYS3d 846 [2 Dept 2013]). However, if a defendant does not establish a prima facie case, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Xin Fang Xia v Saft***, 177 Ad3d 823, 113 NYS3d 249 [2d Dept 2019]; ***Rosenblum v Schloss***, 175 AD3d 1339, 105 NYS3d 894 [2d Dept 2019]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant has failed to make a prima facie case that plaintiff's alleged injuries do not meet the serious injury threshold requirement of Section 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Hernandez v Pagan Corp.***,174 AD3d 513, 101 NYS3d637 [2d Dept 2019]). Defendant has failed to submit competence medical evidence demonstrating that plaintiff did not sustain a serious injury to her right shoulder under the limitations of use categories under Insurance Law § 5102(d) as a result of the subject accident, as Dr. Zuckerman, defendant's examining neurologist and the only doctor who physically examined plaintiff on behalf of defendant, failed to address plaintiff's allegations in her bill of particulars that she sustained injuries to her right shoulder, including a rotator cuff tear as a result of the subject collision (*see* ***Salcedo v MTA-New York City Tr.***, 217 AD3d 698, 190 NYS3d 157 [2d Dept 2023]; ***Pollet v Charyn***, 200 AD3d 728, 159 NYS3d 92 [2d Dept 2021]; ***Safer v Silbersweig***, 70 AD3d 921, 895 NYS2d 486 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment is denied.

Defendant also moves for an order, pursuant to CPLR 2104, enforcing the parties' written agreement, entered into during this litigation, to submit this dispute to arbitration. In particular, defendant asserts that plaintiff signed a high/low arbitration agreement on November 27, 2023, and that, following several email exchanges between the parties in an attempt to select an arbitrator, plaintiff's counsel impermissibly ended the agreement by informing the arbitration company that plaintiff would no longer continue with the arbitration. Defendant contends that the agreement is an enforceable settlement agreement under CPLR 2104, and, therefore, plaintiff cannot unilaterally refuse to proceed to arbitration. In support of the motion, defendant submits the signed arbitration agreement. Plaintiff opposes the motion, arguing that, as defendant failed to sign the arbitration agreement, and there is no agreement as to who will act as the arbitrator, there is no enforceable agreement compelling plaintiff to arbitrate the matter. In opposition to the motion, plaintiff submits the email exchanges between the arbitration company and plaintiff's counsel.

"Stipulations of settlement are judicially favored, will not lightly be set aside, and are to be enforced with rigor and without searching examination into their substance as long as they are clear, final and the product of mutual accord" (***Herz v Transamerica Life Ins. Co.***, 172 AD3d 1336, 1337, 99 NYS3d 664 [2d Dept 2019], quoting ***Bonnette v Lond Is. Coll. Hosp.***, 3 NY3d 281, 286, 785 NYS2d 738 [2004]; *see* ***Matter of Izzo v Salzarulo***, __ AD3d __; 2024 NY Slip Op 03751 [2d Dept 2024]), especially where the party seeking to vacate the stipulation was represented by counsel (*see* ***Rogers v***

Malik, 126 Ad3d 874, 5 NYS3d 525 [2d Dept 2015]). A "high/low" agreement, which assures a minimally acceptable recovery to a plaintiff while also protecting a defendant against a runaway verdict, is considered a conditional settlement (*see* ***Cunha v Shapiro***, 42 AD3d 95, 837 NYS2d 160 [2d Dept 2007]). Such agreements will only be set aside upon a showing of good cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident (*see* ***Espoito v Podolsky***, 104 AD3d 903, 963 NYS2d 664 [2d Dept 2013]; ***Bonnette v Lond Is. Coll. Hosp.***, 3 NY3d 281, 785 NYS2d 738). CPLR 2104 states, that "where, as here, an agreement is not made in open court, the agreement between the parties is binding upon a party if it is in writing subscribed either by the party or by his or her attorney" (*see* ***Martin v Harrington***, 139 AD3d 1017, 31 NYS3d 605 [2d Dept 2016]). For an agreement between the parties to be enforceable, the agreement must set forth all material terms, and there must be a clear mutual accord between the parties (*see* ***Vlastakis v Mannix Family Mkt. @ Veteran's Rd., LLC***, 220 AD3d 908, 198 NYS3d 376 [2d Dept 2023]; ***Forcelli v Gelco Corp.***, 109 AD3d 244, 972 NYS2d 570 [2d Dept 2013]; ***Diarassouba v Urban***, 71 AD3d 51, 892 NYS2d 410 [2d Dept 2009]).

Here, the parties agreed to arbitrate the issue of damages before an arbitrator, that the damages portion of the arbitration would be subject to high/low parameters of $100,000/$0, and the agreement was signed by plaintiff's counsel on November 27, 2003. As there has been no showing of fraud, collusion, mistake or accident, such an agreement is binding upon the party against whom the agreement is sought to be enforced (*see* CPLR 2104; ***Alessina v El Gauchito II, Corp.***, 220 AD3d 645, 198 NYS3d 94 [2d Dept 2023]; ***Herz v Transamerica Life Ins. Co.***, 172 AD3d 1336, 1337, 99 NYS3d 664; ***Esposito v Podolsky***, 104 AD3d 903, 963 NYS2d 664 [2d Dept 2013]; *cf.* ***Kataldo v Atlantic Chevrolet Cadillac***, 161 AD3d 1059, 78 NYS3d 194 [2d Dept 2018]). Contrary to plaintiff's argument, the parties did not condition their agreement on any further occurrence, such as whether defendant signed the agreement (*see* ***Guice v PPC Residential, LLC***, 212 AD3d 577, 182 NYS3d 94 [2d Dept 2023]; ***Trolman v Trolman, Glaser & Lichtman, P.C.***, 144 AD3d 617, 981 NYS2d 86 [1st Dept 2014]; *see also* ***Ospiova v Silverberg***, 200 AD3d 993, 160 NYS3d 313 [2d Dept 2021]). Nor was the agreement rendered ineffective because certain immaterial terms were left for continued negotiations, such as the name of the arbitrator (*see* ***Trolman v Trolman, Glaser & Lichtman, P.C.***, 144 AD3d at 618, 981 NYS2d 86). The arbitration company was chosen and the parties merely needed to establish which arbitrator would oversee the arbitration. Moreover, the record clearly shows that plaintiff's counsel, when he signed the agreement, was clothed with apparent authority as the agent for plaintiff (*see* ***Hallock v State of New York***, 64 NY2d 224, 485 NYS2d 510 [1984]; *cf.* ***Lisi v New York Ctr. for Rehabilitation & Nursing***, 225 AD3d 590, 206 NYS3d 688 [2d Dept 2024]). Accordingly, defendant's motion to enforce the arbitration agreement and compel plaintiff to proceed to arbitration is granted.

Dated: September 10, 2024

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION