

Jean-Pierre v Rodriguez
2024 NY Slip Op 35012(U)
March 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 706509/2021
Judge: Michele R. Titus
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

FILED
4/1/2024
COUNTY CLERK
QUEENS COUNTY

PRESENT: HONORABLE MICHELE R. TITUS, J.S.C. IAS Part 50

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ROSE JEAN-PIERRE,

Index No.: 706509/2021

Plaintiff,

Motion Seq. No.: 3

-against-

Motion Date: 1/17/2024

ANDRES RODRIGUEZ, VII and MARK L. JOSEPH,

DECISION/ORDER

Defendants.
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The e-filed papers bearing NYSCEF document numbers 17-40 were read on the motion made by the defendants, Andres Rodriguez, VII and Mark L. Joseph (the "Defendants"), for an Order: (1) vacating this Court's June 12, 2023 Order, which granted plaintiff's motion to strike defendants' Answers, without opposition; and (2) granting summary judgment and dismissing the complaint of plaintiff, Rose Jean-Pierre (the "Plaintiff"), pursuant to CPLR 3212, inasmuch as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d).

The Plaintiff commenced this cause seeking to recover monetary damages for personal injuries allegedly sustained in a motor vehicle accident (the "Accident"). The Accident, which occurred on June 24, 2017, at the location of 147th Avenue and 235th Street, Queens, New York, involved three vehicles. The Plaintiff was the passenger in the lead vehicle owned by non-party Maryse Eugene that was rear ended by the defendants' vehicle. The defendants now move for summary judgment dismissing the complaint on the grounds that plaintiff fails to meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law. Plaintiff did not submit any opposing papers.

The first branch of Defendants' motion to Vacate this Court's Order dated June 12, 2023, which granted Plaintiff's motion to strike Defendants' Answer, without opposition, is hereby granted.

Turning to the second branch of Defendants' motion, it is well settled that summary judgment should be granted when there is no doubt as to the absence of triable issues. (See, *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978]). As such, the function of the court on such a motion is issue finding and not issue determination. (See, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. (See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, *Zuckerman v. City of New York*, *supra*.

The defendants move for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the definition of Insurance Law 5102(d). The statute states, in pertinent part, that a "serious injury" is defined as:

A personal injury which results in... significant disfigurement;... permanent consequential limitation of use of a body organ or member; significant 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 issue of whether the injuries allegedly sustained by plaintiff fall within the definition of a "serious injury" in the first instance, must be decided by the court. (See, *Licari v. Elliot*, 57 N.Y.2d 230 [1982]). As such, inherent in the court's consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact regarding the injuries sustained by a plaintiff. It is now well-settled that in order for a defendant to establish that plaintiff failed to sustain a serious injury within the purview of the statute, defendant must "submit 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 [2d Dept 2000]). These affidavits or affirmations should be facially sufficient in that they contain original signatures of the affiant. Moreover, any medical reports submitted as evidentiary proof must be sworn. (See, *Grasso v. Angerami*, 79 N.Y.2d 813 [1991]; *Williams v. Hughes*, 256 AD2d 461 [2d Dept 1998]). Once defendant has proffered competent evidence that meets the sufficiency standard, the burden is shifted to the plaintiff to rebut the presumption that there is no issue of fact as to the threshold question. (See, *Echeverri v. Happe*, 256 AD2d 304 [2d Dept 1998]).

Turning to the case at bar, the summary judgment motion at issue presents a situation in which plaintiff elected not to oppose the motion. Plaintiff contends in her verified bill of particulars that she suffered a serious injury in that she sustained neck, back and left knee injuries which resulted in: (1) permanent loss of use of a body organ; (2) significant limitation of use of a body function or system; and (3) medically determined injury or impairment of a non-permanent nature which prevents the injured party 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 summary judgment motion and their assertion that plaintiff did not sustain a "serious injury," defendants submitted documentary evidence in the form of an affirmed medical report of Dr. Scott A. Springer, a radiologist, and the sworn medical reports of Dr. Thomas P. Nipper, an orthopedist. Dr. Springer, referencing an MRI of the plaintiff's lumbar spine taken on September 7, 2019, found mild degenerative changes with disc desiccation and disc bulges, L3-4, L4-5 and L5-S1 level. This MRI reveals no evidence of posttraumatic changes to the lumbar spine. Further, Dr. Springer, referencing an MRI of the plaintiff's right shoulder taken on August 8, 2019, found hypertrophic changes of the acromioclavicular joint, which are "degenerative findings typical of arthritis." Dr. Springer also observed tendinosis and a chronic partial tear of the supraspinatus tendon. This MRI reveals no evidence of posttraumatic changes to the right shoulder. Lastly, Dr. Springer, referencing an MRI of the plaintiff's left ankle taken on March 4, 2020, found a small distal interstitial tear and mild tendinosis of the Achilles tendon, as well as mild tendinosis of the distal posterior tibialis tendon. Dr. Springer found no evidence of posttraumatic changes to the left ankle.

Dr. Nipper, in his affirmed medical report dated October 22, 2021, based upon an examination of the plaintiff's right knee, shoulders, back, and neck, concluded that plaintiff "did not sustain any significant or permanent injury as a result of the motor vehicle accident." Dr. Nipper in his reports noted that plaintiff reported missing one month of work as a home health aide because of the accident. Dr. Nipper in his reports, states "there are no objective clinical findings indicative of a present disability, or functional impairment, which prevents the examinee from engaging in ADLs, including work, school, and hobbies."

By submitting the affidavits or affirmations of medical experts, who through objective medical testing conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden (See, *Fils-Aime v. Hossan*, 208 AD3d 559 [2d Dept 2022] *McCloud v. Reyes*, 82 AD3d 848 [2d Dept 2011]). If a defendant's evidence is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts, and it is then incumbent upon the plaintiff to produce prima facie evidence, in admissible form, to support the claim of "serious injury" (See, *Licari v. Elliott*, 57 NY2d 230, 235; *Lopez v. Senatore*, 65 N.Y.2d 1017 [1985]; *Barnes v. New York City Transit Auth.*, 154 AD3d 800 [2d Dept 2017]; *Master v. Boiakhtchion*, 122 AD3d 589 [2d Dept 2014]).

Here, the Court finds that the defendants have submitted evidence in admissible form to make a “prima facie showing of entitlement to judgment as a matter of law” that the Plaintiff did not sustain a serious injury Accordingly, the burden has shifted to the plaintiff to establish such an injury and to raise a triable issue of fact. (See, *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). This Court finds that she has failed to do so. Based on plaintiff’s failure to submit opposition to the motion, the court must grant, on default, the motion seeking an order awarding summary judgment dismissing the complaint. (See, *Kisiletskiy v. Pena*, 153 AD3d 800 [2d Dept 2017]).

For the reasons stated above, it is hereby:

ORDERED, that the branch of the motion to vacate this Court’s Order dated June 12, 2023, which granted Plaintiff’s motion to strike Defendants’ Answer, is hereby granted; and it is further,

ORDERED, that the branch of the defendants’ motion for summary judgment dismissing plaintiff’s complaint, is hereby granted.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
March 25, 2024



HON. MICHELE R. TITUS, J.S.C.

FILED

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