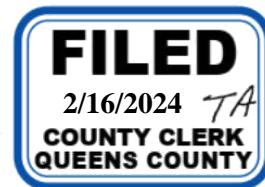


Charles v Kundlas
2024 NY Slip Op 35195(U)
February 15, 2024
Supreme Court, Queens County
Docket Number: Index No. 706167/2021
Judge: Anna Culley
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ANNA CULLEY IA Part 27
Justice



NATALIE CHARLES,
-----X

Index
Number 706167 /2021

Plaintiff,

Motion
Date April 18, 2023

-against-

GURPREET KUNDLAS and PARVINDER KAUR,
Defendants.
-----X

Mot Seq. No. 1

The following numbered papers read on this motion by defendants Gurpreet Kundlas and Parvinder Kaur pursuant to CPLR 3212 for summary judgment dismissing the complaint of plaintiff Natalie Charles on the ground that plaintiff Natalie Charles fails to meet the "serious injury" threshold requirement mandated by Insurance Law § 5102 (d).

Table with 2 columns: Paper Name, Papers Numbered. Includes Notice of Motion - Affidavits - Exhibits (EF 17-25), Answering Affidavits - Exhibits (EF 28-33), Reply Affidavits (EF 35).

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

This is an action to recover damages for personal injuries that plaintiff, Natalie Charles, allegedly sustained in a motor vehicle accident that occurred October 3, 2019, on the corner of 109th Avenue and Northbound Van Wyck Service Road, Queens County, New York. At the time of the accident, plaintiff was a pedestrian walking on 109th Avenue, attempting to cross Van Wyck Service Road and was struck by the vehicle operated by defendant Parvinder Kaur and owned by defendant Gurpreet Kundlas. In her bill of particulars, plaintiff alleges, among other things, injuries to her cervical and lumbar spine, right hip, left knee and left shoulder. She claims her injuries are permanent and progressive in nature. Additionally, plaintiff submits that she underwent left shoulder surgery for the injuries sustained in the accident. Plaintiff brought the instant action claiming she suffered a serious injury pursuant to Insurance Law § 5102 (d) as she alleges that she suffered a fracture, keloid scarring, significant limitation of use of a body function or system and/or a medically determined injury or impairment of a non-permanent nature which has prevented her performing

substantially all of the material acts which constitute her usual and customary daily activities for no less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment ("90-180 day claim").

Defendants now move for summary judgment, claiming that plaintiff has failed to meet the "serious injury" threshold of Insurance Law § 5104 (a), as defined in § 5102 (d). In support of their motion, defendants submitted, inter alia, the pleadings, plaintiff's bill of particulars, deposition testimony from plaintiff and affirmed IME report of Dr. Salvatore Corso ("Dr. Corso") and MRI review reports by Dr. Darren Fitzpatrick ("Dr. Fitzpatrick").

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In this motion by defendants, it is their burden to establish that plaintiff has not sustained a serious injury (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]; *Stead v Serrano*, 156 AD3d 836 [2d Dept 2017]; *Ellis v Vazquez*, 155 AD3d 694 [2d Dept 2017]).

In support of their motion, defendants submit the report by Dr. Corso, an orthopedist, who examined plaintiff on November 30, 2022. In his affirmed report, Dr. Corso reported plaintiff complained of low back pain and pain in her neck. He performed objective testing including range of motion testing measured with a goniometer. Upon physical examination, he found plaintiff exhibited full range of motion in her cervical spine, lumbar spine, left shoulder, right hip and left knee and all other objective tests were negative. Dr. Corso also found plaintiff demonstrated strength of 5/5 in all areas tested. Dr. Corso did report, however, that he observed partial scarring on the plaintiff's left shoulder. After examining plaintiff and making his findings solely on the verified bill of particulars and police report, he concluded that there was no significant and permanent injury as a result of the accident, there was no finding of present disability or functional impairment which would prevent plaintiff from engaging in plaintiff's activities of daily life, including work, school or hobbies and that all injuries have been resolved. However, Dr. Corso made no finding with regard to plaintiff's 90-180 day claim and did not relate any finding to the requisite time period for the 90/180 day claim.

Defendants also submitted the MRI review report of Dr. Fitzpatrick. Dr. Fitzpatrick, a radiologist, performed an independent radiology evaluation on November 30, 2022. He reviewed the MRI of plaintiff's lumbar spine, conducted on October 19, 2019, and concluded it to be normal with no traumatic injury. Dr. Fitzpatrick also reviewed both MRI exams conducted on plaintiff on October 23, 2019, for the cervical spine and the right hip. He concluded that the MRI of the cervical spine revealed no traumatic injury; that there was no traumatic injury to the right hip; and that the right hip MRI was normal. Lastly, Dr. Fitzpatrick reviewed the MRI taken on October 24, 2019, for plaintiff's left shoulder and concluded there was no traumatic injury. It is noted that Dr. Fitzpatrick did not relate any of his findings to the 90-180 day claim made by plaintiff.

By submitting the affidavits and affirmations of medical experts, who through objective medical testing conclude the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d), a defendant may 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]; *Margarin v Krop*, 24 AD3d 733 [2005]). However, on these facts, defendants have failed to present prima facie evidence of entitlement to summary judgment that establishes plaintiff has not suffered a serious injury. The papers submitted by the defendants fail to eliminate triable issues of fact regarding plaintiff's claim, set forth in the bill of particulars, that she sustained a serious injury under the 90/180-day category of Insurance law § 5102(d) (*see Singleton v F&R Royal Inc.*, 166 AD3d 837, 838 [2d Dept 2018] citing *Che Hong Kim v Kossoff*, 90 AD3d 969 [2011]; *Rouach v Betts*, 71 AD3d 977 [2010]).

Plaintiff alleges in her bill of particulars that she had been confined to her bed from October 3, 2019, to October 10, 2019, and intermittently thereafter. Plaintiff also alleged she had been confined to her home from October 3, 2019, to August 17, 2020, and intermittently thereafter. Plaintiff also testified in her deposition that she missed between two to three months of work, that her job granted her an accommodation to be able to work from home and that she continues to work from home. Plaintiff further testified that she has been curtailed from performing the following activities of daily life; laundry and cleaning; being able to sit for more than 20-30 minutes; difficulty cooking; washing her hair; showering; sleeping on left side and reaching for items. Where, as here, plaintiff clearly sets forth a 90-180 day claim in her bill of particulars and testimony, defendants' doctors must then address the claim and relate their findings to this category of serious injury (*see Rosenblum v Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Gentry v Mean*, 166 AD3d 583 [2018]; *Reynolds v Wai Sang Leung*, 78 AD3d 919 [2010]). Neither of the reports submitted by defendants' doctors make any findings as to whether plaintiff was curtailed in her activities for the requisite period of time, and these reports fail to relate any findings to plaintiff's 90-180 day claim. As such, defendants have failed to eliminate issues of fact as to whether plaintiff sustained a serious injury under the 90-180 day category of Insurance Law § 5102 (d).

Inasmuch as defendants fail to meet their burden with respect to the 90-180 day category of serious injury, the motion is properly denied with respect to the remaining statutory categories (*Linton v Nawaz*, 14 NY3d 821 [2010]; *Lewis v John*, 81 AD3d 904 [2d Dept 2011]).

Where the defendants have failed to meet their prima facie burden, the court need not determine whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Reynolds v Wai Sang Leung*, 78 AD3d 920 at 920).

Accordingly, the motion by defendants for summary judgment is denied.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by

mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.



ANNA CULLEY, J.S.C.

Dated: February 15, 2024

