

Buggs v Goeren
2024 NY Slip Op 35285(U)
March 4, 2024
Supreme Court, Nassau County
Docket Number: Index No. 612234/2021
Judge: Thomas Rademaker
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 12 NASSAU COUNTY

PRESENT:

Honorable Thomas Rademaker
 Justice of the Supreme Court

X

DENISE BUGGS,

Index No. 612234/2021

Motion Seq. No.: 001

Motion Submitted: 3/4/2024

Plaintiff,

DECISION AND ORDER

-against-

KATHLEEN A. GOEREN and WILLIAM
 GOEREN,

Defendant.

X

The following papers read on this motion:

Notice of Motion.....X
 Notice of Cross Motion.....X
 Affirmation in Opposition/Reply.....X

Defendants move this Court for an Order, pursuant to CPLR §3212, awarding him summary judgment on the grounds that Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The Plaintiff opposes the Defendants' motion for summary judgment.

This action arises from a motor vehicle accident which occurred on August 2, 2020, at the entrance to the parking lot of Stop & Shop supermarket located at 4055 Merrick Road, Seaford, New York.

An action was commenced by the Plaintiff through the filing of a Summons and Complaint with the Court on September 24, 2021, and issue was joined when the Defendants filed her Answer with the Court on October 22, 2021. The case was certified ready for trial on July 6, 2023, and the Court's Certification Order provides that the parties have sixty days from the filing of the Note of Issue to move for summary judgment.

A Note of Issue was filed with the Court on July 6, 2023, and the Defendant filed her summary judgment motion on September 1, 2023. The Defendant's summary judgment motion was filed within sixty days of the filing of the Note of Issue and is timely.

With respect to motions for judgment, the moving party bears the burden of making a *prima facie* showing that he is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center*, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d 557, *supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

In support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (CPLR 2106; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]). When a defendant's motion 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, in opposition to defendant's motion, to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Licari v. Elliot, supra*).

In order to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unsworn reports of plaintiff's health care providers are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*Reid v. Wu*, 2003 WL 21087012 [Sup. Ct. Bronx 2003] citing *O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept. 1998]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective medical proof of a plaintiff's injury (*Toure v. Avis Rent A Car Systems, supra*). However, even where there is ample objective proof of a plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, 4 NY3d 566 [2005], that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of

causation between the accident and the claimed injury (*Id.*). As a result, to establish a claim for "serious injury" plaintiff must offer contemporaneous findings with the accident (*Perl v. Meher*, 18 NY3d 208 [2011]) as well as recent findings based upon medical examinations.

To meet the threshold of the "significant limitation of use of a body function or system" or "permanent consequential limitation of use of a body organ or member" categories of the serious injury statute, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot, supra; Gaddy v. Eyler*, 79 NY2d 955 [1992]). That is, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]), as is an expert's qualitative assessment of a plaintiff's condition provided that the latter evaluation has an objective basis, and compares the plaintiff's limitations to the normal function, purpose and use of the affected "body organ, member, function or system" (*Id.*). Ultimately however, a minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot, supra; Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

Defendant's Orthopedic consultant reports that the Plaintiff has sustained "no objective signs of any ongoing disability related to the accident of August 2, 2020, and attributed any "ongoing symptoms" to the Plaintiff's spinal region to be "most likely" attributable to prior back injuries and pre-existing conditions.

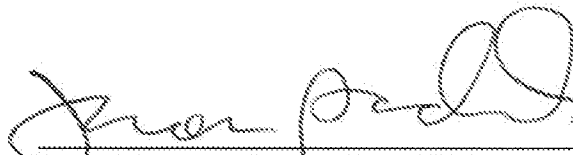
In contrast, the Plaintiff's treating providers determined that the accidental injury exacerbated the Plaintiff's underlying conditions necessitating the Plaintiff's hip replacement surgery, and that the Plaintiff sustained significant loss of range of motion to her cervical and lumbar spine which

were attributable to the accidental loss. Further, the Plaintiff contends that the Defendant failed to come forward with any evidence contradicting the Plaintiff's claim that she was disabled from her work as a rideshare driver for ninety days during the 180 days immediately following her accident.

The significant disputes between the Plaintiff's treating providers and the Defendant's medical consultants regarding the Plaintiff's medical conditions and the permanency or significance of alleged injuries are not amenable to resolution through motion practice, and the Court is presented with questions of fact which cannot be resolved as matters of law.

Accordingly, the Defendant's motion for summary judgment is **DENIED**.

Dated: March 4, 2024
Mineola, N.Y.



Hon. Thomas Rademaker, J.S.C.

ENTERED

Mar 07 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE