

Mojica v Michael E. Garron, P.C.
2024 NY Slip Op 35328(U)
March 19, 2024
Supreme Court, Bronx County
Docket Number: Index No. 304487/2015E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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CAROL MOJICA,

Index No. 304487/2015E

Plaintiff,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

MICHAEL E. GARRON, P.C., AS TEMPORARY
ADMINISTRATOR OF THE ESTATE OF JUAN
SANTANA, DECEASED,

Defendants.

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The following papers were read on these motions (Seq No. 4 & 5) for **SUMMARY JUDGMENT** submitted on November 21, 2023.

Notice of Motion #4 – Affirmation and Exhibits	NYSCEF Doc. # 53-58
Affirmation in Opposition to Motion and Cross-Motion	NYSCEF Doc. # 78-107
Affirmation in Reply	NYSCEF Doc. # 111
Notice of Motion #5 – Affirmation and Exhibits	NYSCEF Doc. # 59-70
Affirmation in Opposition to Motion	NYSCEF Doc. # 71-74
Affirmation in Reply	NYSCEF Doc. # 108

Upon the foregoing papers, defendant moves, under motion sequence #4, for an Order, pursuant to CPLR 3212, for summary judgment on the basis that Plaintiff’s injuries failed to satisfy the “serious injury” threshold as defined by New York Insurance Law 5102(d). Plaintiff opposes.

Plaintiff moves, under motion sequence #5, for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing defendant’s affirmative defenses with respect to plaintiff’s culpable conduct. Defendant opposes.

LIABILITY

Plaintiffs’ Complaint seeks damages for alleged personal injuries arising out of a motor vehicle accident that occurred on October 30, 2012, on Webster Avenue between East 167th Street and 168th Street, Bronx County, New York. Plaintiff now seeks summary judgment against defendant as her vehicle was in the right lane of traffic, with parked cars to her right, defendant’s vehicle struck the right front passenger side of plaintiff’s vehicle.

Summary judgment is the procedural equivalent of a trial. (*Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1[1st Dept. 2011].) It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders Inc., v. Ceppos*, 46 NY2d 223[1978].) The proponent of a motion

for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case. (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985].) Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad*, supra at 853.

Generally, negligence cases do not lend themselves to resolution by a motion for summary judgment unless the facts clearly demonstrate the negligence of one party without any culpable conduct by the other. (*Barnes v. Lee*, 158 AD2d 414, [1st Dept. 1990].) Furthermore, when issue of credibility is presented by conflicting testimony, a motion for summary judgment should not be granted (*Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, 202 AD2d 191 [1st Dept. 1994]), or where there is any doubt as to the existence of a material and triable issue of fact, summary judgment should not be granted (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]).

In support of her motion, plaintiff attaches a copy of the pleadings, plaintiff's own affidavit, an uncertified police report,¹ and plaintiff's deposition transcript. In her deposition, plaintiff states that there were two lanes of moving traffic and she was traveling in the right lane closest to the parking lane (NYSCEF Doc. #66, Exh. D). She states that she was driving at a speed of about 20 miles per hour, when she felt the impact of defendant's vehicle colliding with her own, pushing plaintiff's vehicle to the left (NYSCEF Doc. #79, Exh. H, Pg. 65-71). When asked where defendant's car came from, plaintiff states, "I would think the right, the parked car." *Id.* at 67). Through her submissions, plaintiff provides the facts necessary to trigger a prima-facie-case principle in this case and the burden shifts to defendant to raise a triable issue of fact.

In opposition, defendant failed to raise a triable issue of fact, as Vehicle and Traffic Law § 1162 clearly states that "[n]o person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety" (see Vehicle and Traffic Law § 1162). Here, defendant submits defendant driver Juan Santana (hereinafter "Santana")'s MV-104 form and an uncertified police report. As both the MV-104 form and the uncertified police report are unsworn and uncertified, they are inadmissible (see *Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]; *Raposo v Robinson*, 106 AD3d 593 [1st Dept 2013]). The Court of Appeals has long held "that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form," (*Zuckerman v. City of New York*, 427 N.Y.S.2d 595, 597 [1980]). "Whether the excuse offered will be acceptable must depend on the circumstances in the particular case," (*Friends of Animals, Inc. V. Associated Fur Mfrs., Inc.*, 416 N.Y.S.2d 790, 792 [1979]).

However, even if the Court were to reach the conclusion that the death of defendant driver Santana amounted to an acceptable excuse, defendant fails to raise a triable issue of fact in his submissions. The uncertified

¹ The uncertified police report was not considered as it was not certified, and thus inadmissible (see *Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]; *Raposo v Robinson*, 106 AD3d 593 [1st Dept 2013]).

police report submitted by defendant includes an admission against interest by defendant driver Santana, as the report states, “[A]s [defendant Santana] pulled out he didn’t see [plaintiff] and struck her,” (NYSCEF Doc. #73, Exh. A) (see *Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; *Liburd v Lulgjuraj*, 156 AD3d 532 [1st Dept 2017]). Further, defendant driver Santana’s MV-104 states that he “stopped to drop off a passenger and proceeded to look through his front rear view mirror and didn’t view any oncoming traffic,” (NYSCEF Doc. #74, Exh. B). Here, defendant failed to ascertain whether it was safe to move his vehicle from its parked position into a lane of moving traffic, and as such, movant is entitled to summary judgment on the issue of liability. Accordingly, plaintiff’s motion for summary judgment on the issue of liability is granted.

Plaintiffs’ submission also establishes *prima facie* entitlement to dismissal of defendant’s affirmative defense alleging culpable conduct on the part of the plaintiff. As defendant failed to raise a triable issue of fact, plaintiffs’ branch of the motion seeking dismissal of Defendant’s affirmative defense alleging culpable conduct on the part of the Plaintiff is granted.

SERIOUS INJURY THRESHOLD

When a defendant seeks summary judgment alleging that plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Palmeri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, defendant established that plaintiff’s alleged injuries were not permanent or significant in nature. Defendant accomplished this by submitting an affirmed report from orthopedic surgeon Dr. Joseph Y. Margulies, M.D., PhD., who found normal or near-normal ranges of motion in the allegedly injured body parts, and all diagnostic testing was either normal or negative. Dr. Margulies opined that plaintiff’s examination “revealed no functional disability at the present time,” that “there is no medical necessity for further treatment,” and that plaintiff “may continue with activities of daily living, as well as present employment.” (NYSCEF Doc. #57, Exh. B) (see *Long v. Taida Orchids, Inc.*, 117 A.D.3d 624 [1st Dept. 2014]).

In opposition to the motion, plaintiff raised a triable issue of fact as to whether she sustained a “permanent consequential” or “significant” limitation of use of her cervical spine, lumbar spine, right shoulder, left hip, and left ankle. Plaintiff attached the IME report of the initial examination conducted by defendant’s expert, Dr. Joseph

Y. Margulies, M.D., conducted three months after the subject accident. Dr. Margulies found limitations in Plaintiff's cervical and lumbar spine, right shoulder and left ankle. Plaintiff also submits Dr. Gautam Kaushik Khakhar, M.D.'s affirmed report from a recent examination which details findings of persisting significant limitations of her cervical and lumbar spine, her right shoulder, left hip, and her left ankle. Dr. Khakhar concludes, with a reasonable degree of medical certainty, that plaintiff's injuries are causally related to the accident. Dr. Khakhar opines that plaintiff "has sustained permanent injuries with a reasonable degree of medical certainty," and that "[t]he prognosis for a full and complete recovery remains poor," (NYSCEF Doc. #83, Exh. B). The above submissions are sufficient to raise fact issues as to whether plaintiff sustained a "permanent consequential" or "significant" limitation of use of his lumbar spine and cervical spine as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]).

As to defendant's branch of the motion, which argues that the proof rules out a "serious injury" based on the 90/180-day claim, the Court finds that defendant established his entitlement to summary judgment by annexing plaintiff's deposition transcript where she states that she returned to work the week after the accident, which is fatal to her "90/180 day" injury claim (NYSCEF Doc. #56, Exh. A, Pg. 50) (see *Williams v. Perez*, 92 A.D.3d 528 [1st Dept. 2012]). The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof (see *Sanchez v. Oxcin*, 157 A.D.3d 561, 69 N.Y.S.3d 623 [1st Dept. 2018]). Additionally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

The Court accordingly finds that there remain issues of fact as to whether plaintiff sustained a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of the Insurance Law § 5102(d) as to her left ankle, cervical and lumbar spine, and right knee. Since plaintiff has established a serious injury to one or more body parts, she may recover for all injuries causally related to the accident (see, e.g., *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

Accordingly, it is hereby

ORDERED, the plaintiff's motion, sequence #5, for summary judgment on the issue of liability is granted, it is further,

ORDERED, that defendant's affirmative defense as to culpable conduct on the part of the plaintiff is dismissed, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment against defendant and in favor of plaintiff on the issue of liability and dismissing defendant's affirmative defense of culpable conduct as against plaintiff, and it is further

ORDERED, that defendant’s motion for summary judgment, under sequence #4, is granted only to the extent of dismissing Plaintiff’s claims as to the “permanent loss of use” claim and “90/180” claim, and it is further,

ORDERED, that defendant’s motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: March 19, 2024



Hon. _____
BIANKA PEREZ, J.S.C.

1. CHECK ONE.....

☐ CASE DISPOSED IN ITS ENTIRETY

☒ CASE STILL ACTIVE
2. MOTION.....

GRANTED

☐ DENIED

GRANTED IN PART

☐ OTHER
3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT

☐ REFEREE APPOINTMENT