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| <b>Sitarski v Simmons</b>                                                                                                                                                                                                      |
| 2024 NY Slip Op 35396(U)                                                                                                                                                                                                       |
| August 20, 2024                                                                                                                                                                                                                |
| Supreme Court, Erie County                                                                                                                                                                                                     |
| Docket Number: Index No. 802914/2021                                                                                                                                                                                           |
| Judge: Michael A. Siragusa                                                                                                                                                                                                     |
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At a term of the Supreme Court, Part 29, held in and for the County of Erie, State of New York at 50 Delaware Avenue, Buffalo, on the 20th day of August 2024.

**PRESENT: HON. MICHAEL A. SIRAGUSA, A.J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE

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CARRIE SITARSKI,

Plaintiff,

**DECISION AND ORDER**

-vs-

**INDEX NO. 802914/2021**

DEVIN SIMMONS,

Defendant.

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PRELIMINARY STATEMENT

The defendant, Devin Simmons (hereinafter “defendant”), brings this instant motion for summary judgment seeking dismissal of plaintiff Carrie Sitarski’s (hereinafter “plaintiff”) claims on the basis that plaintiff has not sustained a serious injury as defined under New York State Insurance Law §5102(d), as a result of the motor vehicle accident that occurred on December 6, 2017. *See NYSCEF Doc. Nos. 6-23*. Plaintiff’s attorney, J. Michael Hayes, Esq., filed an affirmation in opposition to defendant’s motion for summary judgment, with attached exhibits, and a memorandum of law. *See NYSCEF Doc. Nos. 24-44*. Defendant’s attorney Thomas A. Digati, Esq., submitted an affirmation in reply to plaintiff’s opposition and in support of defendant’s motion for summary judgment. *See NYSCEF Doc. No. 45*.

In deciding this motion, the court has reviewed and considered *NYSCEF Doc. Nos. 6-45*. Counsel for the parties agreed to submission of the motion on papers only. The motion having regularly come on to be heard, this court hereby issues the following Decision and Order.

LEGAL ARGUMENT

Defendant argues that plaintiff is unable to sustain her burden of demonstrating that she suffered a serious injury as defined in §5102(d) of the New York State Insurance Law. Further, defendant argues that he can demonstrate through objective medical evidence that plaintiff has not suffered from qualifying serious injuries. *See NYSCEF Doc. No. 22*.

Plaintiff claims that as a result the accident she sustained the following injuries: Cervical and lumbar strain/sprain; C2-3 herniation; C3-4 herniation; anterolisthesis of T1 on T2. C4 on

C5, and C3 on C4; end plate spur formation at C3-4 and C4-5; left wrist strain/sprain; spondylolisthesis; headaches; muscle aches and spasms; large right effusion with synovial cyst of the anterior aspects of the joint at C3-4 which required that the synovial cyst be aspirated and drained; C3-4 herniation and facet fusions and arthropathy including the synovial cyst resulting in bilateral foraminal and lateral recess stenosis; a disc herniation at C4-5 with stenosis; disc herniation at C5-6 and C6-7; disc bulge at C7-T1 and effusions at the C1-2 level with facet arthropathy at the C3-4, C4-5 and C7-T1 levels. *See NYSCEF Doc. Nos. 10, 11 & 12.*

Plaintiff claims in her Verified Bill of Particulars that she qualifies under the following serious injury threshold categories: (1) fracture; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and/or (4) a medically determined injury or impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary activities for not less than ninety (90) days during the one-hundred eighty (180) days following the subject accident. *See NYSCEF Doc. Nos. 10-12.*

Despite these claims by plaintiff, defendant contends that based on plaintiff's medical records, deposition testimony and independent medical examination performed by Dr. Daniel L. Carr, she did not sustain a serious injury under any of the statutory categories as a result of the subject accident. *See NYSCEF Doc. No. 22.*

### SERIOUS INJURY

Under New York State Insurance Law §5102(d), plaintiff must prove that she sustained a qualifying serious injury. The proponent of a motion for summary judgment must tender evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 N.Y.2d 851 [1985]. In the present action, the burden rests on defendant to establish, by submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. *Lamar v. Anastasi*, 188 A.D.3d 1637 [4<sup>th</sup> Dept. 2020]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Frank v. Price Chopper*, 275 A.D.2d 940 [4<sup>th</sup> Dept. 2000]; citing *Matter of Redemption Church of Christ v. Williams*, 84 A.D.2d 648, 649 [3<sup>rd</sup> Dept. 1981]; see also *Greenberg v. Manlon Realty*, 43 A.D.2d 968, 969 [2<sup>nd</sup> Dept. 1974]. Once the defendant has met this burden, the burden shifts to the plaintiff to raise a triable issue of fact by submitting competent and admissible medical evidence based on objective medical findings and diagnostic tests supporting a claim of serious injury. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y. 2d 345 [2002]; *Gaddy v. Eyler*, 79 N.Y. 2d 955 [1992]; *Licari, supra*; *Lopez v. Senatore*, 65 N.Y.2d 1017 [1985].

### DECISION

This court concludes that based upon the submissions of Dr. Daniel L. Carr's IME report, plaintiff's medical records, and plaintiff's deposition testimony, defendant has sustained his initial burden under all the serious injury categories that plaintiff did not sustain serious injuries as a result of the subject motor vehicle accident that occurred on December 6, 2017. *See Woodward v. Ciamaricone*, 175 A.D. 3d 942, 943 [4<sup>th</sup> Dept. 2019]; *Alvarez v. Prospect Hospital*,



68 N.Y. 2d 320, 324 [1986]. The defendant asserts that there is no record evidence to substantiate any of plaintiff's claims.

#### Fracture

The defendant asserts that the record is devoid of objective medical proof demonstrating that plaintiff sustained a fracture. Neither in plaintiff's bill of particulars, nor in her supplemental bill of particulars, does she enumerate any fracture sustained as a result of this accident. See *NYSCEF Doc. Nos. 10 & 11*. The only reference of a fracture contained within plaintiff's records is from Buffalo Rheumatology and Medicine, PLLC, dated May 17, 2021, that notes plaintiff has sustained a right wrist fracture, a foot fracture and soft tissue injuries playing sports. See *NYSCEF Doc. No. 22*.

#### Permanent consequential limitation or significant limitation

Relative to plaintiff's claim that her injuries qualify under permanent consequential limitation, the limitation must be important or significant, as well as permanent. See *Wiegand v. Schunk*, 294 A.D. 2d 839 [4<sup>th</sup> Dept. 2002]. The significant limitation of use of a body function or system does not require permanency. See *Oberly v. Bangs Ambulance Inc.*, 96 N.Y. 2d 839 [4<sup>th</sup> Dept. 2002]. However, both categories require that plaintiff show more than minor, mild, or slight of use. See *Licari v. Elliot*, 57 N.Y.2d 230, 236 [1982]. Plaintiff must also provide objective proof of either qualitative or quantitative limitations that her injuries satisfied the significant limitation category of the serious injury threshold. See *Toure v. Avis Rent A Car Sys.*, 98 N.Y. 2d 345, 350 [2002].

Based on the record and on Dr. Carr's IME report, defendant contends that plaintiff has failed to offer objective medical evidence demonstrating that she sustained legally significant limitations as a result of the subject motor vehicle accident. The record reflects that plaintiff only established that she suffered minor sprains and strains. See *NYSCEF Doc. Nos. 7, 15 & 22*. Specifically, Dr. Carr concluded within a reasonable degree of medical certainty, that there is no objective evidence of any injury, and that plaintiff's subjective complaints did not correlate with objective findings. Further, he opined that plaintiff's cervical motion was unimpeded by her injuries, and her cervical motion measured within normal limits in all directions. See *NYSCEF Doc. No. 7*.

#### 90 out of 180-day category

Regarding the 90 out of 180-day category, "a plaintiff must present objective evidence of a medically determined injury or impairment of a non-permanent nature." See *Toure*, 98 N.Y.2d at 357. Defendant claims that plaintiff's deposition testimony alone will not suffice to meet this burden. "A plaintiff's assertion that she was unable to return to work and perform her usual and customary activities after the accident, without objective evidence substantiating the existence of a medically-determined injury which caused the limitation of her activities, is insufficient to create a triable issue of fact as to her inability to perform substantially all her daily activities for not less than 90 of the first 180 days subsequent to the accident." See *Saint-Aime v. Ho*, 274 A.D.2d 569, 570 [2<sup>nd</sup> Dept. 2000].

Defendant contends that in this case, the record is devoid of competent objective evidence demonstrating that the plaintiff suffered from a medically determined injury caused by the December 6, 2017, accident, which greatly curtailed her normal daily activities for not less than 90 out of the first 180 days thereafter. Defendant further asserts that plaintiff's medical records show that plaintiff treated very briefly following the accident, attending two follow up appointments with her primary on December 7, 2017, and on December 18, 2017. Defendant further contends that plaintiff, at her first visit, advised her primary doctor that she wished to return to work full duty as a City of Buffalo Police Officer. At her December 18, 2017 visit, plaintiff reported to her doctor that her neck pain resolved and she was released to return to work full duty. *See NYSCEF Doc. No. 22.*

In sum, defendant argues that although plaintiff offered testimony regarding changes in her physical capabilities, the record does not support plaintiff's subjective complaints with objective medical evidence. Based on the above contentions, defendant concludes that his motion for summary judgment should be granted in its entirety.

As defendant has met his burden, the burden now shifts to the plaintiff to come forward with proof in admissible form to raise triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]. The court finds that plaintiff has sustained her burden of raising triable issues of fact regarding the seriousness of her claimed injuries and as to causation. Plaintiff raised those facts by submitting objective medical evidence, along with her deposition testimony. *See NYSCEF Doc. Nos. 30 & 33.*

The Court of Appeals has held that whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *See Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 353 [2002]; *Dufel v. Green*, 84 N.Y. 2d 795 [1995].

In this case, plaintiff submitted the expert affirmation of Ryan P. DenHaese, a board-certified neurosurgeon. He opined after reviewing the cervical MRI imaging reports and independently reviewing the MRI imaging studies, that the December 6, 2017, motor vehicle collision was a competent producing cause of plaintiff's disc herniations at C3-4 and C6-7. Dr. DenHaese further opined that these herniations and the resultant physical manifestations of pain and restrictions are permanent and progressive injuries, which will impact her for the rest of her life and may ultimately require surgical intervention in the form of an anterior cervical discectomy and fusion or cervical disc replacement. *See NYSCEF Doc. No. 30.* Dr. DenHaese additionally found restrictions in the form of plaintiff's significantly reduced cervical range of motion. He opined that plaintiff's herniations and spinal injuries have affected her ability to freely and fully move her cervical spine, necessarily affecting all aspects of her life. Dr. DenHaese outlined objective medical evidence, muscle spasms, and imaging that correlate to plaintiff's affidavit and deposition testimony regarding her restricted ability to participate in her usual and customary daily activities, all of which clinically relate to his diagnosis. *Id. at ¶¶ 5, 10, 14, 18, 24 & 33.*

Plaintiff testified at her deposition that because of the neck pain from the date of the subject motor vehicle accident on December 6, 2017, until November 2022, she experienced significant difficulty and increased pain wearing her 15-pound bulletproof vest. She further testified that for more than a year following the accident, she was unable to play softball or demonstrate jumps, stunts, squats, or drills in her coaching position as a cheerleader. *See NYSCEF Doc. No. 33.*

The court also notes that it is well established that conflicting expert opinions may not be resolved on a motion for summary judgment. *See Fonseca v. Cronk*, 104 A.D. 3d 1154, 1155 [4<sup>th</sup> Dept. 2013].

Accordingly, based upon the medical records provided by plaintiff, the expert affirmation of Dr. DenHaese, along with plaintiff's deposition testimony, she has raised triable issues of fact as to whether she sustained serious cervical injuries as a result of this subject accident under the permanent consequential limitation of use, significant limitation of use, and the 90/180 categories, as defined by New York State Insurance Law §5102(d).

Accordingly, it is hereby ORDERED and DECREED that defendant's motion for summary judgment on the issue of serious injury is DENIED.

SO ORDERED.

Dated: August 20, 2024

  
HON. MICHAEL A. SIRAGUSA, A.J.S.C.