

Wahrheit v Ciliotta
2024 NY Slip Op 35602(U)
June 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 610782/2022
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 610782/2022
CAL. No. 202300940MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY***P R E S E N T :***Hon. LINDA J. KEVINS
Justice of the Supreme CourtMOTION DATE 11/21/23
ADJ. DATE 2/27/24
Mot. Seq. # 003 MD
Mot. Seq. # 004 MD-----X
DENISE WAHRHEIT,

Plaintiff,

- against -

THOMAS CILIOTTA,

Defendant.
-----XWALKER & MACKENZIE, P.C.
Attorney for Plaintiff
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Bohemia, New York 11716LAW OFFICE OF ERIC D. FELDMAN
Attorney for Defendant
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Hartford, Connecticut 06104

Upon the following papers read on this e-filed motions for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by plaintiff, dated October 24, 2023 ; Notice of Cross-Motion and supporting papers by defendant, dated October 27, 2023 ; Answering Affidavits and supporting papers by defendant, dated November 20, 2023, and by plaintiff, dated February 4, 2024 ; Replying Affidavits and supporting papers by defendant, dated February 22, 2024 ; Other ; it is

ORDERED that the motion by plaintiff Denise Wahrheit seeking partial summary judgment in her favor on the issue of whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendant Thomas Ciliotta seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that upon Entry of this Order, the movants are directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff Denise Wahrheit commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 347 and Arrowhead Lane in the Town of Brookhaven on May 25, 2021. It is alleged that the accident occurred

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when the vehicle owned and operated by defendant Thomas Ciliotta struck the rear of plaintiff's vehicle while it was stopped at a red traffic light on westbound Route 347. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including disc bulges at levels C3 through C5 and level T10-T11; disc herniations at levels C6-C7; cervical radiculopathy; cervical spondylolisthesis; and aggravation of a previously asymptomatic cervical condition at levels C4 through T1.

Plaintiff now moves for summary judgment on the basis that she sustained a serious injury within the meaning of the Insurance Law as a result of the subject accident. In support of the motion, plaintiff submits, inter alia, copies of the pleadings, her own deposition transcript, the sworn medical reports of Dr. Thomas Dowling and Christopher Stoebe, Physician Assistant, and certified copies of her medical records regarding the injuries at issue. Defendant opposes the motion on the grounds that plaintiff's motion is invalid, since she failed to include in her motion papers that she was making her motion pursuant to CPLR 3212, and that plaintiff's experts failed to address the prior injuries to plaintiff's spine following a July 10, 2019 motor vehicle accident.

Defendant cross-moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits, inter alia, copies of the pleadings, the parties' deposition transcripts, a certified copy of the police accident report, certified copies of plaintiff's medical records regarding a prior motor vehicle accident on July 10, 2019, and the sworn medical reports of Dr Edward Weiland and Dr. Marc Chernoff. At defendant's request, Dr. Weiland conducted an independent neurological examination of plaintiff on June 2, 2023. Also at defendant's request, Dr. Chernoff conducted an independent orthopedic examination of plaintiff on June 7, 2023. Plaintiff opposes the motion on the grounds that defendant failed to make a prima facie case that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that she sustained injuries in the "limitations of use" and the "90/180" categories of the Insurance Law.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Yerry v Whole Food Mkt. Group, Inc.*, 208 AD3d 773, 174 NYS3d 392 [2d Dept 2022]; *Clark v Stop & Shop Supermarket Co., LLC*, 204 AD2d 746, 164 NYS3d 463 [2d Dept 2022]).

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made

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by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Van Nostrand v Froehlich*, 44 AD3d 54, 844 NYS2d 923 [2d Dept 2007]).

Insurance Law § 5102 (d) defines a “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential 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.”

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see Rumford v Singh*, 130 AD3d 1002, 14 NYS3d 462 [2d Dept 2015]; *Mahmood v Vicks*, 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; *Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]). Whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e. important . . .), 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” (*Dufel v Green*, 84 NY2d 795,798, 622 NYS2d 900 [1985]). To prove the extent or degree of physical limitation with respect to the “limitations of use” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350, 746 NYS2d 865; *see also Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *see also Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Here, plaintiff has failed to establish her prima facie entitlement to judgment as a matter of law that she sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject collision (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Menjivar v Capers*, 214 AAD3d 640, 183 NYS3d 310 [2d Dept 2023]; *Terranova v Acosta*, 136 AD3d 710, 24 NYS3d 697 [2d Dept 2016]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by plaintiff is insufficient to demonstrate prima facie that she sustained a serious injury as a result of the subject accident. In support of the motion, plaintiff has

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submitted numerous medical records, most of which are unaffirmed and, therefore, are not admissible (see CPLR 2106; *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601, 87 NYS3d 18 [1st Dept 2018]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]), and some of which fail to opine as to causation (see *Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]). In addition, plaintiff has inexplicably failed to provided any excuse as to why she failed to meet “the strict requirement of tender in admissible form” (*Merriman v Integrated Bldg. Controls, Inc.*, 84 AD3d 897, 899, 922 NYS2d 562 [2d Dept 2011]).

Moreover, Dr. Dowling in his report concludes that the herniated discs sustained by plaintiff are the direct result of the injuries she sustained in the subject accident despite his first treatment with plaintiff occurring on January 12, 2022, almost one year after the subject accident. Thus, Dr. Dowling is unable to substantiate the extent or degree of the limitation to plaintiff’s cervical region caused by the alleged injuries and their duration (see *Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]). In addition, Dr. Dowling and Christopher Stoebe, P.A., impermissibly rely upon other doctors’ unaffirmed reports in reaching their conclusions (see *Moore v Sarwar*, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]; *Mahoney v Zerillo*, 6 AD3d 403, 774 NYS2d 378 [2d Dept 2004]). Dr. Dowling’s and P.A. Stoebe’s reports also attempt to affirm the medical reports of other doctors located at different medical practices who performed diagnostic testing on plaintiff, which is impermissible and fails to properly place the reports or the records contained therein before the Court (see *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]).

Similarly, the certification of the medical records of Orlin and Cohen by the records custodian that were submitted by plaintiff was not sufficient to properly place the medical conclusions and opinion contained therein before the court, since the opinions must be sworn to or affirmed (see *Hui-Lin Wu v City of New York*, 183 AD3d 411, 123 NYS3d 590 [2d Dept 2020]; *Nicholson v Kwarteng*, 180 AD3d 695, 115 NYS3d 707 [2d Dept 2020]; *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296). Thus, the opinions and conclusions in Dr. Barry Rubin’s reports were required to be sworn to or affirmed under the penalties of perjury, and since this was not done, the various opinions and conclusions of this doctor have not been submitted in an admissible form (see *Radoncic v Faulk*, 170 AD3d 1058, 96 NYS3d 352 [2d Dept 2019]). Accordingly, plaintiff has failed to eliminate all triable issues of fact as to whether she sustained a serious injury as a result of the subject accident (see *Tolpygina v Teper*, 44 AD3d 747, 842 AD3d 913 [2d Dept 2007]).

Likewise, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (see *Rivas v Hill*, 162 AD3d 809, 79 NYS3d 225 [2d Dept 2018]; *Miller v Ebrahim*, 134 AD3d 915, 20 NYS3d 538 [2d Dept 2015]). A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn

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reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (*see Dufel v Green*, 84 NY2d 795, 622 NYS2d 900; *Irizarry v Lindo*, 110 AD3d 846, 973 NYS3d 846 [2d Dept 2013]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (*see Xin Fang Xia v Saft*, 177 AD3d 823, 113 NYS3d 249 [2d Dept 2019]; *Rosenblum v Schloss*, 175 AD3d 1339, 105 NYS3d 894 [2d Dept 2019]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, defendants failed to submit competent medical evidence establishing a prima facie case that plaintiff did not sustain a serious injury to a her cervical region under the limitations of uses categories of the Insurance Law as a result of the subject accident (*see Christian v My Car Auto Transp., Inc.*, 219 AD3d 796, 194 NYS3d 323 [2d Dept 2023]; *Wickman v Kastavis*, 217 AD3d 905, 191 NYS3d 681 [2d Dept 2023]; *Melika v Caraballo*, 187 AD3d 1173, 131 NYS3d 589 [2d Dept 2020]). Dr. Weiland and Dr. Chernoff, during their examinations of plaintiff, each found significant limitations in the range of motion of her cervical spine and failed to establish that such limitations were not causally related to the subject accident (*see Z.H. B. V Sica*, 221 AD3d 575, 198 NYS3d 753 [2d Dept 2023]; *Matveieva v Metropolitan Transp. Auth.*, 212 AD3d 3d 726, 183 NYS3d 120 [2d Dept 2023]; *Zennia v Ramsey*, 208 AD3d 735, 171 NYS3d 921 [2d Dept 2022]; *Werthner v Lewis*, 120 AD3d 490, 990 NYS2d 267 [2d Dept 2014]). Accordingly, defendant’s motion for summary judgment dismissing the complaint is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 6.18.24


 LINDA KEVINS, JSC

____ FINAL DISPOSITION X NON-FINAL DISPOSITION