

Domatov v Gumus

2025 NY Slip Op 31303(U)

April 10, 2025

Supreme Court, Kings County

Docket Number: Index No. 520456/2018

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the 10th day of April 2025

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

APR 10 2025

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X
LITAL DOMATOV and ORTAL CHALKADAROV,

Index No.: 520456/2018
Mot. Seq. 002

Plaintiffs,
-against-

CEM C. GUMUS,

Defendant(s).
-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendant's Notice of Motion/Affidavits/Affirmations/Exhibits.....	30-42
Plaintiffs' Answering Affirmations/Affidavits/Exhibits.....	52-64
Defendant's Reply Affirmation Exhibits.....	65

MONTELIONE, RICHARD J., J.S.C.

This is an action to recover for personal injuries resulting from a motor vehicle accident alleged to have occurred on February 21, 2016. Plaintiffs Lital Domatov (Domatov) and Ortal Chalkadarov (Chalkadarov) commenced this action by filing a summons and verified complaint on October 11, 2018, alleging that on February 21, 2016, at approximately 5:22 a.m., at or near the northbound Franklin D. Roosevelt East River Drive (FDR), a vehicle owned and operated by Cem C. Gumus (defendant) collided with the vehicle operated by Domatov in which Chalkadarov was a passenger. Defendant joined issue by interposing a verified answer on March 13, 2019. On June 8, 2023, defendant filed a motion for summary judgment in his favor dismissing plaintiffs' complaint pursuant to CPLR 3212 on the basis that plaintiffs do not meet the serious injury threshold requirements of Insurance Law §§ 5104 [a] and 5102[d] (Mot. Seq. No. 2), which was granted by the undersigned Justice on September 20, 2023 (NY St Elec Filing [NYSCEF] Doc. No. 46), without opposition and on plaintiff's default. On October 5, 2023, counsel for the parties stipulated to vacate plaintiff's default and restore the motion to the calendar to be heard on the merits. (NYSCEF Doc. No. 47). The parties appeared before the Court for oral arguments on July 17, 2024 after which the motion was marked fully submitted.

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Under Insurance Law § 5104 [a], “in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury.”

Insurance Law § 5102[d] defines a serious injury as:

“Serious injury” means 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.

“In seeking summary judgment on the issue of whether the serious injury threshold has been satisfied, the burden is initially on a defendant to establish as a matter of law that the plaintiff did not suffer a ‘serious injury.’” *Hines v Capital Dist. Transp. Authority*, 280 AD2d 768, 769 [3d Dept 2001] quoting *Anderson v Persell*, 272 AD 733 [3d Dept 2000].

“[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102[d] by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim” (*Grossman v Wright*, 268 AD2d 79 [1st Dept 2000]). Once a defendant meets their prima facie burden establishing that plaintiff did not suffer a serious injury within the meaning of Insurance Law 5102[d], the burden shifts to plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact. *See Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002].

In her Bill of Particulars, Domatov alleges that she sustained serious injuries to her right knee, lumbar spine, and cervical spine, which were caused, aggravated, accelerated, exacerbated, and/or precipitated by defendant's negligence (Plaintiffs' Verified Bill of Particulars dated August 30, 2019, NYSCEF Doc. No. 33, ¶10). Domatov further alleges that as a result of the subject accident she suffered psychological injuries, including depression and anxiety. *Id.* As for the categories of serious injury which Domatov claims entitles her to recover for non-economic loss, she lists the following: “permanent and progressive in nature” (no ailment described); and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. *Id.*

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Similarly in the same Bill of Particulars, Chalkadarov alleges that she sustained injuries to the lumbar and cervical areas of her spine, left knee, and suffers from right rib pain and post-traumatic headaches, which were caused, aggravated, accelerated, exacerbated, and/or precipitated by defendant's negligence. (Plaintiffs' Verified Bill of Particulars dated August 30, 2019 NYSCEF Doc. No. 33, ¶10). Chalkadarov further alleges that as a result of the subject accident she suffered psychological injuries, including depression and anxiety. As for the categories claimed by Chalkadarov she lists, similar to Domatov, the following: "permanent and progressive in nature" (no ailment described); and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. *Id.*

Defendant argues that summary judgment is warranted against both plaintiffs because their respective injuries do not rise to the level of being a serious injury as defined by Ins. Law § 5102[d] and as required by Ins. Law § 5104 to sustain a cause of action for non-economic loss arising out of negligence in the use of a motor vehicle.

Analysis

In support of the motion for summary judgment against plaintiffs, defendant relies on the independent medical exam reports (IME) of Jeffrey Guttman, M.D., F.A.A.O.S. (Dr. Guttman), an orthopedist, affirmed under penalty of perjury (Defendant's Exhibit F, NYSCEF Doc. No. 37), and the radiological examination reports of Jessica F. Berkowitz, M.D. (Dr. Berkowitz), a radiologist, also affirmed under penalty of perjury (Defendant's Exhibit G, NYSCEF Doc. No. 38).

Neither of defendant's expert doctors addressed either Domatov's or Chalkadarov's alleged psychological injuries, including depression and anxiety which were properly plead in their Bill of Particulars. To be clear, the Court does not expect an orthopedic surgeon or radiologist to examine the plaintiffs for depression and anxiety. However, that does not relieve the defendant of his prima facie burden to demonstrate that *each* of the alleged injuries claimed by the plaintiffs are not serious within the meaning of Ins. Law §5102 [d]. *Krayn v Torella*, 40 AD3d 588 [2d Dept 2007]; *See also Haque v City of New York*, 97 AD3d 636 [2d Dept 2012] [Defendants' motion for summary judgment denied for failing to adequately address plaintiff's psychological injuries]. Therefore, the defendant has failed to meet his prima facie burden, and the motion must be denied regardless of the sufficiency of Domatov's opposition. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]; *see also Detoma v Dobson*, 214 AD3d 949 [2d Dept 2023] [Since the defendants failed to make out prima facie case of lack of serious injury to the lumbar region, the court should not have determined whether other alleged injuries met the serious injury threshold.], and *O'Neill v O'Neil*, 261 AD2d 459 [2d Dept 1999].

Based on the foregoing, it is

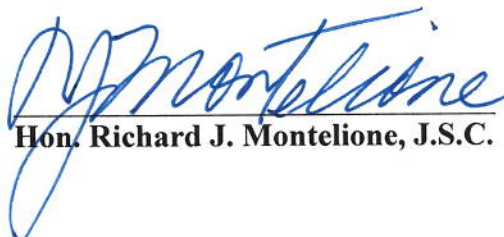
ORDERED that defendant CEM C. GUMUS'S motion for an order granting summary judgment in his favor and dismissing plaintiffs' complaint as asserted against him is DENIED in all respects; and it is further

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ORDERED that all other request for relief herein are DENIED.

This constitutes the decision and order of the Court.

ENTER


Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK
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