

Kenner v Gentile
2025 NY Slip Op 35491(U)
January 9, 2025
Supreme Court, Dutchess County
Docket Number: Index No. 2022-50548
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

SPARKLE KENNER,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2022-50548

MASSIMILI GENTILE, URS MIDWEST INC., UNITED
ROAD SERVICES INC., and URS MIDWEST, INC. d.b.a.
UNITED ROAD AND UNITED ROAD SERVICES INC.,
and CAMPANIA LOGISTICS INCORPORATED,

Motion Sequence: 3

Defendants.

The following papers were read and considered on Defendants' motion for summary judgment:

<u>Document:</u>	<u>NYSCEF Doc. No(s):</u>
NOTICE OF MOTION	71
AFFIRMATION IN SUPPORT and EXHIBITS A-F	72, 74-79
STATEMENT OF MATERIAL FACTS	73
RESPONSE TO STATEMENT OF MATERIAL FACTS	84
AFFIRMATION IN OPPOSITION and EXHIBITS 1-7	85-92
REPLY AFFIRMATION and EXHIBIT A	93-94
COMPLAINT AND ANSWER ¹	1-2

This is an action for personal injuries arising out of a motor vehicle accident that occurred on February 28, 2019 on the New York State Thruway (Interstate 87) in the Town of Coxsackie, New York. Plaintiff was the front-seat passenger in a vehicle driving southbound. The vehicle was allegedly struck in the rear and caused to veer off the highway by a tractor-trailer truck operated by Defendant Massimili Gentile and owned by Defendants URS Midwest, Inc., United

¹ Cross-referenced in Defendants' submissions by NYSCEF document number pursuant to CPLR 2214(c).

Road Services Inc. and/or Campania Logistics Incorporated. As a result of this accident, Plaintiff alleges that she sustained severe and permanent injuries to her knees, back and neck.

Plaintiff commenced this action on February 23, 2022 alleging a single cause of action for negligence against all Defendants. Defendants answered the complaint on April 27, 2022 and also commenced a third-party action against the driver of the vehicle in which Plaintiff was riding. The third-party action was discontinued by stipulation on July 24, 2024. Following the close of discovery, Defendants now move for summary judgment to dismiss the complaint, on the basis that Plaintiff's injuries fail to meet the "serious injury" threshold of Insurance Law §§ 5102(d) and 5104.

On a motion for summary judgment "[t]he movant 'must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact'" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has met this threshold burden, to defeat the motion the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 320; CPLR 3212[b]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, "the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]). The function of the Court on such a motion is issue finding, rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Since it deprives litigants of their day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Under New York's "No-Fault Law," a civil action for damages based upon the use or operation of a motor vehicle cannot be maintained unless the plaintiff suffered a "serious injury" (Insurance Law § 5104). A "serious injury" is defined, in relevant part, as "significant disfigurement; a fracture; . . . permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; [or] significant limitation of use of a body function or system" (Insurance Law § 5102[d]). On a motion for summary judgment under these statutes, the defendant has the threshold burden of establishing that no such serious injury occurred (see *Serrano v. Canton*, 299 AD3d 703 [3d Dept 2002]; *Jorge v Sutton*, 128 AD2d 837 [2d Dept 1987]). Generally, "a defendant can establish that the 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, 83–84 [2d Dept 2000]; see also *Gaddy v Eyler*, 79 NY2d 955, 956–957 [1992]). A defendant may also rely on uncertified medical records of the plaintiff's treating physicians (*Uribe v Jimenez*, 133 AD3d 844, 844 [2d Dept 2015]).

Once the defendant has met its burden, “the burden shifts to the plaintiff to come forward with . . . objective evidence of the injury” in order to defeat summary judgment (*Grossman*, 268 AD2d at 84). “[A] plaintiff’s subjective claim of pain and limitation of motion must be sustained by verified objective medical findings . . . based on a recent examination of the plaintiff . . . [and] any significant lapse of time between the cessation of the plaintiff’s medical treatments after the accident . . . must be adequately explained (*Id.*).”

Initially, Plaintiff’s counsel concedes in an opposition affirmation that only the “significant limitation” and “permanent consequential limitation” categories of serious injury are being claimed as applicable in this matter. Accordingly, the Court will only address Defendants’ arguments related to these two categories.

Defendants argue that Plaintiff did not suffer any injury that qualifies as “serious,” and that any alleged injuries were not caused by the subject accident. In support of their motion, Defendants submit copies of the pleadings, a copy of the transcript of Plaintiff’s deposition, an affidavit and report of a biomechanist (accident reconstruction) expert, affirmations of Defendants’ examining physician, and certain of Plaintiff’s medical records. Defendants’ physician examined Plaintiff on February 5, 2024, and found no restrictions in the range of motion of either of Plaintiff’s knees, her back, or her neck. The physician opines that although Plaintiff had arthroscopic surgeries on both knees in December 2019 and January 2020, and a total left knee replacement in November 2021, these procedures were not related to the subject accident; rather, the procedures were based upon “chronic, pre-existing bilateral knee osteoarthritis” due to “longstanding morbid obesity.” Medical records from the surgeon who performed Plaintiff’s total left knee replacement state that “x-rays from [September 7, 2021] reveals [*sic*] end-stage arthritis, bone-on-bone changes,” and note the impression as “left knee arthritis.” As to Plaintiff’s neck and spine, Defendants’ physician opines that “she has multilevel degenerative disc disease . . . secondary to her longstanding morbid obesity and not related to” the subject accident. The physician concludes that Plaintiff did “not suffer any disability” and “will not require any treatment in the future as a result” of the accident. Plaintiff testified during her deposition that she returned to work within a week after the accident without any required follow-up treatment; that she has not been limited in the activities she is able to perform; and that after her knee surgeries, she has not pursued any medical treatment other than physical therapy. Based upon these submissions, Defendants have established, *prima facie*, that Plaintiff’s injuries were degenerative and not causally related to the accident (*see Dinardo v Yeshiva Kehilath Yakov, Inc.*, 218 AD3d 438, 439 [2d Dept 2023]), and are not sufficiently serious (*see McLoud v Reyes*, 82 AD3d 848 [2d Dept 2011]).

In opposition, Plaintiff relies upon her deposition testimony and several treatment records from within one year following the accident. With respect to her alleged back and neck injuries, those claims are not supported by any medical records other than an unsworn “Initial Chiropractic Examination” dated March 7, 2019—*i.e.*, within two weeks after the accident—which is insufficient to sustain such claims (*Shamsoodeen v Kibong*, 41 AD3d 577, 577–578 [2d Dept 2007]; *Grossman*, 268 AD2d at 85). Regarding Plaintiff’s knees, the medical records indicate that her first two surgeries were elective procedures related to meniscus tears and other soft tissue damage which, even if caused by the accident, would not qualify as serious injuries absent “objective evidence of the extent of the alleged physical limitations resulting from the injur[ies]

and its duration” (*McLoud*, 82 AD3d at 849; *see also Vilomar v Castillo*, 73 AD3d 758, 759 [2d Dept 2010]). As noted above, Plaintiff did not testify to any significant physical limitations; and more importantly, her opposition submissions do not include any medical records dated after her January 2020 knee surgery to objectively support any ongoing limitations (*Shamsoodeen*, 41 AD3d at 579). Accordingly, Plaintiff’s evidence does not create any triable issue of fact that her alleged physical limitations resulting from the accident were either “permanent” or “significant” (*Gaddy*, 79 NY2d at 991–992).

Regarding causation, although Plaintiff’s treatment records from shortly after the accident reference the accident as the cause of her knee, back and neck pain, these submissions are insufficient to rebut Defendants’ expert’s opinions. The unsworn chiropractor’s examination report referenced above is inadmissible (*Grossman*, 268 AD2d at 85). The only other relevant evidence submitted by Plaintiff consists of three reports from the orthopedic surgeon who performed the first two knee surgeries, dated March 19, 2019, April 19, 2019, and June 24, 2020. These reports do not contain any opinion that Plaintiff’s pain and other symptoms were actually caused by the accident. Finally, Plaintiff does not address the records submitted by Defendants regarding her total left knee replacement, which indicate the basis for that surgery as “arthritis” with no reference to the subject accident. As a result, Plaintiff has failed to raise a triable issue of fact on causation (*Dinardo*, 218 AD3d at 439–440).

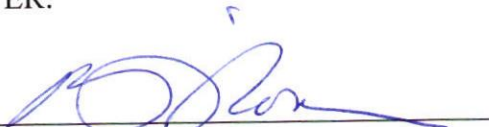
Based on the foregoing, it is hereby

ORDERED that Defendants’ motion for summary judgment is granted, and this action is dismissed. The jury selection scheduled for March 31, 2025 is canceled.

The foregoing constitutes the decision and order of the Court.

Dated: January 9, 2025
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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Sobo & Sobo, LLP
One Dolson Avenue
Middletown, NY 10940

Wilson Elser Moskowitz Edelman & Dicker LLP
150 East 42nd Street
New York, NY 10017