

Thompson-White v Mouzakes
2025 NY Slip Op 35597(U)
March 3, 2025
Supreme Court, Nassau County
Docket Number: Index No. 600880/2023
Judge: Rhonda E. Fischer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - CIVIL TERM PART 46

Present: HON. RHONDA E. FISCHER
Acting Justice of the Supreme Court

DOROTHEA THOMPSON-WHITE and
MAURICE WHITE,

Plaintiff,

INDEX NO: 600880/2023

-against-

MOTION SEQ. No. 001

ASHLEY MOUZAKES and RONALD
MOUZAKES, JR.,

Defendant(s).

The following papers were read on this motion:

NYSCEF Nos. 29-44, 51-62

Defendants move for an Order pursuant to Insurance Law §§ 5102 and 5104, and CPLR §§3211(a)(2), 3211(a)(7) and 3212 for summary judgment dismissing the complaint.

Plaintiffs file opposition.

The plaintiffs commenced this action to recover for personal injuries sustained resulting from an automobile accident which occurred on June 15, 2021, at the intersection of Long Island Avenue and Wellwood Avenue, in the town of Babylon, County of Suffolk, State of New York. Plaintiff Dorothea Thompson-White ("plaintiff") alleges injuries to her left knee and back.

Applicable Law

It is well established that the proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *see also, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The evidence will be construed in a light most favorable to the one moved against. *See Weiss v. Garfield*, 21 A.D.2d 156 (3rd Dept. 1964). Once the movant has made a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman, supra*. Conclusory allegations, bold assertions, or speculation are simply insufficient to successfully oppose a motion for summary judgment. *Id.* A shadowy semblance of an issue is not enough to defeat a motion for summary judgment. *See LoBreglio v. Marks*, 105 A.D.2d 621 (1st Dept. 1984).

Index No. 600880/2023

Motion seq. 001

Page 2 of 4

“Serious Injury” is defined in Insurance Law § 5102(d) as:

“...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 constitutes such person’s usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of the 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 A.D.2d 79 (2nd Dept. 1999). The courts have consistently held a “plaintiff’s subjective claim of pain and limitation of motion must be supported by verified objective medical findings.” *Id.*; *see also, Kauderer v. Penta*, 261 A.D.2d 365 (2nd Dept. 1999). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. *See Gaddy v. Eyler*, 79 N.Y.2d 955 (1992). The proof shall be viewed in a light most favorable to the non-moving party. *See Cammarer v. Villanova*, 166 A.D.2d 760 (3rd Dept. 1990).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member,” or “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 order to prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Id.*

A plaintiff only needs to satisfy one of the prongs under New York Insurance Law § 5102(d), and does not need to prove satisfaction of each prong. *See Linton v. Nawaz*, 14 N.Y.3d 821 (2010). Once this threshold has been satisfied, “plaintiff is entitled to recover for all injuries incurred as a result of the accident.” *Prieston v. Massaro*, 107 A.D.2d 742 (2nd Dept. 1985).

Index No. 600880/2023

Motion seq. 001

Page 3 of 4

Discussion

On this threshold motion, defendants submit, *inter alia*, the parties' pleadings, plaintiff's deposition transcript, and the affirmed medical examination report of Howard Levin, M.D. ("Dr. Levin").

Dr. Levin, a board certified orthopedic surgeon, conducted an orthopedic examination of plaintiff on May 6, 2024. Among other things, Dr. Levin conducted a physical examination of the cervical spine, lumbar spine, and left knee. Dr. Levin also conducted range of motion testing and compared the values to normal range of motion values. Based on Dr. Levin's examination of the plaintiff, Dr. Levin concluded that "The examination was normal; there were no positive findings.... Injuries have resolved and [plaintiff] has reached pre accident status. There is no permanency.... As to causation, Dr. Levin found that "it appears that the above-diagnosed acute injuries are causally related to the accident on June 15, 2021."

In opposition, plaintiff submits, *inter alia*, medical records, MRI reports, and an examination report of Dr. Brett M. Spain, D.O., dated November 25, 2024. Upon review of Dr. Levin's report, Dr. Spain opined that he disagreed with Dr. Levin's findings in that plaintiff "clearly will have permanent issues with at least her lower back and her left knee as she has herniated discs, which are not expected to resolve at this point as well as degenerative changes in her spine that were exacerbated by the motor vehicle accident." Dr. Spain further opined as to plaintiff's possible need for additional care, including but not limited to intermittent physical therapy for the rest of her life, chiropractic care, injections, and possible surgical intervention for her lumbar spine, and eventual total knee replacement. Therefore, Dr. Spain concluded "within a reasonable degree of medical certainty that there is a permanency to the injuries to her back and knee. Again, osteoarthritis and degenerative changes are irreversible and would expect to cause her pain for the rest of her life."

Dr. Spain based his findings in part on plaintiff's MRI results, which showed "exaggerated lordosis, multilevel degenerative disc disease and disc herniations contributing to mild central stenosis and bilateral exiting L3 nerve root impingement at L3-4, mild central stenosis and bilateral exiting L4 nerve root impingement at L4-5 and right exiting L5 nerve root impingement at L5-S1. There was prominent facet arthrosis in the lumbar spine contributing to reactive marrow signal changes greatest on the right at L5-S1. No fracture or degenerative changes in the lower thoracic spine. Findings suggestive of bilateral adnexal cysts, left greater than right. Left knee MRI showed a severe complex lateral meniscus tear with lateral compartment arthrosis extending into the femoral trochlea and multiple lateral loose bodies with multiple displaced lateral meniscal flaps associated with complex lateral meniscal tearing, effusion, synovitis, loose bodies, and popliteal cyst. Diagnoses included low back pain, degenerative disc disease, multilevel herniated discs, left knee pain, lateral meniscus tear with displaced meniscal flaps and osteoarthritis."

Index No. 600880/2023

Motion seq. 001

Page 4 of 4

As to causation, Dr. Spain opined “within a reasonable degree of medical certainty that the injuries she sustained in the car accident on the date listed above are causally related to the chronic and persistent pain in her lower back and left knee. While she did have prior lumbar spine injuries, she did not have to deal with those issues for quite a while until the car accident, which required her to seek regular care. She had never had prior issues with her left knee, which clearly has been chronic and unrelenting, as she had to return almost two years later for repeat corticosteroid injection and the expectation is that she would need to return again for further injections or other procedures listed above.”

Here, defendants have met their burden in establishing, *prima facie*, that plaintiff has not sustained a serious injury, based on defendant’s examining physician’s report indicating, *inter alia*, that plaintiff has no significant limitation of range of motion, and that all injuries have been resolved. *See Grossman, supra; see also, Alvarez, supra.* However, in opposition to the motion, plaintiff submitted evidence that plaintiff sustained objectively measured, causally related conditions to that may be permanent in nature. *See Molina v. Choi*, 298 A.D.2d 508 (2nd Dept. 2002); *see also, Toure, supra.* Therefore, plaintiff has submitted competent objective evidence for the purposes of this motion. Accordingly, issues of fact exist to preclude summary judgment in favor of defendants. *See Gaddy, supra; see also, Zuckerman, supra.*

Upon the foregoing, it is hereby

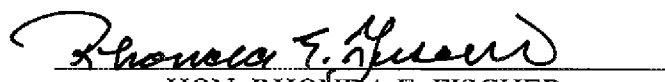
ORDERED that the defendants’ motion for an Order pursuant to CPLR § 3212 granting summary judgment in his favor and dismissing the plaintiff’s Complaint on the grounds that the plaintiff did not suffer a “serious injury” as defined by Insurance Law § 5102(d), and thus, plaintiff’s claims for non-economic loss are barred by § 5104(a) of the New York Insurance Law is DENIED.

This shall constitute the Decision and Order of the Court.

It is **SO ORDERED**.

Dated: March 3, 2025

Mineola, New York



HON. RHONDA E. FISCHER
A.J.S.C.

ENTERED

Mar 05 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE