Joseph v Tucker
2013 NY Slip Op 33416(U)
December 19, 2013
Supreme Court, Queens County
Docket Number: 21318/11
Judge: Bernice D. Siegal

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Kerline Joseph,

Plaintiff,

-against-

Darlene M. Tucker,

Defendant.

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Darlene M. Tucker,

Third Party Plaintiff,

-against

Alex Joseph,

Third Party Defendant.

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Index No.: 21318/11
Motion Date: 9/30/13
Motion Cal. No.: 85
Motion Seq. No.: 3

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment in the favor of to the defendant, dismissing the Summons and Complaint of the plaintiff Kerline Joseph.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5- 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant/Third-Party Plaintiff Darlene Tucker ("Defendant") moves for summary judgment

pursuant to CPLR § 3212, dismissing the complaint on the grounds that plaintiff Kerline Joseph ("Joseph" or "Plaintiff") did not sustain a serious injury under Insurance Law § 5102(d). This case arises as a result of a motor vehicle accident between the plaintiff and the defendant that occurred on June 18, 2011. The Bill of Particulars alleges that as a result of the accident, Plaintiff sustained serious injuries to her right, cervical and lumbar spine.

The court notes that the Plaintiff's affirmation in opposition refers to a cross-motion by Third-Party Defendant Alex Joseph, however, the submission failed to include a cross-motion.

Analysis

Defendant's motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's cause of action is denied as more fully set forth below.

Threshold

Defendant moves for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). The statutory provision states, in pertinent part that a "serious injury" is defined as:

> A personal injury which results in...significant disfigurement;...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 party from performing substantially all of the material acts which constitute such a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury

or impairment.

Insurance Law § 5102(d).

Defendant contends that Plaintiff did not sustain a serious injury based on the medical report of Dr. Thomas Nipper, an Orthopedic Surgeon and Dr. Jean Robert Desrouleaux, a Neurologist and Dr. Bert R. Heyligers, a Radiologist. The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v Elliot,* 57 NY2d 230 [1982]; *Porcano v Lehman,* 255 AD2d 430, 431 [2nd Dept 1998]; *Brown v Stark,* 205 AD2d 725 [2nd Dept 1994].) When moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries the plaintiff sustained from the subject accident are not serious as defined within the meaning of Insurance Law §5102(d). (*Toure v Avis Rent A Car Sys.,* 98 NY2d 345 [2002]; *Lewis v John,* 81 AD3d 905 [2nd Dept 2011].) A defendant can meet this burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that the plaintiff's injuries are not serious. (*see Magarin v Kropf,* 24 AD3d 733 [2nd Dept 2005]; *see also Gaddy v Eyler,* 79 NY2d 955, 956 [Ct. App. 1992]; *Morris v Edmond,* 48 AD3d 432 [2nd Dept 2008].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review the papers submitted by the plaintiff in opposition. (*Coscia v 938 Trading Corp.,* 283 AD2d 538 [2nd Dept 2001].) Thus, consideration is only given to the plaintiff's opposing papers if the defendant-movant makes a prima facie showing that the plaintiff did not sustain a serious injury. (*Toure v Avis Rent A Car Sys.,* 98 NY2d 345 [2002].)

Defendant met its initial burden of establishing that Plaintiff did not sustain a serious injury through the submission of the affirmation of Dr. Nipper based on an orthopaedic examination on December 10, 2012, wherein he concludes that Joseph has no objective evidence of a causally related disability and that Plaintiff's range of motion was normal.

In addition, defendant provided evidence establishing, prima facie, "that during the 180-day period immediately following the subject accident, [s]he did not have an injury or impairment which, for more than 90 days, prevented [her] from performing substantially all of the acts that constituted [her] usual and customary daily activities." (*Frederique v. Krapf*, 86 A.D.3d 533 [2nd Dept. 2011].) Specifically, Defendant submitted a copy of Plaintiff's employment attendance records which indicates that she did not miss any time from work due to the subject accident.

Defendant have therefore made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). The burden now shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 566, 567 [2nd Dep't 2003]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dep't 2000].)

Plaintiff, in opposition met her burden to defeat Defendant's motion for summary judgment on the issue of serious injury. Plaintiff submits the affidavit of a chiropractor, Scott Leist, DC who examined the plaintiff following the accident and more recently in May of 2013 Dr. Leist, using objective medical testing, established that Plaintiff sustained a loss of range of

motion to her cervical and lumbar spine as a result of the subject accident.[1] Accordingly, plaintiff submitted evidence raising a triable issue of fact as to whether the alleged injuries to her cervical and lumbar spine were a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). (*See Perl v. Meher*, 18 NY3d 208 [2011].) The plaintiff also submitted evidence raising a triable issue of fact as to whether those alleged injuries were caused by the accident. (*Id.; see Jaramillo v. Lobo*, 32 AD3d 417, 418 [2nd Dept 2006].)

For the reasons set forth above, Defendant's motion for summary judgment on the issue of "serious injury" is denied.

Dated: December 19, 2013

Bernice D. Siegal, J. S. C.

[1]Although its is true that the affidavit of Dr. Leist is replete with inadmissible evidence on certain medical findings (e.g., references to unsworn to medical records), there is sufficient probative evidence of a causally related injury with objective findings (.e.g. straight leg raising, range of motion).