Kriskovich v Cruz
2020 NY Slip Op 35528(U)
December 14, 2020
Supreme Court, Bronx County
Docket Number: Index No. 28649/2018E
Judge: Veronica G. Hummel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

----------X

JOSEFINA KRISKOVICH,

Plaintiff,

-against -

HECTOR LUIS CRUZ,

Defendant.

----------X

Index No. 28649/2018E
DECISION/ORDER
Motion Seq. 1

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF, in support of and in opposition to the motion by defendant HECTOR LUIS CRUZ (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff JOSEFINA KRISKOVICH (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as a result of a February 17, 2017, accident. On that date, plaintiff was walking along 100 Aldrich Street in Bronx County when defendant’s motor vehicle allegedly struck her (the Accident). Plaintiff claims that she suffered injuries to the lumbar spine, cervical spine, and right shoulder, and argues that that the injuries satisfy one or more of the following Insurance

Law 5102(d) threshold categories: permanent consequential limitation, significant limitation, and 90/180 days rule.[1]

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the accident. Defendant also asserts that plaintiff's testimony that she returned to work one week post-accident combined with the emergency room doctor's note opining that she could return to work within three days of the Accident prove that plaintiff cannot satisfy the criteria under the 90/180-day definition of "serious injury". In support of the motion, defendant submits an affirmation of defense counsel, the pleadings, plaintiff's deposition transcript, and plaintiff's medical records. Defendant does not submit an expert affirmation or report.

While plaintiff has the burden of establishing a *prima facie* case of "serious injury" at trial (*Licari v. Elliott*, 57 NY2d 230 [1982]), defendants on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a "serious injury" as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Brown v Mat Enterprises of N.Y. Inc.,* 97 AD3d 401 [1st Dept 2012]). Defendant bears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*McElroy v Sivasubramaniam*, 305 AD2d 944 [3d Dept 2003]). If defendant meets this burden, defendant has established *prima facie* entitlement to summary judgment.

[1] The Bill of Particulars also cites permanent injury and significant disfigurement. Plaintiff in opposition fails to address these claims and therefore concedes that the categories are inapplicable here. In any event, there is no medical evidence submitted on the motion supporting either claim. In terms of permanent loss of use of a body organ, member, function or system, such a loss must be total, which is not alleged or proven here (*Oberly v Banges Ambulance,* 96 N.Y.2d 295 [2001]). Nor is there any evidentiary basis for finding that plaintiff suffered a significant disfigurement. As such, both categories are dismissed without opposition (*See Landsman v Bunker*, 142 AD2d 986 [4th Dept 1988]).

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a serious injury (*Franchini v Palmieri*, *supra*; *Shinn v Catanzaro,* 1 AD3d 195 [1st Dept. 2003]; *see Cabrera v Ahmed*, 2020 N.Y. Slip Op. 07129 [1st Dept 2020]). Specifically, plaintiff must demonstrate that there is a serious injury under the Insurance Law, that summary judgment is not warranted and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed (*see Pommells v Perez*,4 NY3d 566 (2005); *Tusu v Leone*, 187 AD3d 655 [1st Dept 2020]).

Contrary to plaintiff's contention, defendant may establish entitlement to summary judgment by submitting plaintiff's deposition testimony and the medical reports and records of plaintiff that were supplied by plaintiff's counsel (*Franchini v Palmieri*, *supra*; *see Newton v Drayton,* 305 AD2d 303 [1st Dept 2003]; *Nigro v Penree,* 238 AD2d 908 [4th Dept 1997]; *McNair v Ofori*, 198 AD2d 47 [1st Dept 1993]; *Hochlerin v Tolins,* 186 AD2d 538 [2d Dept 1992];*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], *aff'd*, 69 NY2d 700 [1986]; *La Frenire v Capital Dist. Transp. Authority,* 96 AD2d 664 [3d Dept 1983]).

Here, the documents submitted by defendants are inadequate to meet their initial burden (*see, Savage v. Delacruz*, 100 AD2d 707 [3d Dept 1984]).Plaintiff's records show that after the Accident on February 17, 2017, plaintiff was taken to Montefiore Weiler Emergency Room where she complained of right knee, right hip, right shoulder, and musculoskeletal pain. One week later, plaintiff presented, at Dynamic Healthcare Center, on February 24, 2017, complaining of left shoulder and elbow pain, along with neck and back pain. The MRI of the lumbar spine taken on April 11, 2017, revealed flattening of the normal lumbar lordosis and herniated discs. The MRI of the cervical spine, performed the same day, revealed similar flattening, a bulging disc, and herniated discs. In a report submitted by defendant dated April 11, 2019, Dr. Hank Ross (orthopaedic surgeon) [NYSCEF No. 19], found that plaintiff's lumbar spine, cervical spine, and right shoulder showed restrictions in motion and loss of function, which he opined were permanent in nature and causally related to the Accident.

This evidence is insufficient to establish that, as a matter of law, plaintiff did not suffer a "serious injury" under the permanent consequential limitation of use and significant limitation of use categories (*Seymour v Roe,* 301 AD2d 991 [3d Dept 2003]). Certainly, the submitted documentation proves the existence of bulging and herniated discs in the lumbar and cervical spine which defendant fails to establish were not the result of the Accident or permanent in nature. As defendant fails to make *prima facie* showing as to these categories, the court need not consider plaintiff's opposition papers (*McElroy v Sivasubramaniam*, *supra*). Of note, defendant failed to submit any reply papers.

In any event, even if defendant were found to have set forth a *prima facie* case, the affirmations and expert medical report and medical records submitted by plaintiff in opposition to the motion raise triable issues of fact as to his claims of "serious injury" under the threshold categories of permanent consequential limitation and significant limitation (*Hochlern v Tolins, supra*; see *Perl v Meher*, 18 NY3d 208 [2011]; *Aquino v Alvarez*, 162 AD3d 451[1st Dept 2018];*see Ramkumar v Grand Style Transportation, Enterprises, Inc.,* 22 NY3d 905 [2013]). Hence, plaintiff generates a question of fact as to whether he suffered a permanent consequential limitation or significant limitation of the cervical spine, lumbar spine, and right shoulder sufficient to constitute a "serious injury" under the Insurance Law.

In contrast, defendant sets forth *prima facie* showing that plaintiff does not qualify under the 90/180-day category of serious injury based on plaintiff's testimony and the records (*Smith v Green,* 131 AD3d 879 [1st Dept 2020]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]; *Eisenberg v Guzman*, 101 AD3d 505 [1st Dept 2012]). In opposition, plaintiff's submissions fail to generate a question of fact as to the issue (*Smith v Green, supra*; *Curet v Kuhlor*, 172 AD3d 634 [1st Dept 2019]; *Pouchi v Pichardo*, 173 AD3d 643 [1st Dept 2019]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion by defendant HECTOR LUIS CRUZ [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff JOSEFINA KRISKOVICH has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The parties are reminded that this action is scheduled for compliance conference on May 26, 2021. The attorneys are expected to review the new Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: December 14, 2020

E N T E R,

/Hon. Veronica G. Hummel/signed 12-14-2020

HON. VERONICA G. HUMMEL