SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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SHAKAINA THOMAS, SHELOVE SAINFLEUR,

Plaintiff,

- v -

GEORGES SALOMON, LUCHEZAR GIRGINOV, SHAHZAD & ALI AKHTAR, SHAHZAD AKHTAR

Defendant.

INDEX NO. 157977/2015

MOTION DATE 08/13/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment is denied. The underlying incident involves a motor vehicle accident in which plaintiffs allege to have sustained serious injuries. The accident occurred on April 23, 2015, at the intersection of northbound Central Park West and West 61st Street, in the County, City and State of New York when a vehicle operated by defendant Luchezar A. Girginov and owned by Georges Salomon struck a vehicle operated and owned by defendant Shahzad Akhtar and also owned by defendant Ali Akhtar that was carrying plaintiff Shakaina Thomas and plaintiff Shelove Sainfleur as passengers.

This decision and order addresses defendants' motion for summary judgment in favor of defendants against plaintiff for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). The decision and order are as follows:

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep't 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep't 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Plaintiff Shelove Sainfleur

Here, defendants allege that plaintiff Sainfleur's injuries are pre-existing, not causally related to the accident, and insufficient to support a finding of serious injury under No-Fault law. Further, defendants allege that plaintiff did not miss any time from her customary activities after the incident and provide plaintiff Sainfleur's testimony to show that she was never confined to her home following the accident. Additionally, defendants submit plaintiff's "Claimaint's Liability Questionnaire Form" to demonstrate that plaintiff Sainfleur did not receive any treatment for over a year from May 2016 to July 2017 (Mot at 9, ¶10; Exh D). Pursuant to *Henry v Peguero*, 72 AD3d 600, 603 [1st Dep't 2010], in which the Court citing *Pommells v Perez*, 4 NY3d 566, 572 [2005], found that plaintiff's "fail[ure] to explain the two-week gap between the accident and the commencement of treatment, … 'interrupt[s] the chain of causation between the accident and the claimed injury. Thus, defendants have satisfied their burden and the burden shifts to plaintiff to demonstrate an issue of fact.

In opposition, plaintiff provides documentation of medical treatment including physical therapy for the alleged injuries spanning over a year (*id.*, Exh D). Thus, the gap in treatment is not relevant as plaintiff did indeed treat for these injuries and stopped treatment due to her physician's recommendation that she "reached the maximum improvement that the treatment could yield" (*id.*, ¶ 19). Thus, plaintiffs have proffered an explanation for the gap in treatment in addition to demonstrating that plaintiff suffered from a loss of range of motion. Accordingly, the branch of defendant's motion for summary judgment for failure to demonstrate a serious injury pursuant to Insurance Law § 5102(d) is denied.

Plaintiff Shakania Thomas

Defendants allege that plaintiff Thomas' injuries are pre-existing, not causally related to the accident, and insufficient to support a finding of serious injury under No-Fault law. Defendants provide the Independent Radiological Examination of plaintiff Thomas performed by Dr. Eisenstadt who found that plaintiff had pre-existing conditions in the right shoulder, degenerative bulging in the cervical spine, and disc degeneration in the lumbar spine (Mot, Exh I). Dr. Eisenstadt concludes that none of these injuries are casually related to the incident at issue (*id.*). Defendants also attach the medical affirmation of Dr. Stein who recorded that plaintiff had a 10-degree loss in range of motion in cervical bilateral rotation, 10-degree loss in range of motion of lumbar flexion, 10-degree loss in range of motion of both bilateral abduction, bilateral forward elevation and external rotation of the right shoulder (*id.*, Exh I). While Dr. Stein goes on to state that "each claimant has their own 'normal range' based on body type, physical conditioning, and age," the report when taken at face value demonstrates that plaintiff's range of motion is less than that of a normal person. Defendants' motion contains evidence of a restriction in plaintiff's range of motion.

Thus, defendants have failed to satisfy their burden and summary judgment is precluded as a defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep't 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep't 2004] [finding that "defendants' examining doctor found that the plaintiff continued to have restrictions in motion of her lower back … in light of this finding by the defendants' expert, the defendants did not meet their initial burdens"]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that both plaintiffs have not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

9/21/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE