Asaro v Dimeglio
2018 NY Slip Op 33042(U)
November 30, 2018
Supreme Court, New York County
Docket Number: 150361/2016
Judge: Adam Silvera

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

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STEFANIE ASARO

Plaintiff,

- v -

GERALD DIMEGLIO,

Defendant.

INDEX NO. 150361/2016

MOTION DATE 10/24/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant Gerald J. Dimeglio's motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff's complaint is denied. Before the court is defendant's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law.

The suit at bar stems from a motor vehicle collision which occurred on February 4, 2015, on Route 17 at or near its intersection with Interstate 87, in the Town of Ramapo, County of Rockland, and State of New York, when a vehicle operated by defendant, Gerald J, Dimeglio allegedly struck the rear of a vehicle operated by plaintiff, Stefanie Asaro, which led to the serious injury of plaintiff.

"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 to 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]).

Here, defendant alleges that plaintiff did not sustain a serious injury. Defendant claims that plaintiff has a perfect range of motion in the areas plaintiff has claimed injury to and that plaintiff was merely confined to his home for 1 week after the accident. Defendant claims that plaintiff's medical records and deposition indicate that plaintiff's complaints predate the accident

at issue. Plaintiff testified at deposition that after the accident she had an MRI taken in the radiology department of Good Samaritan Hospital, which showed she had one herniated disc (Mot, Exh D at 58, ¶ 5-21). However, plaintiff also testified that in 2008, she had an MRI taken of her lower back at Harsdale Imaging and was diagnosed with a herniated disco there (*id.*, at 58-59, ¶ 22-9). Defendant notes, that while plaintiff testified that she was diagnosed by Dr. Beenstock, Dr. London, Dr. Ober, Dr. Mullen, and Dr. Gottlieb with a traumatic brain injury, she admitted that she never had any MRIs taken of her head and was never referred for neurological testing since the accident at issue (*id.* at 65, 7-21 & *id.* at 90, 17-22). Defendant also notes that plaintiff testified to having been involved in three prior accidents in 1994, 2008, and 2010 (*id.* at 8, 82, & 83). Plaintiff testified that she injured her neck and back in the 2008 incident (*id.*)

Further, in support of his motion, defendant submits the Affirmed report of Dr. William B. Head Jr., who recorded that plaintiff demonstrated normal health and cognitive condition however, Dr. Head Jr. did note that plaintiff suffered a loss of range of motion to the lumbar spine (Exh E). Defendant's motion contains evidence of a restriction in plaintiff's range of motion. Thus, defendants have failed to satisfy their burden 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"]).

The Court also notes that in opposition, plaintiff submits the Affirmed medical report of Dr. Ali E. Guy, who examined plaintiff on May 12, 2018. Dr. Guy found a limited range of motion to the neck, back, and leg (Aff in Op, Exh A). Further, Dr. Guy states that "this patient

has clearly sustained a permanent partial disability causally related to the accident of February 4, 2015" (*id.*). Additionally, Dr. Guy opined that plaintiff's "injuries are permanent and progressive" and will require visits to a neurologist six times per year, visits to a spinal surgeon 3-4 times per year, at least 40 physical therapy sessions per year, periodic MRIs of the brain and lumbar spine, EMGs every 2-3 years, lumbar epidural injections three times per year and lumbar facet injections three times per year (*id.*). Thus, an issue of fact exists as to plaintiff's alleged injuries and defendant has failed to meet its burden, precluding summary judgment. Accordingly, it is

ORDERED that defendant's motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has 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, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

11/30/2018
DATE

ADAM SILVERA, J.S.C.

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