Schor v Castello
2018 NY Slip Op 34109(U)
September 26, 2018
Supreme Court, Rockland County
Docket Number: Index No. 031560/2017
Judge: Sherri L. Eisenpress

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
ANNA SCHOR,

Plaintiff,

-against -

MELISSA CASTELLO and ANTHONY CASTELLO,

Defendants.
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HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 031560/2017

(Motion #1)

The following papers, numbered 1-8, were read in connection with Defendants Melissa Castello and Anthony Castello's ("Defendants") motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-G"	1-2
AFFIRMATION IN OPPOSITION/AFFIDAVIT OF PLAINTIFF/AFFIDAVIT OF DR. JEFFREY SCHNAPPER/AFFIRMATION OF DR. STEVEN MYERSON/ AFFIRMATION OF DR. HERSCHEL KOTKES/EXHIBITS "A-L"	3-7
REPLY AFFIRMATION	8

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on May 15, 2014, at the intersection of Wilder Road and Lime Kiln Road, in the Village of Wesley Hills, County of Rockland. Plaintiff alleges that as a result of the accident, she sustained disc bulges at C2-C3, C3-C4 and C5-C6; disc bulging at L3-L4, L4-L5 and L5-S1; necessitating a cervical epidural injection with fluoroscopy and a lumbar epidural injection with fluoroscopy. Defendants move for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d).

In support of their summary judgment motion, Defendants do not annex a report from their own examining physician but instead rely upon Plaintiff's deposition and medical records from the emergency room; Plaintiff's MRI of her cervical and lumbar spine; and medical records from her treating chiropractor Schnapper and her physical therapy records. Defendants argue that disc bulges alone do not meet the definition of a serious injury. They further argue that Plaintiff's 90/180 day category claim must be dismissed because Plaintiff returned to school and work about a week after the accident.

In opposition thereto, Plaintiff submits her Affidavit and an Affirmation of Dr. Steven Meyerson, who personally reviewed the MRI films taken in his office dated June 23, 2014, who, if called as a witness, would testify consistently with his MRI reports. Additionally, the Affidavit of Jeffrey Schnapper is submitted which states that he began treating Plaintiff for the May 15, 2014, accident on May 21, 2014, at which time he noted spasm and tenderness of the paralumbar and paracervical muscles and found positive objective findings including a positive Valsalva Test, positive cervical comperssion test, positive Soto Hall test, positive Kemp's Test and range of motion abnormalities. Dr. Schnapper's affidavit provides contemporaneous quantified ranges of motion, as well as quantified ranges of motion on June 4, 2018, which he found to be significantly restricted in comparison to normal findings. Plaintiff also produced the affirmed medical report and records of Dr. Herschel Kotkes, a board certified physical specializing in pain management, who also treated Plaintiff and administered two epidural steroid injections. Dr. Kotkes also found positive objective findings of limited range of motion at his most recent examination on June 5, 2018.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency

of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). "A moving defendant may rely upon the unsworn reports of the plaintiff's own physicians and is not required to produce affidavits or affirmations of medical experts to make the requisite showing provided, of course, that the reports are sufficiently complete and, combined with other proof, demonstrate that the plaintiff did not suffer a serious injury." Seymour v. Roe, 301 A.D.2d 991, 755 N.Y.S.2d 452 (3d Dept. 2003). In the instant matter, a review of the evidence relied upon by Defendants render them insufficient to sustain their *prima facie* burden upon summary judgment. Dr. Schnapper's records demonstrate contemporaneous objective findings of an injury to Plaintiff's lumbar and cervical spine, with quantified limited range of motion. These findings, coupled with the MRI reports which indicate disc bulges, fail to eliminate all triable issue of fact as to whether Plaintiff sustained a serious injury under the law.

While this Court need not address whether Plaintiff demonstrated a triable issue of fact in opposition to the motion since Defendants failed to sustain their *prima facie* burden, this Court nonetheless notes that a triable issue of fact has been established by Plaintiff. A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the

Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

Here, Plaintiff's Affidavit of Dr. Schnapper, as well as the Affirmation of Dr. Herschel Kotkes, which state their findings with respect Plaintiff's restrictions of motion contemporaneous to the accident, and at present, demonstrate triable issues of fact sufficient to defeat summary judgment. As such, the triable issues of fact require denial of Defendants' summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

However, Plaintiff has failed to demonstrate that she was disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. She returned to school and work a week after the accident and her Affidavit in which she avers that she had restrictions with regard to her daily activities, coupled with her failure to submit medical evidence which documents that she was prevented from performing "substantially all" of her usual and customary activities for the requisite period, See Rubin v. SMS Taxi Corp., 71 A.d.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010), is insufficient to sustain her burden upon summary judgment. As such, that claim is hereby dismissed.

Accordingly, it is hereby

ORDERED that Defendants Melissa Castello and Anthony Castello's motion for summary judgment, pursuant to CPLR § 3212, is denied, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that this matter is scheduled for an appearance in the Trial Readiness Part on **Wednesday, October 17, 2018, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: New City, New York
September 26, 2018

HON.SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)