Rexon v Giles
2019 NY Slip Op 34330(U)
May 30, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 602133/2017E
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Briana Rexon,

Plaintiff,

-against-

Adrienne Giles,

Defendant .

Clerk of the Court

Index No.: 602133/2017**E**

Motion Sequence No.: 001; MD
Motion Date: 11/7/18
Submitted: 3/6/19

Motion Sequence No.: 002; MG
Motion Date: 1/2/19
Submitted: 3/6/19

Attorney for Plaintiff:

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Upon the **E-file document list** numbered 10 to 32 read on the application by defendant for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 [d] and upon the cross-motion for summary judgment in favor of plaintiff on the issue of liability or in the alternative, precluding defendant from offering any evidence at the time of trial for her failure to appear for a deposition; it is

ORDERED that the defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under Insurance Law §5102 [d] is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that the plaintiff's cross-motion for an order precluding plaintiff from offering any testimony at the time of trial is denied as academic.

This is an action seeking damages for personal injuries sustained by the plaintiff as a result of a motor vehicle accident that occurred on June 14, 2014 at the intersection of Cuba Hill Road and Elwood Road, in the Town of Huntington, County of Suffolk, New York. The action was commenced by the filing of a summons and complaint on February 2, 2017. Issue was joined on July 7, 2017. A preliminary conference was held on September 25, 2017, resulting in an order and plaintiff's deposition was held on March 12, 2018 pursuant thereto. Plaintiff, who was 18 years of age at the time of the accident, alleges in her verified bill of particulars that she sustained permanent consequential limitation of use of a body organ or member, significant limitation of use of body function or symptom and a medically determined injury of impairment of a non-permanent nature which have prevented her from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. In particular, plaintiff alleges in her verified bill of particulars the following injuries: C6/C7 disc protrusion, cervical radiculopathy, lumbar radiculopathy with cervical disc bulge, contusion of scalp, cervical pain, and back pain. Defendant now moves for summary judgment on the grounds that plaintiff did not sustain a serious injury, as that term is defined by Insurance Law §5102 [d]. In support of the motion, defendant submits a copy of the pleadings, plaintiff's verified bill of particulars, the transcript of plaintiff's deposition, and the independent medical report ("IME") of Dr. Mathew M. Chacko ("Dr. Chacko"). Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability or in the alternative, for an order precluding defendant from offering any testimony at the time of trial due to her failure to appear for a deposition. Plaintiff submits a copy of the preliminary conference order, her physical therapy records, the MRI report of her cervical spine, the affirmed report of Dr. Aron Rovner ("Dr. Rovner"), an affidavit of Nicholas Vitale, D.P.T, and an affirmation of good faith. Defendant opposes the cross-motion and replies to the opposition papers submitted on her motion. Plaintiff submits a reply to her cross-motion.

Plaintiff testified at her deposition that at the time of the accident, her vehicle was completely stopped on Cuba Hill Road when her vehicle was struck on the front driver's side by defendant's vehicle, which was traveling on Elwood Road. Prior to the accident, plaintiff's vehicle was stopped for a red light behind the line existing in the right turning lane on Cuba Hill Road. Plaintiff further testified that she had observed to her left that defendant's vehicle was traveling on Elwood Road approximately a quarter of a mile away. While the light controlling Cuba Hill Road turned green prior to the impact, plaintiff decided to let defendant's vehicle pass before her before entering the intersection, as it appeared to plaintiff that defendant's vehicle was going to "blow the light" controlling Elwood Road. Plaintiff testified that despite the fact that she had the right of way, defendant's vehicle continued to drive straight ahead, crossing over into the lanes of travel on Cuba Hill road, striking her stopped vehicle. Plaintiff further testified that the force of the impact caused

her vehicle to spin 270 degrees pushing it onto a grass shoulder where it collided with a sign, which resulted in her head, left knee, and left ankle making contact with the driver's side door. Plaintiff further testified that she was taken by ambulance to Huntington Hospital complaining of pain to her head, left knee and left ankle. Plaintiff was discharged and instructed to refrain from physical activity and consult with her primary care physician. Plaintiff presented to her primary care physician at NYU Langone and Huntington Medical Group and was referred to Dr. Christopher Frendo, a spine specialist. Plaintiff testified that Dr. Frendo referred her for a cervical MRI and prescribed a course of physical therapy. An MRI of plaintiff's cervical spine was taken on January 22, 2015, which revealed a C6-7 left paracentral disc protrusion with slight mass effect upon the exiting left C7 nerve root. Plaintiff then also began treatment with Dr. Rovner and was evaluated by Dr. Rovner several times between 2014 and 2018. Plaintiff testified that she continued physical therapy until her no-fault insurance denied coverage. Plaintiff further testified that she had been a referee of youth soccer games on weekends for three years prior to the accident but has ceased this activity since the accident, is no longer a member of her taekwondo club, and that she has trouble sleeping, standing, and bending.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v. Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v. Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v. Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either

a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v. Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nunez v. Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept. 2018]; *see also* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]; ***Moore v. Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v. Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). A defendant may also establish entitlement to summary judgment using the plaintiff's own sworn deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v. Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v. U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v. Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v. Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v. Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, *supra*; ***Burns v. Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept. 2006]; ***Rich-Wing v. Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2 Dept. 2005];***Boone v. New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v. Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v. Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept. 2003]; ***Pagano v. Kingsbury***,182 AD2d 268, 587 NYS2d 692 [2d Dept. 1992]).

Here, defendant initially asserts that she is entitled to summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not assert in her verified bill of particulars that her injuries fell within a particular section or section of Insurance Law 5102 [d]. However, the court notes that plaintiff indeed indicated in her verified bill of particulars that she sustained permanent consequential limitation of use of a body organ or member, significant limitation of use of body function or symptom and a medically determined injury of impairment of a non-permanent nature

which have prevented her from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. These allegations sufficiently delineate the provisions of Insurance Law 5102 [d] relied upon by plaintiff. Defendant next asserts that plaintiff should be precluded from claiming a serious injury because she stopped treatment without a reasonable excuse for doing so. During her deposition, however, plaintiff explained that she ceased further treatment due to a denial of insurance coverage. Moreover, plaintiff's physician opined that plaintiff has reached maximum medical improvement and any further treatment would be palliative. These are sufficient justifications for the cessation of treatment (*see* ***Jules v. Barbecho,*** 55 AD3d 548, 549, 866 NYS2d 214 [2d Dept. 2008]).

Defendant next relies upon the affirmed report of Dr. Chacko, a neurologist, to support the claim that plaintiff has not sustained a serious injury. Upon examination, Dr. Chacko found plaintiff exhibited full range of motion to her lumbar and cervical spines yet his report indicates plaintiff had lumbar spine range of motion limitations (*see* ***Ramos v Baig***, 145 AD3d 695, 41 NYS3d 902 [2d Dept 2016], ***Cockburn v Neal***, 145 AD3d 660, 44 NYS3d 59 [2d Dept 2016]; ***Dean v Coffee-Dean***, 144 AD3d 1080, 41 NYS3d 750 [2d Dept 2016]; ***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]). The presence of inconsistencies within the defendant's expert's affirmed report creates a question of fact (*see, e.g.,* ***Velasquez v Quijada***, 269 AD2d 592, 703 NYS2d 518 [2d Dept 2000]; ***Martinez v Pioneer Transp. Corp.***, 48 AD3d 306, 851 NYS2d 306 [1st Dept 2008]; ***Martin v Schwartz***,308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Further, Dr. Chacko indicated that the decreased ranges of motion were voluntary and subjective, however, he failed to explain, with any objective medical evidence, the basis for his conclusion that the limitations were self-imposed (***Mercado v. Mendoza.*** *supra;* ***Chung v. Levy,*** 66 AD3d 946, 887 NYS2d 676 [2d Dept. 2009]). Moreover, Dr. Chacko did not address the MRI results of plaintiff's cervical spine except to state that the MRI "did not reveal any significant traumatic pathology" nor did Dr. Chacko relate his findings to the 90/180 serious injury category indicated in plaintiff's bill of particulars for the period of time immediately following the accident (***Ballard v. Cunneen,*** 76 AD3d 1037, 908 NYS2d 442 [2d Dept. 2010]; ***Volpetti v. Yoon Kap,*** 28 AD3d 750, 814 NYS2d 236 [2d Dept. 2006]; *see also* ***Kapeleris v. Riordan,*** 89 AD3d 903, 933 NYS2d 92 [2d Dept. 2011]).

Based upon the above, defendant failed to meet her prima facie burden establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 [d] (***Quiceno v. Mendoza,*** 72 AD3d 669, 897 NYS2d 643 [2d Dept. 2010]; ***Agathe v. Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Reitz v. Seagate Trucking, Inc.,*** 71 AD3d 975, 898 NYS2d 173 [2d Dept. 2010]; ***Walters v. Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) and thus there are triable issues as to whether plaintiff suffered a serious injury (*see* ***Greenidge v. United Parcel Serv., Inc.***, 153 AD3d 905, 60 NYS3d 421 [2d Dept 2017]). Inasmuch as defendant failed to establish prima face entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposing papers were sufficient to raise a triable issue of fact (*see* ***Cues v Tavarone***, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]; ***Reynolds v Wai Sang Leng***, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; ***McMillan v. Naparano,*** 61AD3d 943, 879 NYS2d 152 [2d Dept. 2009]; ***Yong Deok Lee v. Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v.***

Torella, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v. Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]). Nevertheless, even if this Court were to find that defendant's burden had been met, plaintiff presented objective medical evidence regarding her limitations in range of motion to her cervical spine sufficient to raise an issue of fact to be resolved at trial (*see* ***Romano v. Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v. County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Moreover, the conflicting medical opinions of the respective experts raise issues of fact as well as issues of credibility to be resolved by a jury at trial (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Accordingly, defendant's motion for summary judgment is denied.

Addressing now the motion by plaintiff for summary judgment on liability, Vehicle and Traffic Law § 1110 provides that the driver of a vehicle shall obey the instructions of any official traffic control device, and Vehicle and Traffic Law § 1111 (d) (1) provides, in part, that all vehicles must stop when faced with a steady circular red traffic signal before entering an intersection, and remain standing until an indication to proceed is shown. Vehicle and Traffic Law § 1111 (a) (1) provides that vehicles faced with a steady circular green signal may proceed straight through or turn right or left at an intersection, unless a sign provides otherwise. Also, the failure of a driver to stop at a red light constitutes negligence as a matter of law (*see* ***Monteleone v. Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]; ***Pitt v. Alpert***, 51 AD3d 650, 857 NYS2d 661 [2d Dept 2008]). Further, a driver with the right of way is entitled to anticipate that another driver will obey the traffic laws that require him to yield the right of way (*see* ***Smith v. Omanes***, 123 AD3d 691, 998 NYS2d 198 [2d Dept 2014]; ***Yelder v. Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). A plaintiff may obtain partial summary judgment on the issue of liability without demonstrating the absence of his or her own comparative fault (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Here, plaintiff has established prima facie her entitlement to judgment as a matter of law on the issue of liability by demonstrating that she was operating her vehicle in a lawful and prudent manner, and that the accident was caused by defendant's vehicle improperly proceeding through the red light and striking her vehicle (*see* ***Jiang-Hong Chen v. Heart Tr., Inc.***, 143 AD3d 945, 39 NYS3d 504 [2d Dept 2016]; ***Joaquin v. Franco***, 116 AD3d 1009, 985 NYS2d 131 [2d Dept 2014]; ***Delig v. Vinci***, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; ***Shapiro v. Munoz***, 28 AD3d 638, 813 NYS2d 755 [2d Dept 2006].

The burden, then, shifted to defendant to raise a triable issue of fact (*see* ***Emil Norsic & Son, Inc. v. L.P. Transp., Inc.***, 30 AD3d 368, 815 NYS2d 736 [2d Dept 2006]; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645 [2d Dept 2005]). Defendant, however, has failed to submit any evidence in admissible form to raise a triable issue of fact (*see* ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). In particular, there is neither an affidavit nor testimony from defendant disputing plaintiff's version of the accident and the affirmation of defendant's attorney has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). Further, where, as here, a party fails to oppose matters advanced on a motion, the facts alleged in the moving

papers may be deemed admitted by the court (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., Inc. v. Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co, LLC v. Mentesana***, 79 AD3d 1079, 915 NTS2d 591 [2d Dept 2010]). Accordingly, the motion by plaintiff for summary judgment in her favor on the issue of liability is granted.

Dated: 5/30/19

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**