Short Form Order



SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

- - - - - - - - - - - - - - - - - - - - x

Kelvin Burdier and Leybis Ruiz,

Plaintiff,

- against -

Merlin Rodriguez, MFS Fleet, Inc, Mclane Copany, Inc, Penske Leasing and Rental, PTL Collateral Company, LLC and Transco, Inc.,

Defendants.

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Index No.: 701923/2018

Motion Date: 09/24/2020

Motion No.: 25

Motion Seq No.: 3

The following electronically filed documents read on this motion by defendants for an order Dismissing plaintiff, Leybis Ruiz-Burdier's (hereinafter "plaintiff") complaint since plaintiff has failed to establish a serious injury as defined pursuant to §5102(d) of the Insurance Law; and (b) Granting an extension of time to file dispositive motions;

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits.....EF | 46-59 |

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on April 14, 2018 on the Long Island Expressway, at its intersection with 205th Street, in Queens, New York.

In the verified bill of particulars, plaintiff alleges that as a result of the accident she sustained serious injuries to her nasal bone; face; cervical and lumbar spine; both shoulders pain in her right arm; knees; left hip; head; spasms; post traumatic arthritis; striking nerve pain; serve pain; swelling and tenderness; and need for suture surgery.

Plaintiff commenced this action by filing a summons and

complaint on February 7, 2018. Defendants joined issue by service of an answer dated March 23, 2018. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff Leybis Ruiz-Burdier appeared for an examination before trial on June 13, 2019. She testified that on August 30, 2017 at approximately 11:10pm, she was a front seated passenger in a vehicle operated by co-plaintiff and her husband Kelvin Burdier. The accident occurred on the Long Island Expressway near the entrance to the Clearview Parkway exit. Plaintiffs' vehicle was traveling behind a truck in the right lane for approximately two to three seconds before the accident occurred. The vehicle plaintiff Ruiz-Burdier was traveling at approximately 50-55 miles per hour. The speed of the truck ahead of her vehicle was traveling at approximately 35-40 miles per hour. Plaintiffs' vehicle was caused to strike the back of the truck in front of them because the truck did not have it's lights on. Plaintiff's husband applied his brakes to avoid a collision but was not successful. As a result of the accident, plaintiff Ruiz-Burdier lost consciousness and woke up in the hospital. She remained in the hospital for four days following the accident. Plaintiff did not receive any stitches. Plaintiff was re-admitted to the hospital the day after her discharge due to pain in her face which was caused by cuts in her mouth. After being discharged, plaintiff wore a soft collar for two weeks and then on and off thereafter. Plaintiff was given pain medication but was not given any assistive devices. Plaintiff took the medication for three to four weeks following her second discharge. Approximately one and half weeks after her discharge, Plaintiff began attending physical therapy at Queens Wellness. Plaintiff stopped treating there in 2018. Plaintiff also treated with Dr. Christy Perdue and received two injections, on in her neck and one in her back. To date, plaintiff has not undergone any surgeries for her alleged injuries. Plaintiff testified that she was confined to her bed for one to two weeks following the accident and confined to her home for two and half to three months. Plaintiff is able to put clothes on and bathe herself. Aside from exercising, there is nothing she is unable to do anymore. She is able to care for, play with, and cook for her child. She is also able to do work around the house. Plaintiff has not applied for social security disability, and recently traveled abroad.

Paul Lerner, M.D., a neurologist performed an independent medical examination on plaintiff on November 21, 2019. He reported that Plaintiff complained of intermittent headaches occurring two to three times per month. Plaintiff denied any

visual disturbances, loss of vision, nausea or cognitive impairment and did not describe any dizziness or auditory disturbances. Dr. Lerner opined that plaintiff's physical examination was within normal limits including her mechanical examination, mental status, cranial nerves, motor sensory reflexes. Dr. Lerner further opined that plaintiff's cervical and lumbar strain and subjective shoulder pain had all objectively resolved. Dr. Lerner further opined that plaintiff's neurological examination was objectively within normal limits with no abnormalities to support her subjective complaints. Specifically absent were fasciculation,, reflex changes, palpable muscle spasms, atrophy or other abnormalities. Dr. Lerner found no evidence of neurological disability or impairment.

Edward Toriello, M.D., an orthopedic surgeon, performed an independent medical examination of the plaintiff on December 10, 2019. Plaintiff exhibited a normal range of motion to her neck, lower back, and both shoulders. Dr. Toriello stated that there was no objective evidence of a continued disability, and that she was able to return to work and conduct normal daily living activities without restriction.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (see Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that 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" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the court (Licari v Elliott, 57 NY2d 230 [1982]). Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept. 2000]).

Here, the competent proof submitted by defendants, including the reports of Dr. Lerner and Dr. Toriello and plaintiff's own

testimony, that following the accident plaintiff was only confined to her bed for 10 days, was under no restrictions on returning to work, was able to maintain her household and care for her child, is sufficient to meet defendants' prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

Defendants deadline to file this motion was originally April 27, 2020. However, due to the COVID-19 pandemic, and movant's filing of this motion as soon as they were permitted, this motion is deemed timely filed.

No opposition has been filed.

Accordingly, the motion is granted in it's entirety and it is further,

ORDERED, that plaintiff Leybis Ruiz-Burdier's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: September 30, 2020
Long Island City, N.Y.

**ROBERT J. MCDONALD**
**J.S.C.**

**FILED**

**9/30/2020**
**3:45 PM**

**COUNTY CLERK**
**QUEENS COUNTY**