Min Zhao v Poppo
2020 NY Slip Op 35196(U)
October 19, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68515/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---x
MIN ZHAO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 68515/2018
Sequence No. 1

MICHAEL F. POPPO,

Defendant.
---x

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 10-22, were read in connection with the motion by defendant for summary judgment on the issue of Serious Injury under Insurance Law §5104.

This is an action for alleged serious personal injuries arising out of a rear end automobile accident on December 9, 2015, approximately 7:11PM on Mount Kisco Road in North Castle. As a result of the car accident, plaintiff reported that she sustained injuries to her head, neck and left knee.

Now, upon the foregoing papers, the motion is decided as follows:

A 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d

Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104(a) (Licari v Elliott, 57 NY2d 230 [1982]). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury." Pursuant to Insurance Law §5102(d), serious injury

means: 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.

Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v Avis Rent-A-Car Systems, Inc., 98 NY2d 345, 350 [2002]).

To recover under the permanent loss of use category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance Inc., 96 NY2d 295, [2001]). For the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, 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 (98 NY2d 345). The consequential limitation of use category also requires that the limitation be permanent (Lopez v Senatore, 65 NY2d 1017 [1995]).

A plaintiff claiming a significant limitation of use of a body function must substantiate his complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). The Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well." Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" under the state (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]).

To prove the 90/180 day category, an injury must be (1) medically-determined injury or impairment of a nonpermanent nature (2) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment and (3) there must be curtailment of usual activities to a great extent, rather than some slight curtailment (Damas v Valdes, 84 AD3d 87, 91 [2d Dept 2011]). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (98 NY2d 345). In order to establish serious injury here, the plaintiff must establish that he "has been curtailed from performing his [or her] usual activities to a great extent" (57 NY2d at 236; Lanzarone v Goldman, 80 AD3d 667, 669 [2d Dept 2011]).

As the moving party, it is the defendant's initial burden to establish that the plaintiff has not sustained a "serious injury" (Gaddy v Eyler, 79 NY2d 955, 956 [1992]). This is accomplished by submitting objective proof, generally in the form of "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, 84 [2d Dept 2000]). Such proof can even include "unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers" (Elshaarway v U-Haul Company of Mississippi, 72 AD3d 878 [2d Dept 2010]; see Itkin v Devlin, 286 AD2d 477[2d Dept 2001]). A defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]).

If defendants establish their prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to produce evidence sufficient to demonstrate a triable issue of fact on the existence of a "serious injury" as defined by the statute (see Sanevich v Lyubomir, 66 AD3d 665 [2d Dept 2009]; Azor v Torado, 59 AD3d 367, 368 [2d Dept 2009]).

It is well-settled that "in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury" (Grossman v Wright, 268 AD2d at 84). An affidavit or affirmation simply setting forth the observations of the affiant is not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination (Grossman v Wright, 268 AD2d at 84). To meet its burden of proof, a plaintiff is required to submit medical

evidence based on an initial examination close to the date of the accident (Griffiths v Munoz, 98 AD3d 997, [2d Dept 2012]). Equally important, plaintiff must also establish through admissible medical evidence that the injuries sustained are causally related to the accident claimed (Pommells v Perez, 4 NY3d 566 [2005]). A plaintiff's submission must contain a competent statement under oath and must demonstrate that plaintiff sustained at least one of the categories of serious injury as enumerated in Insurance Law §5102(d). Where there has been a gap or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation (Neugebauer v Gill, 19 AD3d 567 [2d Dept. 2005]). While plaintiff is not required to submit contemporaneous range of motion testing, he is required to submit competent medical evidence demonstrating that he sustained range of motion limitations contemporaneously with the accident (Perl v Meher, 18 NY3d 208, 218 [2011]). The absence of a contemporaneous medical report invites speculation as to causation (Griffiths v Munoz, 98 AD3d at 999). Even if plaintiff's doctor does not specifically address the findings in the reports submitted by defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctor that the injuries were indeed traumatic and were causally related to the collision, is sufficient as it implicitly addressed the defendants' contention that the injuries were degenerative (Fraser-Baptiste v New York City Transit Authority, 81 AD3d 878 [2d Dept 2011]). Finally, subjective complaints of pain, without more, are not sufficient to establish a serious injury (Scheer v Koubek, 70 NY2d 678 [1987]).

With these principles in mind, addressing the Permanent Loss of Use Category, plaintiff's medical records shows no total loss of use of any body organ or member. There are no allegations that plaintiff's injuries consist of death, dismemberment significant disfigurement fracture or loss of fetus. Thus, these categories under the statute are inapplicable.

Turning to the merits of defendant's motion, he offers the Affirmation of board certified Orthopedic Surgeon, Dr. Jeffrey Salkin, M.D., who conducted an IME on February 21, 2020 (NYSCEF#16). Dr. Salkin measured plaintiff's range of motion with the aid of a standard hand-held goniometer. Range of motion normal values were based on the AMA guidelines. From these parameters, plaintiff's ranges of motion for the cervical spine were normal or close to normal for flexion, extension, for right and left rotation there was a 30 degree difference and for right and left lateral bending a 15 degree difference between normal and plaintiff's readings. Examination of the thoracic spine and lumbar spine showed normal or close to normal within 10 degrees for all ranges of motion. Examination of the right and left knee showed normal ranges of motion. Dr. Salkin's diagnosis was that the cervical spine sprain, resolved, Thoracic spine pain non causal, clinically normal examination of the lumbar spine and left knee pain non-causal. Dr. Salkin found that plaintiff had a pre-existing condition from a prior motor vehicle accident in 2007, which resulted in neck and bilateral shoulder injuries; degenerative disc disease of the cervical spine. The expert believes plaintiff sustained an aggravation of the underlying cervical disc disease.

Turning to the Permanent Consequential Limitation of Use/Significant Limitation of Use Categories. Defendant submitted competent medical evidence establishing, prima facie, that the alleged injuries to the lumbar and thoracic regions of her spine and to her right and left knee did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law §5102(d) (Staff v Yshua, 59 AD3d 614). In opposition, plaintiff failed to raise triable issues of fact as to whether she sustained serious injuries to these parts of the body.

However, as to the region of the cervical spine, defendant failed to submit competent

medical evidence establishing, prima facie, that plaintiff did not sustain a serious injury to the cervical spine, as defendant's expert found significant limitations in the range of motion of this body part. Additionally, defendant's expert opined that this injury was caused by cervical disc disease, perhaps by the 2007 motor vehicle accident.

In opposition, plaintiff offers the Affidavit of Charles J. Blatt, M. D. Radiologist, who performed an MRI of the cervical spine on December 10, 2015, one day after the subject accident, which demonstrates traumatic soft tissue damage to the cervical region. From his examination of the MRI, Dr. Blatt opined that the findings are casually related to the date of the accident (NYSCEF#20).

Clearly, the conflicting affidavits submitted present a credibility battle between the parties' experts regarding the extent of plaintiffs injury relating to the cervical spine, and issues of credibility are properly left to a jury for its resolution (Ain v Allstate Ins. Co., 181 AD3d 875, 878–79 [2d Dept 2020]).

Plaintiff also alleged that she sustained a serious injury under the 90/180-day category of Insurance Law §5102(d). Defendant claims that during the 180-day period immediately following the subject accident, plaintiff did not have an injury or impairment which, for more than 90 days, that prevented her from performing substantially all of the acts that constituted his usual and customary daily activities (Karpinos v Cora, 89 AD3d 994 [2d Dept 2011]).

Plaintiff testified that for the first four days after the accident she was confined to her home. She went back to work within a week of the accident, and her boss accommodated her schedule. When she went back to work she wore a neck collar that she had worn for her 2007 accident. She testified that for a period of at least a month within that accident, she couldn't drive and do household chores, like vacuum, clean up the floor, cooking, gardening, and church activity. She quit the choir, because her shoulder was "heavy"(NYSCEF#14, Pgs83-84).

Notwithstanding the claims in the bill of particulars regarding the length of confinement, plaintiff's testimony combined with the absence of any contemporaneous medical opinion respecting a causally related disability, leads to dismissal of this claim. No expert testimony was offered as to whether the limitations plaintiff experienced during at least 90 of the first 180 days following the accident were related to the injuries from the accident. According to defendant's medical expert, plaintiff reported that she was employed full time as a database administrator when the accident occurred on December 9, 2015, and that she missed 2 weeks from work following the accident. She is now working at a new job as an analyst. For these reasons, this category is dismissed.

Accordingly, it is

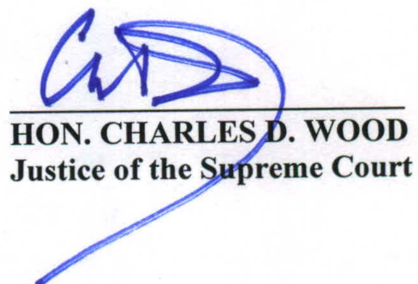
ORDERED, that defendants' motion for summary judgment under the Permanent Loss Categories, the 90/180-day category, Permanent Consequential Limitation of Use/Significant Limitation of Use Categories relating to the lumbar and thoracic regions, and the right and left knee is granted, and denied otherwise; and it is further

ORDERED, that the parties are directed to appear in the Compliance Conference Part in Room 800 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at a date, time, and place, as so designated by that Part.

All matters not herein decided are denied.

This constitutes the Decision and Order of the court.

Dated: October 19, 2020
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF