SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

----------X

MICHE CELESTIN and KIMBERLY SAINPLICE,

Plaintiffs,

– against –

HUSSIEN S. HASHIM and ZULFIQAR AHMAD,

Defendants.

----------X

Index No.: 518950/2019
Motion Date: 09/15/2021
Motion Seq.: 01, 02

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 30-40, 44-56, and 75; and (Motion 02) 57-69 and 77-79 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, the defendants move for an Order (Motion 01) granting summary judgment pursuant to CPLR § 3212 on the ground that there are no triable issues of fact, in that the plaintiffs cannot meet the serious injury threshold requirement as mandated by Insurance Law §§ 5104(a) and 5102(d). The plaintiffs also move for an Order (Motion 02): 1) pursuant to CPLR § 3216, striking the answer of the defendants for failing to appear for an examination before trial; or, in the alternative, 2) pursuant to CPLR § 3216 precluding the defendants from offering any testimony at the time of trial of this action or via affidavit in motion practice with regards to liability and/or damages; and 3) granting the plaintiffs summary judgment against the defendants pursuant to CPLR § 3212 on the issue of liability. After oral argument and consideration of the parties' submissions, Motion 01 is denied and Motion 02 is granted.

Defendants' Motion for Summary Judgment on Threshold (Motion 01)

This action arises out of a motor vehicle accident that occurred on Nostrand Avenue at or near its intersection with Rutland Road in the County of Kings, City and State of New York, on or about August 22, 2018. In his verified bill of particulars, plaintiff Miche Celestin claims that he suffered injuries including, inter alia, a tintrameniscal tear of anterior horn of lateral meniscus of the right knee, anterior subcutaneous soft tissue swelling of the right knee, right knee surgery, disc bulges at C2-C6, and an intrasubstance partial tear of the distal supraspinatus tendon of the right shoulder. Plaintiff Kimberly Sainplice alleges that she has also suffered injuries such as a horizontal tear of the medial meniscus of the right knee, right knee surgery, disc hernation at T11-T12, disc bulge at L2-L4, and disc herniation at L4-L5 and L5-S1.

In support of its motion, the defendants offer the pleadings, the bill of particulars, the plaintiffs' deposition testimony, and the affirmations of Drs. Salvatore J. Corso and Jessica F. Berkowitz. In a report dated October 22, 2020, Dr. Corso, a board-certified orthopedist, stated

that he examined Mr. Celestin and measured ranges of motion through the use of a goniometer. *See* NYSCEF Doc. No. 37. With regard to Mr. Celestin, Dr. Corso found normal ranges of motions in all affected areas. Dr. Corso opined that Mr. Celestin did not sustain any significant or permanent injury as a result of the motor vehicle accident, and that there are no objective clinical findings indicative of a disability and/or functional impairment that prevents Mr. Celestin from engaging in his activities of daily living, including work, school, and hobbies. Dr. Corso also examined Ms. Sainplice, and in a report dated November 13, 2020, opined that Ms. Sainplice showed normal ranges of motion and did not sustain any significant or permanent injury as a result of the motor vehicle accident.

The defendants also offer the reports of board-certified radiologist Dr. Berkowitz. Dr. Berkowitz reviewed the MRIs of Mr. Celestin's cervical spine, lumbar spine, right shoulder, and right and left knee, and opined that his MRIs showed no evidence of acute traumatic injury to any of the examined areas. Dr. Berkowitz further opined that there was no causal relationship between Mr. Celestin's alleged accident and the findings on the MRI examinations. Dr. Berkowitz also reviewed the MRIs taken of Ms. Sainplice's lumbar spine, right knee, and right wrist, and found that there was no evidence of acute traumatic injuries and no causal relationship to the accident.

In opposition, the plaintiffs submit the pleadings, the bill of particulars, the deposition transcripts of the plaintiffs, and various medical records and affirmations. Board-certified radiologist Dr. Steve Losik reviewed the right knee and right shoulder MRI films of Mr. Celestin and found, inter alia, an intrameniscal tear of anterior horn of the lateral meniscus in the right knee and a type III acromion with hypertrophic changes of the acromioclavicular joint with impingement of the rotator cuff in the right shoulder. Dr. Susan Azar reviewed the MRI films of Mr. Celestin's lumbar and cervical spine and found disc bulges and herniations. Drs. Scott Leist and Richard Pearl also treated Mr. Celestin and provide affidavits in which they state that there is a causal relationship between the subject accident and the restrictions in Mr. Celestin's range of motion. With regard to Ms. Sainplice, Drs. Losik and Azar also reviewed her MRI films and found, inter alia, bulges and herniations in the lumbar spine and a horizontal tear in the medial meniscus in the right knee. Drs. Leist and Pearl also provided affidavits and medical records for Ms. Sainplice's injuries and treatment, stating that there was a causal relationship between the accident and her injuries. In addition, Dr. Pearl performed knee surgeries on both plaintiffs and provided medical reports describing the procedures.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendant has the initial burden of establishing that the plaintiffs did not sustain serious injuries under the categories of injury claimed. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). Defendants can satisfy the initial burden by relying on statements of the defendants' examining physician(s), or plaintiffs' sworn testimony, or by the affirmed reports of the plaintiffs' own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurements,

must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

The defendants' submissions demonstrate their prima facie entitlement to summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain serious injuries within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955 (1992); *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendants have submitted competent medical evidence in the form of the affirmed reports of its examining medical experts, Drs. Corso and Berkowitz, establishing that the alleged injuries do not constitute a serious injury under Insurance Law § 5102(d). *See Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009).

However, in opposition, the plaintiffs have raised a triable issue of fact as to whether they suffered serious injuries as a result of the accident through the affirmations and affirmed medical records of Drs. Leist, Pearl, Azar, and Losik. *See Lopez v Senatore*, 65 NY2d 1017 (1985); *see also Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Dr. Pearl performed orthopedic evaluations on the plaintiffs and found limited ranges of motion in both. *See Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010). A significant limitation need not be permanent in order to constitute a serious injury. *Partlow v Meehan*, 155 AD2d 647 (2d Dept 1989), quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); *see Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648.

Furthermore, with regard to the defendants' claim that there was a gap in treatment, Dr. Leist noted in his affirmations on behalf of both plaintiffs that the patients' treatment stopped because there is "very little more than can be done" even though symptoms persist. *See* NYSCEF Doc. Nos. 53 and 55. This constitutes a sufficient explanation for the plaintiffs' gap in treatment. *See Bonilla v Tortoriello*, 62 AD3d 637 (2d Dept 2009) (physician's affirmation stating that the plaintiff had reached maximum medical improvement and that any further treatment at that time would have been merely palliative in nature was sufficient to explain the plaintiff's gap in treatment). In light of the foregoing, the defendants' motion for summary judgment based on serious injury threshold is denied.

Plaintiffs' Motion for Summary Judgment on Liability and to Strike Defendants' Answer (Motion 02)

The plaintiffs also seek summary judgment on the issue of liability for the subject accident, which occurred on August 22, 2018, on Nostrand Avenue near its intersection with Rutland Road. The plaintiffs testified that they were passengers in a green taxi and that the cab owned by Hussein Hashim and driven by Zulfiqar Ahmad was swerving wildly and recklessly prior to the happening of the accident. Mr. Celestin testified that one such reckless lane switch

preceded the accident, when the cab moved to the right and struck another vehicle that drove away from the scene.

In opposition, the defendants argue that although the plaintiffs as passengers are free from comparative fault for the occurrence, this does not determine that they are entitled to summary judgment on liability as against one or more of the defendants unless the liability of said defendant is determined as a matter of law. The defendants further argue that plaintiff passengers are not automatically entitled to summary judgment on liability, and that in automobile negligence actions, the question of fault is ordinarily a question of fact to be determined by the jury.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

Pursuant to Vehicle and Traffic Law § 1128, "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Joaquin v Franco*, 116 AD3d 1009 (2d Dept 2014); *see also Vainer v C.J. DiSalvo*, 79 AD3d 1023 (2d Dept 2010); *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650 (2d Dept 2008). Furthermore, the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence. *Medina v Rodriguez*, 92 AD3d 850 (2d Dept 2012); *see also Balladares v City of New York*, 177 AD3d 942 (2d Dept 2019); *Jung v Glover*, 169 AD3d 782 (2d Dept 2019); *Rodriguez v City of New York*, 31 NY3d 312 (2018).

Here, the plaintiffs established prima facie entitlement to judgment as a matter of law through their depositions, which demonstrated that they were not negligent and did not contribute to the happening of the accident. *See Lopez v Dobbins,* 164 AD3d 776 (2d Dept 2018); *Nikolic v City–Wide Sewer & Drain Serv Corp.,* 150 AD3d 754 (2d Dept 2017); *see also Rodriguez v City of New York,* 31 NY3d 312 (2018). In opposition, the defendants failed to raise a triable issue of fact. *See Medina* at 850.

Furthermore, pursuant to CPLR § 3126, if a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, the court may make an order "striking out pleadings or parts thereof…" However, before a court invokes the drastic remedy of striking a pleading, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious. *HSBC Bank USA, National Association v Oscar*, 161 AD3d 1055 (2d Dept 2018) (internal quotations removed); *see also Household Finance Realty Corp. of New York v Delia Cioppa*, 153 AD3d 908 (2d Dept 2017).

On December 3, 2020, the Hon. Lawrence Knipel issued an order that stated as follows: "Pursuant to CPLR §3126, failure to strictly comply with this final order, will result in preclusion, the striking of a pleading and/or sanctions as may be appropriate." The plaintiffs represent that the defendants have violated four prior Court orders and have failed to appear for depositions six times. In opposition, the defendants represent that the plaintiffs have not requested the deposition of Mr. Hashim, and that good faith efforts have been made to contact Mr. Ahmad. Here, before exercising the drastic remedies of striking the pleading or precluding the defendants from offering evidence at trial, the Court will allow the defendants an additional 30 days to appear for deposition(s).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss plaintiffs' complaint on the ground that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102(d) (Motion 01) is DENIED; and it is further

ORDERED, that the plaintiffs' motion for summary judgment and to strike the defendants' Answer (Motion 02) is GRANTED to the extent that the plaintiffs are not liable for the happening of the accident; and it is further

ORDERED, that if the defendants fail to appear for deposition(s) on or before December 18, 2021, the defendants shall be precluded from offering evidence at the time of trial.

This constitutes the decision and order of the Court.

DATED: November 18, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.