

Barnes v Schiff

2021 NY Slip Op 33527(U)

January 13, 2021

Supreme Court, Rockland County

Docket Number: Index No. 032531/2019

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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DENISE BARNES,

Plaintiff,

-against -

MATTHEW C. SCHIFF,

Defendant.

-----X

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

DECISION/ORDER

Index No. 032531/2019

(Motion #1)

The following papers, numbered 1-7 , were read in connection with Defendant Matthew C. Schiff 's("Defendant") 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/AFFIRMATION OF BARRY KRAUSHAAR, M.D./AFFIRMATION OF SHELDON FEIT, M.D./ EXHIBITS A-G	1-4
AFFIRMATION IN OPPOSITION/AFFIRMATION OF SCHOTT GOTTLIEB, M.D.	5-6
REPLY AFFIRMATION	7

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on April 17, 2019, on Route 303 at or near its intersection with Emerald Drive, in the Town of Clarkstown, when the rear of her vehicle was struck by Defendant's vehicle. Plaintiff, 47 years old at the time of the accident, alleges that as a result of the accident she sustained disc bulges at L4-5 and L5-S1 which required right lumbar paraspinal, thoracic paraspinal and trapezius trigger point injections; and sprain/strain of the lumbar, thoracic and cervical spine. Defendant moves 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 her summary judgment motion, Defendant annexes the Plaintiff's examination before trial transcript and the affirmed medical report of Barry Kraushaar, M.D., Defendant's examining orthopedist. Upon examination, Dr. Kraushaar finds Plaintiff's cervical and lumbar examination to be unremarkable, with all measurements to be within normal ranges. His impression is that Plaintiff's injuries were purely muscular and ligamentous. Defendant also submits the affirmation of Dr. Sheldon Feit, radiologist, who finds no evidence disc bulge or focal herniation and opines that there are no abnormalities causally related to the subject accident. Additionally, Defendant argues that Plaintiff's 90/180 day category claim must be dismissed because Plaintiff's proof fails to show that she was medically prevented from performing "substantially all" of her usual and customary activities for the requisite period and the time.

In opposition to the instant motion, Plaintiff submits the affirmed report of Dr. Scott Gottlieb, an orthopaedic surgeon. Dr. Gottlieb finds limitations of range of motion in Plaintiff's lumbosacral spine including a finding of 65 degrees flexion (normal 80); extension limited to 15 degrees (normal 30); right lateral rotation limited to 15 degrees (normal 25) and left lateral rotation limited to 20 degrees (normal 25). Dr. Gottlieb diagnoses Plaintiff with thoracolumbar strain with lumbar facet arthropathy; causally related pain and that she has a partial permanent disability which will require ongoing treatment including lumbar facet blocks. As such, Plaintiff alleges that there is a triable issue of fact.

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). In the instant matter, Defendant's examining physicians found full range of motion in Plaintiff's cervical and lumbar spine. As such, Defendant has met his burden on summary judgment with respect to the categories of significant limitation of use and permanent consequential limitation of use and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

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).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon her lumbar spine limitations, which the Court finds sufficiently significant. Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2d 518 (1st Dept 1996). As such, the triable issues of fact require denial of Defendant's summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

However, Defendant is entitled to summary judgment with respect to the 90/180 day category. Defendant submits Plaintiff's examination before trial transcript which demonstrates that Plaintiff had some restrictions with regard to her work and/or everyday activities but not that she was prevented from performing all of her usual activities for 90 out of the 180 days following the occurrence, as she continued to work until she gave birth in October, 2018. This, coupled with Plaintiff's 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, requires the grant of summary judgment with respect to this category. See Rubin v. SMS Taxi Corp.,

Accordingly, it is hereby


ORDERED that Defendant Matthew Schiff'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 a settlement conference on **APRIL 5, 2021, at 10 a.m. via Microsoft Teams.** Link to be provided the day prior.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion

#1.

Dated: New City, New York
January 13, 2021



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

TO:
All Parties (by e-file)