Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Justice

IA Part 33

x

Index No. 704572/2018

PATRICIA BLACK,

Plaintiff,

Motion Date:
January 19, 2021

- against-

Motion
Seq. No. 2

MATTHEW SANTOS and FERNANDO SANTOS,

Defendants.

x

The following numbered papers have been read on this motion by defendants for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury," as defined in Insurance Law § 5102 (d), and on this cross motion by plaintiff for summary judgment on liability, and on the issue of "serious injury, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	E14-E23
Notice of Cross Motion - Affirmation - Exhibits.....	E27-E32
Reply Affirmations.....	E33-E34

Upon the foregoing papers, it is ordered that defendants' motion, and plaintiff's cross motion, are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on April 14, 2017, on the Cross Island Parkway. In her bill of particulars, plaintiff alleged, among other things, "disc herniation(s) at L4-5; L5-S1; C5-C6; disc bulging L3-4; fracture of tooth #18; adhesive capsulitis of left shoulder." Defendants move for summary judgment, dismissing the complaint, for plaintiff's failure to prove a "serious injury" pursuant to Ins. Law 5102 (d). Plaintiff cross-moves for summary judgment on liability, and for judgment on the issue of "serious injury."

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Wonderly v City of Poughkeepsie*, 185 AD3d 632 [2d Dept 2020]; *Oxford Health Plans (NY), Inc. v Biomed Pharms., Inc.*, 181 AD3d 808 [2d Dept 2020]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69 [2020]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Roos v King Constr.*, 179 AD3d 857 [2d Dept 2020]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendants (*see Hewitt v Palmer Veterinary Clinic, P.C.*, 35 NY3d 541 [2020]; *Matter of New York City Asbestos Litig.*, 33 NY3d 20 [2019]; *Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (*see Ayotte v Gervasio*, 81 NY2d 1062; *Khadka v American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]; *Cach, LLC v Khan*, 188 AD3d 1135 [2d Dept 2020])

On defendants' motion for summary judgment, defendants bear the initial burden of

establishing that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]; *Shamsoodeen v Kibong*, 41 AD3d 577 [2007]). By submitting the affidavits or affirmations of medical experts, who through objective medical testing conclude that plaintiffs' injuries are not serious within the meaning of Insurance Law § 5102 (d), a defendant can meet his or her prima facie burden (*see Margarin v Krop,* 24 AD3d 733 [2005]; *Karabchievsky v Crowder*, 24 AD3d 614 [2005]).

Plaintiff was examined by Regina Hillsman, M.D., an orthopedist, on June 29, 2020, on behalf of defendants. In her affirmed medical report regarding the examination of plaintiff, Dr. Hillsman reported complaints of pain in plaintiff's neck, back and left shoulder, and found normal ranges of motion in plaintiff's cervical, thoracic, and lumbar spine and in her shoulder, which were supported by objective testing and compared to normal function (*see Kaminski v Kawamoto*, 49 AD3d 501[2008]). Dr. Hillsman concluded that her physical examination of plaintiff revealed that the "sprain and strain" injuries to the parts of the body examined, had "resolved," without any long-lasting effect. Based on defendants' medical evidence alone, defendants have presented a prima facie case of entitlement to summary judgment under Insurance Law § 5102 (d), with regard to the claimed injuries to plaintiff's neck, back and shoulder (*see Maitre v Empire Paratransit Corp.*, 192 AD3d 786 [2d Dept 2021]; *Foy v Pieters*, 190 AD3d 700 [2d Dept 2021]; *Preciado v Garfield,* 133 AD3d 582 [2015]; *Ceglian v. Chan*, 283 AD2d 536 [2001]).

However, Dr. Hillsman's examination of plaintiff did not address plaintiff's claim of an injury to her "tooth #18," as stated in her bill of particulars. Failure to respond to a listed injury does not result in a shift of the burden, and it is, thus, not incumbent upon plaintiffs to produce prima facie evidence, in admissible form, to support the claim of "serious injury" with regard to that injury (*see Lopez v. Senatore,* 65 NY2d 1017 [1985]; *Licari v Elliott*, 57 NY2d 230 [1982]). Additionally, here, plaintiff has submitted the affirmed report of James M. Hensley, DDS, MAGD, a dentist, who saw plaintiff on April 19, 2017, and, ultimately, performed a ceramic crown restoration on tooth #18. He opined that plaintiff "sustained a nondisplaced fracture at the lingual wall of tooth #18" which resulted from the subject automobile accident. Such evidence of "a fracture"is sufficient, under Ins. Law 5102 (d), to raise a material issue of fact which has been left unresolved, thereby requiring a determination by a trier of the facts (*see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712 [2d Dept 2020]; *Flaccavento v John's Farms*, 173 AD3d 1141 [2d Dept 2019]), and the denial of defendants' motion. Even had defendants addressed said dental injury, and properly disputed same, said evidence would only have raised an outstanding issue of fact as to that injury.

As plaintiff has estabilised that a question of fact exists as to having met the No-Fault threshold on at least one of her alleged injuries, she has succeeded in defeating the instant motion (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Nussbaum v Chase*, 166 AD3d 638 [2d

Dept 2018];*Navarro v Afifi*, 138 AD3d 803 [2016]), and defendants have failed to demonstrate entitlement to summary judgment on the issue of "serious injury."

Plaintiff's cross motion seeks summary judgment on liability, and on the issue of "serious injury." Based upon the facts presented, taken from plaintiff's affidavit in support, and from defendant driver's deposition testimony, plaintiff moves for summary judgment, demonstrating that she was stopped in her lane of traffic, for approximately two seconds, when defendants' vehicle struck her car in the rear. Such evidence established, prima facie, entitlement to judgment as a matter of law on the issue of liability (*see Rincon v Renaud*, 186 AD3d 1551 [2d Dept 2020]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Modena v M&S Mech. Servs., Inc.*, 181 AD3d 802 [2d Dept 2020]; *Batashvili v Veliz-Palacios*, 170 AD3d 791 [2d Dept 2019]), by demonstrating that defendant driver was negligent, and that his negligence was the sole proximate cause of the accident, by reason of his violation of Vehicle and Traffic Law § 1129 [a], which states that the operator of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*see Sorocco v Meglio*, 157 AD3d 838 [2d Dept 2018]; *Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101 [2d Dept 2016]). Thus, a collision as described by both plaintiff and defendant herein establishes a prima facie case of negligence on the part of the driver of the following (rear) vehicle, and requires that driver to rebut the inference by providing a non-negligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Modena v M&S Mech. Servs., Inc.*, 181 AD3d 802).

In the case at bar, defendants have failed to submit affidavits in opposition on this issue. As such, defendants have failed to rebut plaintiff's account of the accident; have failed to allege that plaintiff's vehicle made a "sudden stop" or an "unexpected lane change," or take any other action, which could be considered a non-negligent explanation for the accident (*see Butbul v City of New York*, 147 AD3d 897 [2017]; *Finney v Morton*, 127 AD3d 1134 [2015]); and have failed to raise a triable issue of fact in rebuttal (*see Rossnagel v Kelly*, 177 AD3d 650 [2d Dept 2019]; *Skura v Wojtlowski*, 165 AD3d 1196 [2d Dept 2018]; *Vuksanaj v Abbott*, 159 AD3d 1031 [2d Dept 2018]). As such, the branch of plaintiff's cross motion seeking summary judgment on liability is granted, without opposition.

The branch of plaintiff's cross motion seeking summary judgment on the issue of whether her alleged "tooth fracture" is to be considered a "serious injury," pursuant to Ins. Law 5102 (d), is denied. Plaintiff's treating dentist, Dr. Hensley, did opine, in his affirmation herein, submitted in support of plaintiff, that plaintiff "sustained a non displaced fracture ... of tooth #18" in the subject accident, which required him to perform a crown restoration." However, such opinion is problematic in that his office notes for plaintiff, from over six months before the accident date, state "#18 will need future crown," and, on "4/19/17," the date of plaintiff's first visit to him, there is no mention of "tooth #18" and he adds "nothing significant showing on radiographs." While he explains that a "nondisplaced"

tooth fracture may not be revealed on such radiographs, such language is too vague and ambiguous to remove any question of fact as to whether plaintiff suffered a fractured tooth as a result of the accident, or at a later date.

Further, with regard to whether a dental fracture constitutes a No-Fault "serious injury," the case law, including that cited by plaintiff, requires "an undeniable fracture which called for prompt repair and ongoing treatment" (*Kennedy v Anthony*, 195 AD2d 942, 944 [3rd Dept 1993]; *see Chatoorang v Navarrete-Duque*, 105 AD3d 518 [1st Dept 2013]; *Newman v Datta*, 72 AD3d 537 [1st Dept 2010]), or "treatment" and "future treatment" (*Sanchez v Romano*, 292 AD2d 202, 202 [1st Dept 2002]). Dr. Hensley's affidavit makes no mention of either "ongoing" or "future" treatment. As such, plaintiff's allegation that plaintiff sustained "a fracture ... which needed substantial corrective dentistry including a crown," is unsupported, and without merit, based on the documentation submitted herein. As a result, plaintiff has failed to demonstrate entitlement to summary judgment on the issue of "serious injury" based on the claimed "tooth fracture."

The parties' remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, defendants' motion for summary judgment, seeking dismissal of plaintiffs' complaint on the issue of failure to meet the "serious injury" threshold requirement of Insurance Law § 5102 (d), is denied. The branch of plaintiff's cross motion for summary judgment on liability is granted, without opposition. The branch of plaintiff's cross motion for summary judgment on the issue of "serious injury" is denied.

Dated: May 13, 2021

J.S.C.