Degen v Lopez

2012 NY Slip Op 30917(U)

March 30, 2012

Supreme Court, Suffolk County

Docket Number: 10-7124

Judge: Thomas F. Whelan

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SHORT FORM ORDER

INDEX No. 10-7124
CAL. No. 11-01854MV

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11-23-11
ADJ. DATE 1-23-12
Mot. Seq. # 002 - MG; CASEDISP

LAUREN RIEGEL DEGEN,

Plaintiff,

- against -

WILLIAM R. LOPEZ and MARIA R. LOPEZ,

Defendant.

CARTIER, BERNSTEIN, AUERBACH and DAZZO, P.C.
Attorney for Plaintiff
100 Austin Street - Bldg. 2
Patchogue, New York 11772

RICHARD T. LAU & ASSOCIATES
Attorney for Defendants
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Upon the following papers numbered 1 to 33 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 31 ; Replying Affidavits and supporting papers 32 - 33 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants William Lopez and Maria Lopez for summary judgment dismissing the complaint is granted.

Plaintiff Lauren Riegel Degen commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident, which occurred on Round Swamp Road in the Town of Oyster Bay on June 10, 2008. The accident allegedly happened when a vehicle owned by defendant William Lopez and driven by defendant Maria Lopez collided with the vehicle driven by plaintiff as it was traveling southbound through the intersection with the South Service Road of the Long Island Expressway. The force of the impact allegedly propelled plaintiff's vehicle past the intersection, causing it to collide with a vehicle that was traveling north on Road Swamp Road. By her bill of particulars, dated November 6, 2010, plaintiff alleges she sustained various injuries due to the accident, including a herniated disc at level L5-S1, an abrasion to her left knee, and "multiple sprains, strains, swelling, bruises, contusions [and] pains." An amended bill of particulars, dated July 15, 2011, alleges plaintiff also suffered scarring on her left knee. It further claims plaintiff suffered the following serious injuries

within the meaning of Insurance Law § 5102 (d): scarring; 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; and a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of her normal daily activities for at least 90 days of the 180 days immediately following the accident.

Defendants now move for an order granting summary judgment in their favor, arguing that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss as she did not sustain a "serious injury" as defined by Insurance Law §5102 (d). Defendants' submissions in support of the motion include copies of the pleadings and the bills of particulars, a transcript of plaintiff's deposition testimony, an initial consultation prepared by plaintiff's treating orthopedist, Dr. Ronald Light, and affirmed medical reports prepared by Dr. Michael Katz and Dr. Melissa Sapan Cohn. At defendants' request, Dr. Katz, an orthopedic surgeon, conducted a physical examination of plaintiff on August 16, 2011, and Dr. Sapan Cohn, a radiologist, reviewed the images produced from an MRI examination of plaintiff's lumbar spine conducted in July 2008. Plaintiff opposes the motion on the grounds that defendants' submissions are insufficient to establish a prima facie case of entitlement to judgment in their favor as a matter of law, and that plaintiff has suffered permanent injuries to her lower back and left knee as a result of the accident.

Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e.,affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form sufficient to demonstrate a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427

NYS2d 595 [1980]).

Defendants' submissions established a prima facie case that plaintiff did not suffer a serious injury within the limitation of use categories (*see* ***Kublo v Rzadkowski***, 71 AD3d 831, 899 NYS2d 250 [2d Dept 2010]; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2d Dept 2009]; ***Shevardenidze v Vaiana***, 60 AD3d 660, 875 NYS2d 119 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). The medical report of Dr. Katz states that plaintiff presented at the August 2011examination with complaints of occasional pain in her back and left knee. It states, in relevant part, that plaintiff exhibited normal range of motion in the cervical and lumbosacral regions of her spine, that no paravertebral muscle spasm was detected, and that the straight leg raise test was negative. It also states that plaintiff walked with a normal gait, that her sensation was intact, and that the reflexes in her upper and lower extremities were symmetric. As to plaintiff's left knee, the report states that range of motion testing showed normal joint function, and that orthopedic testing revealed no evidence of kneecap, ligament or meniscus injury. Dr. Katz diagnoses plaintiff as having suffered a lumbosacral strain and contusions to her thumb and knee due to the accident. He further concludes that there were no findings of disability and that plaintiff, who is employed as a school teacher, is able to perform her normal daily activities. Dr. Sapan Cohn's report states that images from the MRI examination of plaintiff's lumbar region performed one month after the subject accident revealed no evidence of disc herniation, and that a disc bulge at level L5/S1 is the result of a degenerative condition in the spine, not trauma.

The evidence submitted by defendants also made a prima facie showing that plaintiff did not sustain either an injury that resulted in a "significant disfigurement" or a medically-determined nonpermanent injury that prevented her from performing substantially all of the acts constituting her normal daily routine for at least 90 of the 180 days following the accident (*see* ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; ***Richards v Tyson***, 64 AD3d 760, 883 NYS2d 575 [2d Dept 2009]; ***Benitez v Sexton***, 139 AD2d 686, 527 NYS2d 803; ***Koppelmann v Lepler***, 135 AD2d 507, 522 NYS2d 12 [2d Dept 1987]). Plaintiff, who teaches at an elementary school in the borough of Queens, testified at deposition conducted on July 14, 2011 that she missed three days of work immediately after the accident. She testified that she passed up an offer to work as a tutor during the summer because of her injuries, but returned to her full-time teaching position in September 2008. She also testified that she was not advised by a doctor or other health care provider to limit her job activities as a result of the injuries suffered in the accident. When asked about any current complaints, plaintiff responded that she always feels "discomfort" in her lower back and occasionally feels tightness in her knee "when the weather is getting bad."

As to the disfigurement claim, the initial consultation report of Dr. Light, an orthopedist who treated plaintiff after the accident, states that she presented on June 11, 2008 with complaints of pain in her left thumb and left knee. It states, in part, that the initial examination revealed a "superficial soft tissue abrasion to the anterior medial aspect of [plaintiff's] left knee consistent with a dashboard abrasion or airbag deployment," and that "active passive range of motion" in the knee was "intact." Dr. Light's report sets forth a diagnosis of contusions to the left knee and thumb and left knee sprain,

recommends only that plaintiff rest and ice the affected areas and avoid stressful activities. It also states that plaintiff may undergo an MRI examination of the left knee and a course of physical therapy if symptomatic the following week. When questioned at the deposition, plaintiff testified that the impacts to her car caused her left knee to hit the dashboard, and that she suffered a cut on her left knee as a result. She testified that the cut was not sutured when she received treatment at the emergency department of North Shore University Hospital at Plainview after the collision, and that she now has a scar on the knee. Observed at the deposition by the parties' attorneys, the scar, located on the inside of the knee, was described as approximately one centimeter in length and lighter in color than the skin around it.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). Further, to establish a "significant disfigurement" within the meaning of the No Fault Law, a plaintiff must demonstrate that a reasonable person viewing the scar or other disfigurement attributable to the accident would regard such condition as unattractive, objectionable or as the subject of pity or scorn (*see* ***Lynch v Iqbal***, 56 AD3d 621, 868 NYS2d 676 [2d Dept 2008]; ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]; ***Spevak v Spevak***, 213 AD2d 622, 624 NYS2d 232 [2d Dept 1995]; ***Prieston v Massaro***, 107 AD2d 742, 484 NYS2d 104 [2d Dept 1985]). And while the question of whether a plaintiff's scar constitutes a significant disfigurement generally is submitted to the trier of fact (*see* ***Prieston v Massaro***, 107 AD2d 742, 484 NYS2d 104; ***Benitez v Sexton***, 139 AD2d 686, 527 NYS2d 803 [2d Dept 1988]), it is for the court to determine in the first instance whether a prima facie case of serious injury has been established by the plaintiff (*see e.g.* ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359; ***Jordan v Baine***, 241 AD2d 894, 660 NYS2d 509 [3d Dept 1997]; *see generally* ***Licari v Elliott***, 57 NY2d 230, 237, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991];).

The evidence submitted by plaintiff in opposition to the motion is insufficient to raise a triable issue of fact. The medical report of Dr. Light, dated December 14, 2011, shows that he examined plaintiff on four occasions during the two months after the accident, and then again on November 25, 2011. It states that plaintiff continued to complain of pain in her knee at a follow-up exam conducted on June 20, 2008, and that "some healing of the skin abrasions and ecchymosis was noted." It states plaintiff's knee symptoms showed improvement at examinations performed on July 11 and August 6, 2008, and that physical therapy "was re-ordered for her left knee which also included the lumbar spine."

Further, the report states that plaintiff exhibited 90 degrees of forward flexion and 25 to 30 degrees of lateral flexion in her lumbar region, and 135 degrees of flexion in her left knee at the examination conducted in November 2011. Dr. Light concludes in the report that plaintiff suffered a sprained left thumb, contusions, abrasions and sprains of the left knee, and a herniated disc at level L5-S1 as a result of the accident, and that the knee and back conditions "appear to be of a permanent nature."

Dr. Light, however, does not allege in his report that plaintiff suffers from significant limitations of movement in her lumbar spine or knee or that such limitations was caused by the accident. In fact, there is no indication in the report that plaintiff sought treatment from him for a back condition or that he performed any objective tests prior to November 2011 to ascertain whether she suffered an injury to her back. Rather, he states only that "in accordance with a negative past medical history, the patient's findings of a herniated disc on MRI of the L-S spine clinically and radiographically correlate with her history of trauma related to the accident of record." In addition, it appears no actual measurements of the range of motion in plaintiff's knee were taken until the November 2011 examination. Dr. Light's report, therefore, does not constitute competent evidence that plaintiff sustained significant restriction in knee or lumbar joint function and that any such restriction is causally related to the subject accident (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245; ***Silkowski v Alvarez***, 19 AD3d 476, 798 NYS2d 468 [2d Dept 2005]; ***Collazo v Jun Yong Kim***, 288 AD2d 173, 733 NYS2d 93 [2d Dept 2001]; ***Estrella v Marano***, 255 AD2d 358, 679 NYS2d 678 [2d Dept 1998]; ***Mickelson v Padang***, 237 AD2d 495, 655 NYS2d 592 [2d Dept 1997]). It is noted that the mere existence of a herniated or bulging disc is not evidence of a serious injury absent objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]).

Further, the photographs of plaintiff's knee submitted in opposition fail to raise a question as to whether she suffered a significant disfigurement. Such photographs, which have been magnified by undisclosed amounts, are not in admissible form, as they are unauthenticated (*see* ***Morales v City of New York***, 278 AD2d 293, 717 NYS2d 344 [2d Dept 2000]; ***Gutierrez v Cohen***, 227 AD2d 447, 643 NYS2d 121 [2d Dept 1996]). In any event, only a very small, faint scar is visible in the photograph with the greatest magnification (*see* ***Maldonado v Piccirilli***, 70 AD3d 785, 894 NYS2d 119 [2d Dept 2010]; ***Lynch v Iqbal***, 56 AD3d 621, 868 NYS2d 676 [2d Dept 2008]; ***Jordan v Baine***, 241 AD2d 894, 660 NYS2d 509). Finally, absent any objective proof of a serious injury, plaintiff's affidavit is insufficient to raise a triable issue of fact (*see* ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358; ***Ambos v New York City Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2d Dept 2010]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]).

Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 3/30/12

THOMAS F. WHELAN, J.S.C.