Misiti v County of Suffolk
2012 NY Slip Op 32050(U)
July 27, 2012
Supreme Court, Suffolk County
Docket Number: 08-1115
Judge: John J.J. Jones Jr
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 08-1115
CAL. No. 10-02448MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-22-11 (#001)
MOTION DATE 1-11-12 (#002)
MOTION DATE 2-14-12 (#003)
ADJ. DATE 2-15-12
Mot. Seq. # 003 - MG; CASEDISP
004 - MG
005 - XMD

---X

FRANK J. MISITI,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS and THOMAS E. BELL, JR.,

Defendants.

---X

Action No. 1
Index No. 08-1115

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---X

ZONIA M. GALVEZ,

Plaintiff,

-against-

THOMAS E. BELL, JR., COUNTY OF SUFFOLK and FRANK J. MISITI,

Defendants.

---X

Action No. 2
Index No. 08-19708

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Upon the following papers numbered 1 to 49 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 29; Notice of Cross Motion and supporting papers 30 - 43; Answering Affidavits and supporting papers 44 - 49; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendants County of Suffolk, Suffolk County Department of Public Works and Thomas Bell, Jr. seeking summary judgment dismissing the complaint, the motion (#004) by defendant County of Suffolk, Suffolk County Department of Public Works and Thomas Bell, Jr. seeking summary judgment dismissing the complaint, and the cross motion (#005) by plaintiff Frank Misiti seeking summary judgment in his favor on the issue of liability hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants County of Suffolk, Suffolk County Department of Public Works and Thomas Bell, Jr. seeking summary judgment dismissing the complaint is granted; and it is

ORDERED that the motion by defendants County of Suffolk, Suffolk County Department of Public Works and Thomas Bell, Jr. seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross motion by plaintiff Frank Misiti seeking summary judgment in his favor on the issue of liability is denied, as moot.

Plaintiff Frank Misiti commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Jericho Turnpike ("Route 25") and Walter Court in the Town of Smithtown on March 13, 2007. The accident allegedly occurred when plaintiff's vehicle was struck in the rear by the vehicle operated by defendant Thomas Bell, Jr. and owned by defendants County of Suffolk and Suffolk County Department of Public Works. As a result of the initial collision, plaintiff's vehicle was propelled forward into the vehicle in front of his vehicle. Plaintiff, by his bill of particulars, alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including disc herniations at levels L4 through S1, a disc bulge at level L3/L4, and cervical and lumbar radiculitis. Plaintiff alleges that he was confined to his bed for approximately two days and to his home for approximately one week as a result of the injuries he sustained in the subject accident. Plaintiff further alleges that at the time of the accident he was a student and a waiter, and that he was incapacitated from his employment for approximately two weeks following the subject collision.

Defendants County of Suffolk and Suffolk County Department of Public Works and Thomas Bell, Jr. (hereinafter collective referred to as the "County") now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident failed to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, the County submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Joseph Elfenbein and Dr. Iqbal Merchant. At the County's request, Dr. Elfenbein conducted an independent orthopedic examination of plaintiff and Dr. Merchant conducted an independent neurological examination of plaintiff in July 2009.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]).

Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "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.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], 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 may also 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]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Based upon the adduced evidence, the County established, prima facie, its entitlement to judgment as a matter of law on the ground that the injuries allegedly sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). The County's orthopedist, Dr. Elfenbein, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his spine, shoulders, wrists, and knees. Dr. Elfenbien states that there is no tenderness or spasm upon palpation of the paracervical and paralumbar muscles in plaintiff's spine, that the straight leg raising test is negative bilaterally, and that there is no heat, swelling, effusion, erythema or crepitus in plaintiff's shoulders or knees. Dr. Elfenbein opines that the cervical and lumbar sprains that plaintiff sustained as a result of the subject accident have resolved and that an examination of plaintiff's upper and lower extremities is normal. Dr. Elfenbein concludes that plaintiff does not have any objective findings of an

orthopedic disability as a result of the subject accident, and that he is capable of working and performing his normal activities of daily living without restriction. Likewise, the County's neurologist, Dr. Merchant, states that an examination of plaintiff reveals that he has full range of motion in his spine despite noting that his forward flexion in his lumbar spine is 70 degrees (normal is 90 degrees). However, the limitation noted in plaintiff's lumbar spine during Dr. Merchant's examination is insignificant within the meaning of the no-fault statute (*see* ***Licari v Elliot***, *supra*; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). Dr. Merchant states that plaintiff ambulates with a normal gait, that his motor systems are normal, and that there is no muscle atrophy. Dr. Merchant opines that the cervical and lumbar spine sprains that plaintiff sustained have resolved and that plaintiff's neurological examination is normal. Dr. Merchant concludes that plaintiff has no objective neurological findings of disability or permanency as a result of any injuries sustained during the subject collision, that there is no need for any causally related neurological treatment, and that plaintiff is capable of performing his normal daily living activities without restriction. Therefore, the County has shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff opposes the motion on the grounds that the County failed to meet their prima facie burden and that he sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law as a result of the subject collision. In opposition to the motion, plaintiff submits his own deposition transcript, and the affidavits of Dr. Alvand Hassankhani, Dr. Alex Rosioreanu and Dr. Sanford Scheman.

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and 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" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the County's prima facie showing, plaintiff has failed to raise a triable issue of

fact as to whether he sustained a serious injury within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). Plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the limitations of use categories of § 5102(d) of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). The medical reports of Dr. Hassankhani and Dr. Rosioreanu demonstrate that plaintiff sustained bulging and herniated discs in his cervical and thoracolumbosacral regions of his spine. However, the mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of serious injury under Insurance Law § 5102 (d) in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*see* ***Pommells v Perez.***, *supra*; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]; *see also* ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]). Moreover, neither Dr. Hassankhani nor Dr. Rosioreanu concluded that the disc bulges and herniations observed on the magnetic resonance imaging films of plaintiff's cervical and lumbar spine were causally related to the subject accident (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Gibbs v Hee Hong***, 63 AD3d 559, 881 NYS2d 415 [1st Dept 2009]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]). In addition, Dr. Scheman's report, which concludes that plaintiff suffers from bilateral lumbar radiculitis, cervical radiculopathy, and limitations in his lumbar spine as a direct result of the March 13, 2007 accident, is insufficient to raise a triable issue of fact (*see* ***Toure v Avis Rent A Car Sys.***, *supra*). Dr. Scheman's report fails to specify any objective testing that he performed to determine that plaintiff sustained range of motion limitations to his spine, as compared to the norm, as a result of the subject accident (*see* ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Giammalva v Winters***, 59 AD3d 595, 873 NYS2d 227 [2d Dept 2009]; *cf.* ***Geliga v Karibian, Inc.***, 56 AD3d 518, 867 NYS2d 519 [2d Dept 2008]; ***Martin v Pietrzak***,273 AD3d 361, 709 NYS2d 591 [2d Dept 2000]). The failure to indicate which objective tests were performed to measure the loss of range of motion renders the expert's opinion as to any purported loss without merit, and the Court cannot consider such opinion (*see* ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]).

In addition, plaintiff has failed to raise a triable issue of fact as to whether he sustained an injury within the 90/180 category of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Zeman v Valenti***, 302 AD2d 593, 755 NYS2d 306 [2d Dept 2003]). Here, plaintiff, at his deposition, testified that following the accident he missed a class from the adult education program that he was attending at Hofstra University for personal training; that his working hours were substantially reduced to 20 to 25 hours per week; that he was no longer able to perform morning deliveries for the Buona Serra restaurant where he worked; and that he required the assistance of another personal trainer to assist him in demonstrating exercises to his clients. Although the fact that a plaintiff was able to return to work during the statutory period is not dispositive on the question of whether he or she sustained a serious injury (*see* ***Sands v Stark***, 299 AD2d 642, 749 NYS2d 334 [3d Dept 2002]; ***Judd v Walton***, 259 AD2d 1016, 703 NYS2d 845 [4th Dept 1999]), plaintiff has failed to present objective medical evidence to establish that he sustained a qualifying injury or impairment (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Cummings v Jiayan Gu***, 42 AD3d 920, 839 NYS2d 663 [4th Dept 2007]). Additionally, Dr. Scheman's note that he informed plaintiff not to return to work for at least a week does not satisfy the requirement that plaintiff objectively demonstrate that his activities were restricted or curtailed as a resulted of the subject accident (*see* ***Licari v Elliott***, *supra*; ***Ortega v Maldonado***, 38 AD3d 388, 832 NYS2d 193 [1st Dept 2007]; *cf.*

Gleissner v Lo Presti, 135 AD2d 494, 521 NYS2d 735 [2d Dept 1987]). Accordingly, the County's motion for summary judgment is granted.

Having determined that the County satisfied its burden on the motion for summary judgment on the ground that plaintiff failed to demonstrate that he sustained an injury within the meaning of the serious injury threshold requirement of the Insurance Law, plaintiff's cross motion seeking summary judgment in his favor on the issue of liability is denied, as moot.

Dated: 27 July 2012

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION