Cantave v Jilnicki
2013 NY Slip Op 33323(U)
December 10, 2013
Sup Ct, Suffolk County
Docket Number: 11-34073
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 11-34073
CAL No. 13-00657MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 5-3-13 (#002)
MOTION DATE 5-21-13 (#003)
ADJ. DATE 7-2-13
Mot. Seq. # 002 - MG; CASEDISP
003 - MD

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MOLONNE CANTAVE,

Plaintiff,

- against -

JOHN C. JILNICKI and ASHLEY M. JILNICKI,

Defendants.

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment; and this motion to vacate note of issue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 34 - 42 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 31; 43 - 47 ; Replying Affidavits and supporting papers 32 - 33 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (#002 and #003) by defendants John Jilnicki and Ashley Jilnicki hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#002) by defendants John Jilnicki and Ashley Jilnicki seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion (#003) by defendants John Jilnicki and Ashley Jilnicki for, inter alia, an order vacating the note of issue and certificate of readiness is denied, as moot.

Plaintiff Molonne Cantave commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Peconic Avenue and East Main Street in the Town of Riverhead on June 29, 2010. It is alleged that, at the time of the

accident, plaintiff was a back seat passenger in the vehicle operated by her friend, John Daniels, when it was struck in the rear by the vehicle operated by defendant Ashley Jilnicki and owned by defendant John Jilnicki. As result of the impact between the Daniels and Jilnicki vehicles, the Daniels vehicle was propelled forward into a vehicle ahead of it. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a herniated disc at level C4/C5, disc bulges at levels C3/C4 and L2 through L4, and an aggravation/exacerbation of previously asymptomatic degenerative changes in her lumbar spine. Plaintiff alleges that due to the injuries she sustained in the subject accident she was confined to her home and bed until February 28, 2011. Plaintiff further alleges that she was totally disabled from the date of the collision until June 29, 2011.

Defendants now move for summary judgment on the basis that plaintiff did not sustain an injury within the "serious injury" threshold requirement of § 5102(d) of the Insurance Law as a result of the subject accident. Defendants further assert that plaintiff's alleged injuries are the result of a prior motor vehicle accident that occurred on June 2, 2009. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript and uncertified copies of plaintiff's medical records regarding injuries she alleges to have sustained in the subject accident and in a prior motor vehicle accident in 2009. Defendants also submit the sworn medical report of Dr. Robert Michaels. At defendants' request, Dr. Michaels conducted an independent orthopedic examination of plaintiff on March 5, 2013.

Plaintiff opposes the motion on the grounds that defendants failed to establish a prima facie case that she did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision, and that the evidence submitted in opposition establishes that she sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. In opposition to the motion, plaintiff submits an uncertified copy of the police accident report, uncertified copies of her medical records, and uncertified copies of receipts for home care services from July 1, 2010 through May 22, 2011, and the sworn medical reports of Dr. Vinodkumar Velayudhan and Dr. Iqbal Merchant. Dr. Merchant, a neurologist, performed an independent examination of plaintiff at the request of her no-fault carrier on June 6, 2011.

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 defendant has met this burden, 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*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, defendants have met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of § 5102 (d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Defendants, through the submission of competent medical evidence, established, prima facie, that plaintiff did not sustain any serious injuries to her spine (*see* ***Mackins v Javed***, 109 AD3d 879, 971 NYS2d 215 [2d Dept 2013]; ***Parks v Pastore***, 104 AD3d 744, 961 NYS2d 283 [2d Dept 2013]), and, in any event, that any injuries were not caused by the subject accident (*see* ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]; *cf.* ***Wedderburn v Simmons***, 95 AD3d 1304, 944 NYS2d 894 [2d Dept 2012]). Defendants' examining orthopedist, Dr. Michaels, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her cervical spine, that there is no vertebral tenderness or paravertebal spasm upon palpation of the paraspinal muscles, and that her motor strength is 5/5. Dr. Michaels states that, although plaintiff claimed to have pain in her lumbar spine and refused to perform any range of motion testing for that region, the straight leg raising test was negative, bilaterally, her sensation was intact, and the motor strength in her quads, hamstrings, calves, and extensor hallucis longus ("EHL") muscles was 5/5. Dr. Michaels opines that the strains that plaintiff sustained to her spine have resolved and that no muscle atrophy was observed. Dr. Michaels concludes there is no sign of any ongoing traumatic injuries to plaintiff's spine, and that there is no objective evidence of an orthopedic disability relative to the subject accident.

In addition, defendants submit the sworn medical report of Dr. John Denton, an orthopedist who conducted an independent medical examination of plaintiff at the behest of her no-fault carrier on November 11, 2010. Dr. Denton states that an examination of plaintiff's spine revealed she has full range of motion in the region, that no muscle spasm was observed upon palpation of the paraspinal muscles, although there is mild tenderness along the paraspinal muscles, that the straight leg raising test was negative, and that there was no atrophy noted in her muscles. Dr. Denton states that her gait was antalgic due to morbid obesity and that her muscle strength was 5/5. Dr. Denton further states that the left knee contusion and spinal strains that plaintiff sustained as a result of the subject accident had resolved, that there was no evidence of an orthopedic disability, and that there was no need for continued orthopedic treatment, including physical therapy. Dr. Denton concludes that plaintiff is capable of performing the duties of her occupation as a nurse as well as the activities of her daily living, without restrictions, and that there is no need for household help, special supplies or transportation.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence, based on objective findings, sufficient to raise a triable issue of fact that she sustained a serious injury as a result of the subject collision (*see* ***Gaddy v Eyler***, *supra*). 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***, *supra*). 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, plaintiff has failed to raise a triable issue of fact to refute defendants' prima facie showing that she did not sustain a serious injury as a result of the accident (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). Plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the 90/180 category of the Insurance Law (*see* ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). While not

required to submit contemporaneous range of motion testing, a plaintiff is required to submit competent medical evidence demonstrating significant limitations in her spine based upon a recent examination, and in this instance, plaintiff has failed to do so (*see* ***Brand v Evangelista***, 103 AD3d 539, 962 NYS2d 52 [2d dept 2013]; ***Estrella v Geico Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Perez v Santiago***, 59 AD3d 692, 873 NYS2d 734 [2d Dept 2009]). Moreover, the vast majority of plaintiff's submissions are not in admissible form and, therefore, are without probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]). Although the sworn medical report of Dr. Iqbal Merchant, an independent neurologist, indicates that plaintiff, at the time of his examination on June 6, 2011, had limitations in her spinal range of motion, the observed limitations were insignificant within the meaning of the no-fault statute (*see* ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]). Further, Dr. Merchant states that the sprains to plaintiff's spine, which she sustained as a result of the subject accident, are resolving or have resolved, that she is currently working and may continue to do so, that she is capable of carrying out her activities of daily living, without restriction, and that she does not require any further treatment, household help or special transportation in regards to any injuries she sustained due to the subject accident.

In addition, the medical report of Dr. Velayudhan, the radiologist who performed the computed tomography ("CT Scan") of plaintiff's cervical and lumbar spine on June 16, 2011, states, among other things, that there are bulging discs in her spine and that there are mild degenerative disc changes throughout her lumbar spine. However, Dr. Velayudhan did not opine as to the cause of the radiological findings and, as such, his report is insufficient to rebut defendants' prima facie case (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). Further, a herniated or bulging disc, by itself, is insufficient to constitute a serious injury; rather, to constitute an injury, a herniated or bulging disc must be accompanied by objective evidence of the extent of the alleged physical limitations resulting from the herniated or bulging disc (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). Evidence of complaints of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Young v Russell***, 19 AD3d 688, 798 NYS2d 101 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Thus, plaintiff's medical evidence fails to demonstrate that she sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Larrabee v Bradshaw***, 96 AD3d 1257, 947 NYS2d 659 [3d Dept 2012]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]).

As to plaintiff's "90/180" claim, the Court notes that a plaintiff must submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Ly v Holloway***, 60 AD3d 1006, 876 NYS2d 482 [2d Dept 2009]). Aside from plaintiff's own deposition testimony, wherein she states that she is unable to walk long distances or stand for extended periods of time, that she is in pain all the time, and that she has a helper to assist her

in performing some of her duties as a nurse to a 13-year-old patient, plaintiff has failed to submit any competent medical evidence demonstrating that she was restricted from performing such tasks or heavy lifting during 90 out of the first 180 days following the subject collision (*see e.g.* ***Rasporskaya v New York City Tr. Auth.***, 73 AD3d 727, 899 NYS2d 665 [2d Dept 2010]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]).

Accordingly, defendants' motion for summary judgment seeking to dismiss the complaint is granted. Having granted defendants summary judgment on the ground that plaintiff failed to sustain an injury within the meaning of § 5102 (d) of the Insurance Law, defendants' motion to vacate the note of issue and certificate of readiness is denied, as moot.

Dated: DECEMBER 10, 2013.

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**