Heiser v Coreas
2016 NY Slip Op 32435(U)
December 6, 2016
Supreme Court, Suffolk County
Docket Number: 13-32686
Judge: James Hudson
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SHORT FORM ORDER

INDEX No. 13-32686
CAL. No. 15-02004MV

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 12-16-15
ADJ. DATE 4-20-16
Mot. Seq. #001 - MD

LYNN J. HEISER,

Plaintiff,

- against -

ANDRES COREAS and HAMPTON DRAINAGE & PAVING CORP,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 8 ; Answering Affidavits and supporting papers 9 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Andres Coreas and Hampton Drainage & Paving Corp. for summary judgment dismissing the complaint against them is denied.

Plaintiff Lynn J. Heiser commenced this action to recover damages for injuries she allegedly sustained on August 13, 2013 when the motor vehicle she was operating was struck in the rear by a vehicle owned by defendant Hampton Drainage & Paving Corp. and operated by defendant Andres Coreas. In her bill of particulars, plaintiff claims the following injuries and conditions were the result of said accident: an anterior inferior labral tear to her right shoulder, subacromial subdeltoid bursitis, bicipitial tenosynovitis, cervicalgia, rotator cuff strain, and brachial neuritis.

Defendants now move for summary judgment dismissing the complaint on the ground that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as she did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d). In support of their motion, defendants submit copies of the pleadings, a transcript of plaintiff's deposition testimony, and a sworn affirmation of Isaac Cohen, M.D.

At her examination before trial, plaintiff testified that immediately following the motor vehicle accident in question, she was taken by ambulance to Southside Hospital, which then discharged her shortly afterward without specific treatment or medication. She testified that she called her primary care physician's office the next morning and was advised to see an orthopedist. She stated that approximately one week later, she saw an orthopedist named Dr. David Weissberg, to whom she complained of pain in her neck and shoulders, as well as in her right heel. Plaintiff explained that during her first visit to his office, Dr. Weissberg ordered x-rays, which revealed no broken bones. She stated that at the conclusion of that first visit, Dr. Weissberg recommended physical therapy and prescribed pain medication. Plaintiff testified that Dr. Weissberg ordered an MRI of her right shoulder, which revealed a tear in the labrum of her right shoulder. She stated that, though it was recommended by Dr. Weissberg, she is reluctant to undergo surgery to correct the labrum tear.

Plaintiff described attending physical therapy sessions at Main Street Physical Therapy in Kings Park three times a week following the accident, which has been reduced to twice a week. Plaintiff also reported seeing a chiropractor named Dr. Bagshaw for a short period of time after beginning physical therapy, but switched to another chiropractor named Dr. Renee Sacharny, whom she visited twice a week for approximately eight months. Plaintiff indicated that she has persistent neck and shoulder pain, for which she takes over-the-counter ibuprofen approximately once a week.

Regarding her physical limitations following the accident, she stated that she is employed full-time by the Suffolk County Office for the Aging as a case worker and was forced to miss approximately three weeks of work. She testified that during those three weeks she was unable to vacuum, do yoga, or "work out." Plaintiff indicated that she continues to be unable to lift heavy objects or perform acts involving a pushing or pulling motion.

Plaintiff was examined by Dr. Isaac Cohen on March 4, 2015 as part of an independent medical evaluation. Dr. Cohen affirms that he reviewed plaintiff's medical records and conducted range of motion tests on her right shoulder and cervical spine. He states that testing of plaintiff's cervical spine revealed: flexion of 50 degrees, where the normal range of motion is 50 degrees; extension of 50 degrees, rather than the normal 60 degrees; right and left rotation of 75 degrees, rather than the normal 80 degrees; and right and left lateral bending to 45 degrees, where the normal range is 45 degrees. No sensorial deficits, muscle atrophy, or motor weakness were noted. As to plaintiff's right shoulder, Dr. Cohen measured ranges of motion as follows: forward elevation of 175 degrees, rather than the normal 180 degrees; abduction of 180 degrees, where the normal range is 180 degrees, adduction of 30 degrees, where the normal range is 30 degrees; external rotation of 90 degrees, where the normal range is 90 degrees; and internal rotation of 80 degrees, where the normal range is 80 degrees. Dr. Cohen diagnoses plaintiff as having suffered cervical spine strain and right shoulder contusion, both resolved. Dr. Cohen further states that plaintiff's MRI imaging demonstrates "preexistent degenerative changes with no evidence of acute posttraumatic pathology present." In conclusion, Dr. Cohen opines that plaintiff shows no evidence of a functional disability or sequelae related to the accident in question.

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570

[1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 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]). 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 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.***, *supra*; ***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*; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by 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 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 a plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***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***, *supra*). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, defendants' submissions are sufficient to establish a prima facie case that plaintiff did not sustain serious physical injury within the "limitation of use" categories of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Santucci v Sousa***, 131 AD3d 1036, 16 NYS3d 469 [2d Dept 2015]; ***Master v Boiakhtchion***, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Defendants also met their burden regarding plaintiff's 90/180 claim through plaintiff's deposition testimony that she missed only three weeks of work (*see* ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]).

The burden then shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). Plaintiff argues that defendants failed to establish that she did not sustain a serious injury under Insurance Law § 5102 (d). In opposition, plaintiff submits multiple uncertified medical and chiropractic records, an affirmation of David J. Weissberg, M.D., plaintiff's own affidavit, an uncertified copy of an MV-104A police accident report, and an affirmation of Pradeep Albert, M.D., certifying an MRI report.

In a sworn affirmation, Dr. Weissberg states that he is licensed to practice medicine in the State of New York and is Board Certified in Orthopedic Surgery. Dr. Weissberg avers that plaintiff is his patient and that he has been treating her for injuries she sustained in her August 13, 2013 motor vehicle accident, as well as for unrelated injuries she sustained in a subsequent accident on April 1, 2014. In his affirmation, Dr. Weissberg reports range of motion testing he conducted on plaintiff's right shoulder on August 20, 2013 revealed flexion of 165 degrees, where the normal range is 170 degrees; internal rotation of 75 degrees, where the normal range is 90 degrees; and external rotation of 75 degrees, where the normal range is 90 degrees. Dr. Weissberg affirms that during plaintiff's visit to his office on September 10, 2013, he ordered an MRI examination of plaintiff's right shoulder, which was performed on September 12, 2013. He states that he has personally reviewed the MRI imagery, which revealed: arthritic acromio clavicular articulation, subacromial subdeltoid bursitis, bicipital tenosynovitis, and an anterior inferior labral tear. Dr. Weissberg opines that these findings are "consistent with trauma from a rear end collision and the patient's complaints."

Dr. Weissberg affirms that he conducted additional objective range of motion tests on plaintiff's right shoulder on December 22, 2015. His findings were as follows: flexion of 50 degrees without pain, where the normal range is 170 degrees; extension of 50 degrees without pain, where the normal range is 50 degrees; and limited rotation of 50 degrees on left and right, where the normal range is 90 degrees. Dr. Weissberg opines that plaintiff "still exhibited a 25% loss of use of the shoulder," that her "condition has not resolved," and that her loss of use of her shoulder is "a permanent and consequential limitation."

Plaintiff has met her burden of demonstrating the existence of a triable issue of fact as to whether she suffered a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*). The Court notes other than the MRI report, the sole admissible medical report put forth by plaintiff was the one prepared by Dr. Weissberg, dated January 25, 2016. All other medical records provided to the Court are unsworn and uncertified and, therefore, are not in admissible form (*see* ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Perdomo v***

Scott, 50 AD3d 1115, 857 NYS2d 212 [2d Dept 2008]). Nevertheless, Dr. Weissberg's affirmation contains both long-term qualitative and quantitative descriptions of plaintiff's injuries, as required by ***Toure v Avis Rent A Car Sys.***, *supra*, as well as an opinion that plaintiff's injuries are permanent and a direct result of her August 13, 2013 accident. While a gap in treatment exists between July 15, 2014 and December 22, 2015, Dr. Weissberg opines that, absent surgery, additional physical therapy would no longer benefit plaintiff and "would only be palliative" (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]; ***Park v He Jung Lee***, 84 AD3d 904, 922 NYS2d 564 [2d Dept 2011]; ***Lee v Cornell Univ.***, 112 AD3d 466, 976 NYS2d 85 [1st Dept 2013]).

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

Dated: 12/6/2016

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION