Brignoli v Greco
2017 NY Slip Op 30480(U)
March 10, 2017
Supreme Court, Suffolk County
Docket Number: 12-19666
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-19666
CAL. No. 16-00263MV

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 5-11-16 (001)
ADJ. DATE 7-13-16
Mot. Seq. #001 - MG; CASEDISP

THOMAS BRIGNOLI AND DONNA MARIE FACILLA,

Plaintiffs,

- against -

LINDA GRECO AND RICHARD REICH,

Defendants.

LAW OFFICE OF MATTHEW A. SOSNIK
Attorney for Plaintiffs
125-10 Queens Boulevard, Suite 15
Kew Gardens New York 11415

MARTYN, TOHER, MARTYN & ROSSI
Attorney for Defendants
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-27; Replying Affidavits and supporting papers 28-29; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Linda Greco and Richard Reich for summary judgment dismissing the complaint is granted.

Plaintiffs Thomas Brignoli and Donna Marie Facilla commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Deer Park Avenueand Talisman Drive in the Town of Huntington on July 4, 2009. It is alleged that the accident occurred when the vehicle operated by defendant Richard Reich and owned by defendant Linda Greco struck the rear of the vehicle owned and operated by plaintiff Thomas Brignoli while it was traveling in the northbound right lane of Deer Park Avenue. Immediately after the first impact to the rear of the Brignoli vehicle, the Reich vehicle struck the rear of the Brignoli vehicle a second time. At the time of the accident, plaintiff Donna Facilla was riding as a front seat passenger in the Brignoli vehicle. By their bill of particulars, plaintiffs allege that plaintiff Brignoli sustained various personal injuries as a result of the subject collision, including exacerbation of a prior lumbar injury;

lumbar radiculopathy; derangement of the right shoulder and left wrist; and a tear of the supraspinatus tendon of the right shoulder. Plaintiff Brignoli further alleges that he was confined to bed and home for approximately one week as a result of the injuries he sustained in subject accident. Plaintiff Facilla also alleges that she sustained numerous personal injuries as a result of the subject accident, including cervical radiculopathy; lumbar derangement; disc herniations at level C6-7 and level T11-12; and disc bulges at levels C3 through C6 and levels L3 through S1. Plaintiff Facilla further alleges that she was confined to her bed and home for approximately one month due to the injuries she sustained as a result of the subject collision.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiffs do not meet the serious injury threshold requirement of Section 5102 (d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiffs' deposition transcripts, the sworn medical reports of Dr. Joseph Margulies and Dr. Sheldon Feit. Dr. Margulies conducted an independent orthopedic examination of plaintiff Brignoli and on plaintiff Facilla on December 22, 2014. In addition, Dr. Feit performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff Brignoli's right shoulder taken on July 18, 2008 and August 3, 2009. Plaintiffs oppose the motion on the grounds that defendants failed to meet their prima facie burden demonstrating that they did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition shows that they sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiffs submit their own affidavits, uncertified copies of their medical records regarding the injuries they allegedly sustained in the subject accident, and the sworn medical reports of Dr. Joseph Perez, Dr. Miguel Vargas, Dr. Philip Beuchert, and John Himmelfarb. In addition, plaintiffs submit the independent medical examination of plaintiff Facilla requested by plaintiff's insurer, and conducted by Dr. Frank Oliveto on December 22, 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 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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*).

Here, defendants, by submitting competent medical evidence and plaintiff Brignoli's deposition transcript, have demonstrated, prima facie, that he did not sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Green v Canada Dry Bottling Co. of N.Y., L.P.***, 133 AD3d 566, 20 NYS3d 94 [2d Dept 2015]). Defendants' examining orthopedist, Dr. Margulies, states in his medical report that an examination of plaintiff Brignoli reveals he has full range of motion in his spine, shoulders, and knees, that there is no paravertebral muscle spasm or tenderness upon palpation of the paraspinal muscles, that the straight leg raising test is negative, and that there is no instability in his knees. Dr. Margulies opines that the sprains to plaintiff Brignoli's spine and the contusions to his shoulders and knees that were sustained as a result of the subject accident have resolved. Dr. Margulies further states that plaintiff Brignoli does not have a functional or any residual objective orthopedic disability, and that he is capable of performing his activities of daily living and employment without restrictions.

In addition, the medical report of defendants' reviewing radiologist, Dr. Feit, states that plaintiff Brignoli's MRI of his right shoulder showed that there was no evidence of acute fractures or dislocations, that there were no gross labral tears observed, that there were no soft tissue masses identified, and that there were no abnormalities causally related to the subject accident. Dr. Feit further states that a small tear along the humeral side of the distal supraspinatus tendon of plaintiff Brignoli's right shoulder, which was evident on the MRI of plaintiff's right shoulder performed on July 18, 2008, is stable and unchanged following the subject accident.

Additionally, plaintiff Brignoli's deposition testimony establishes that he did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff Brignoli testified at an examination before trial that following the subject accident he does not recall the exact amount of time that he missed from his landscaping business, but that when he returned to work, it was in the same capacity and

capability prior to the subject accident despite imposing his own limitations on the type of work he performed and turning away "jobs." Plaintiff Brignoli further testified that once his No Fault benefits were terminated, he ceased treatment for his injuries, and that at the time of the subject accident's occurrence he was undergoing physical therapy for injuries to his back, neck and ankle from a prior motor vehicle accident, which occurred on June 24, 2008.

Likewise, defendants established their prima facie burden demonstrating plaintiff Facilla did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (*see* ***Sok Hwan Chun v Bloom***, 144 AD3d 661, 40 NYS3d 189 [2d Dept 2016]; ***Chan v Auto Traders 5 Towns, Inc.***, 135 AD3d 891, 24 NYS3d 367 [2d Dept 2016]). Dr. Margulies states in his report that an examination of plaintiff Facilla reveals that she has full range of motion in her spine, that she has good motor and sensory function without any deficits in her upper or lower extremities, that the straight leg raising and Lasegue's tests are negative, and that there are no muscle spasms or tenderness upon palpation of the paraspinal muscles. Dr. Margulies opines that the sprains plaintiff Facilla sustained to the cervical and lumbar regions of her spine have resolved, and that there were no residual objective orthopedic findings observed during the examination. Dr. Margulies further states that plaintiff Facilla is not functionally disabled and that she is capable of performing her usual daily living activities and her present employment without restriction.

Moreover, plaintiff Facilla's deposition testimony shows that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]). Plaintiff Facilla testified at an examination before trial that she did not miss any time from her employment as a special education school teacher, because the accident occurred while she was on summer vacation from her employment, and that once her No Fault benefits were terminated, she ceased all treatment related to any injuries she sustained in the subject accident.

Thus, defendant shifted the burden to plaintiffs to come forward with evidence in admissible form to raise a material triable issue of fact as to whether they 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]). 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, plaintiffs Brignoli and Facilla have failed to raise a triable issue of fact as to whether they sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (***Boettcher v Ryder Truck Rental, Inc.***, 133 AD3d 625, 19 NYS3d 86 [2d Dept 2015]; ***Posa v Guerrero***, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]; ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by plaintiffs was insufficient to establish a serious injury or to defeat defendants' prima facie showing. Notwithstanding the fact that plaintiffs have submitted the affirmed medical reports of Dr. Perez and Dr. Vargas, showing that plaintiff Brignoli sustained range of motion limitations in his spine and right shoulder, and that plaintiff Facilla sustained range of motion limitations in her spine, contemporaneous with the subject accident, plaintiffs failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a recent examination (*see* ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Nesci v Romanelli***, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). Indeed, the most recent examination for plaintiff Facilla is dated December 22, 2009 wherein Dr. Oliveto states that the strains to plaintiff Facilla's spine have resolved and are healed, that she does not have any evidence of a causally related disability, and that she is capable of performing her activities of daily living without restrictions.

Similarly, the most recent examination submitted for plaintiff Brignoli is dated January 18, 2010 and Dr. Perez's examination shows that despite plaintiff Brignoli's prognosis being guarded, his mild disability classification had decreased and his range of motion was improving. Significantly, the medical report from Dr. Beuchert states that plaintiff Brignoli suffers from degenerative changes in the acromioclavicular joint in his right shoulder. Although Dr. Beuchert in a subsequent affirmation disputes Dr. Feit's finding that the "small partial thickness tear within the distal supraspinatus tendon" of plaintiff Brignoli's right shoulder predates the subject accident, the mere existence of a tear is not sufficient to raise a triable issue of fact as to the existence of a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Simanovskiy v Barbaro***, 72 Ad3d 930, 899 NYS2d 324 [2d Dept 2010]).

Furthermore, although a plaintiff may rely upon his or her examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see* ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; ***Kearse v New York***

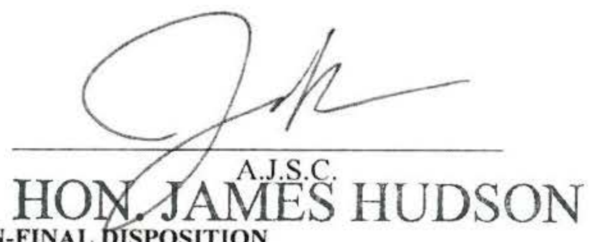
City Tr. Auth., 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), in this instance, defendants did not submit any of the uncertified medical reports that either plaintiff Brignoli or plaintiff Facilla relied upon to attempt to raise a triable issue of fact as to whether he or she sustained an injury within the serious injury threshold requirement of Section 5102(d) of the Insurance Law (*see* ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). As a result, the numerous unsworn medical reports submitted by plaintiffs in opposition are not sufficient to defeat defendants' motion for summary judgment (*see* ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Elfiky v Harris***, 301 AD2d 624, 754 NYS2d 59 [2d Dept 2003]).

Moreover, plaintiffs affidavits are self-serving and merely raise feigned issues of fact (*see* ***Lipsker v 650 Crown Equities, LLC***, 81 AD3d 789, 917 NYS2d 249 [2d Dept 2011]; ***Marcelle v New York City Tr. Auth.***, 298 AD2d 459, 735 NYS2d 580 [2d Dept 2001]). 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, plaintiffs' medical evidence fails to demonstrate that they sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Acosta v Alexandre***, 70 AD3d 735, 894 NYS2d 136 [2d Dept 2010]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]).

Additionally, neither plaintiffs nor their experts have provided an explanation for the cessation of treatment by plaintiff Brignoli and plaintiff Facilla (*see* ***Pommells v Perez***, *supra*; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2d Dept 2009]; ***Berktas v McMillian***, 40 AD3d 563, 835 NYS2d 388 [2007]; *cf.* ***Mazil v Quinones***, 84 AD3d 893, 922 NYS2d 560 [2d Dept 2011]).

Finally, plaintiffs failed to submit competent medical evidence demonstrating that the injuries they sustained prevented them from performing substantially all of their usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Accordingly, defendants' motion for summary judgment dismissing plaintiffs' complaint is granted.

Dated: March 10, 2017



A.J.S.C.
HON. JAMES HUDSON

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION