Canning v Frank
2017 NY Slip Op 31058(U)
April 13, 2017
Supreme Court, Suffolk County
Docket Number: 12-21141
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-21141
CAL. No. 16-01812MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-27-16
ADJ. DATE 1-27-17
Mot. Seq. # 003 - MG; CASEDISP

SHANNON CANNING,

Plaintiff,

- against -

MICHAEL FRANK, as Administrator of the Estate of JUDITH BARONFELD,

Defendant.

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Upon the following papers numbered 1 to 65 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 60 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 61 - 63 ; Replying Affidavits and supporting papers 64 - 65 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Michael Frank for summary judgment in his favor is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Shannon Canning as a result of a motor vehicle accident, which occurred on January 29, 2009 in the parking lot of 89 Route 25A, near its intersection with Westchester Drive, in Rocky Point, New York. The accident allegedly occurred when plaintiff's vehicle was struck in the rear by the vehicle operated by defendant's decedent, Judith Baronfeld, while stopped when attempting to exit a parking lot. Subsequently, as plaintiff was inspecting the damage to the outside of her vehicle, defendant's decedent's vehicle ran over plaintiff's left foot when fleeing the scene of the accident. By her verified complaint, as amplified by her verified bill of particulars, plaintiff alleges that, as a result of the accident, she suffered serious injuries and symptoms, namely, a closed fracture of her calcaneus; a fracture of her left foot; sprains to her left foot, left ankle, left knee, and left hip; sprains to her cervical, thoracic, and lumbar spine; and radiculopathy.

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Defendant seeks an order granting summary judgment dismissing the complaint on the grounds that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings; various discovery demands; copies of the pleadings in the case of Fitzpatrick v Zimmerman, assigned index number 07-23275; copies of the pleadings in the case of Fitzpatrick v Ivan Kalina Self Declaration of Trust, assigned index number 04-16519; the transcript of plaintiff's deposition testimony; and the affirmed medical reports of orthopedist Dr. Isaac Cohen and radiologist Dr. Marc Katzman. In opposition, plaintiff argues that the fracture to her foot constitutes a serious injury and that defendant failed to address plaintiff's claim that she suffered a serious injury under the "90/180-day" category of the statute. Plaintiff submits, in opposition, her affidavit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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 by the No-Fault Insurance Law bears the initial burden of establishing, prima facie, 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]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Keith v Duval***; 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Likewise, sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant's submissions established a prima facie case that the alleged injuries to plaintiff's spine, foot, ankle, knee, and hip do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Crutchfield v Jones***, 132 AD3d 1311, 17 NYS3d 525 [4th Dept 2015]; ***Beltran v Powow Limo, Inc.***, *supra*). Defendant has presented competent medical evidence that none of plaintiff 's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). The affirmed medical reports of Dr. Katzman consistently state that examinations of plaintiff's left foot, left ankle, and left tibia fibula show no evidence of posttraumatic injury related to the subject accident. Dr. Katzman opines that the x-rays of plaintiff's left foot and left tibia fibula taken the day of the accident showed no evidence of posttraumatic injury, acute fracture, or dislocation. Similarly, he opines that the x-rays of plaintiff's left foot, ankle, and tibia fibula taken approximately one week after the accident showed no evidence of recent posttraumatic injury; and that the computed tomography ("CT") examinations of plaintiff's lower left extremity taken approximately one week after the accident showed no acute posttraumatic injury and no evidence of recent fracture or dislocation. Dr. Katzman further states that the x-ray of plaintiff's left heel taken approximately five weeks after the accident was "normal" and

showed "no evidence of recent posttraumatic injury." Dr. Katzman opines that the magnetic resonance imaging ("MRI") examination of plaintiff's left ankle taken approximately three months after the accident showed "mild chronic degenerative 'wear-and-tear' tendinosis of the distal Achilles tendon," and an x-ray of plaintiff's left heel was "normal" and showed no change since the previous x-ray taken one month prior. According to Dr. Katzman, the MRI examination of plaintiff's left ankle taken more than one and a half years after the accident showed no posttraumatic injury, and no evidence of recent fracture, dislocation, or soft tissue injury. Dr. Katzman found that the MRI examination of plaintiff's right ankle and foot taken approximately six and a half years after the accident revealed mild swelling and mild tenosynovitis in the ankle, but he concluded that such findings appeared to be relative to the time of the exam and not related to the subject accident.

The affirmed medical report of Dr. Cohen states, in relevant part, that during her examination, plaintiff exhibited only minor restrictions in her cervical spine and her reflexes were normal. It also states that there was no evidence of radiculopathy or "any functional sequelae related to this accident." Similarly, plaintiff exhibited only minor restrictions in her thoracolumbar spine, and Dr. Cohen stated that there was no evidence of radiculopathy and "no indication of any posttraumatic pathology." Dr. Cohen found that plaintiff exhibited only minor restrictions in joint function of her left hip and normal joint function in her left knee, with normal patella tracking and no instability or tenderness. As to plaintiff's foot and ankle, Dr. Cohen's report states the examination revealed only minor restrictions in joint function, with no swelling of the calcaneal area, and that plaintiff walked with a normal heel-toe gait. It further states that the examination was unremarkable and that although plaintiff's lower left extremities appeared slightly larger than the right, such difference is caused by a developmental issue, not a posttraumatic event. Dr. Cohen diagnoses plaintiff as having suffered soft tissue contusions to her neck, back, left hip, and left knee, as well as a "left ankle/foot sprain," and concludes that such contusions and sprain have resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). Dr. Cohen states that although plaintiff told him she was not employed at the time of the accident, records indicated that she was working as a medical biller and that she did not lose any time from work due to the subject accident. In addition, through plaintiff's own deposition testimony that she cannot recall if she was employed at the time of the accident, defendant established, prima facie, that plaintiff did not suffer injury within the "90/180-days" category of the statute (*see* ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

Defendant having met his initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiff failed to raise an issue of fact as to whether her injuries constitute serious injuries. Evidence of subjective complaints of pain and discomfort alone, unsupported by credible medical evidence based on recent examination 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]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Young v Russell***, 19 AD3d 688, 798 NYS2d 101 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Plaintiff's affidavit lists range of motion examination results of her left ankle and foot, as told to her by her treating orthopedist, Dr. Legouri. Absent from the opposition papers, however, is any

competent objective medical proof of a significant loss of range of motion in her spine, hip, or knee as a result of her alleged injuries (*see* ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*). Furthermore, plaintiff has not submitted any admissible medical evidence demonstrating that she was informed by any doctor that she was required to stop working as a result of the alleged injuries she sustained in the subject accident (*see e.g.* ***McLoud v Reyes***, *supra*). As a result, plaintiff has failed to substantiate her claim that she sustained nonpermanent injuries that left her unable to perform her normal daily living activities for at least 90 out of the first 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]; ***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, defendant's motion for summary judgment in his favor is granted.

Dated: 4-13-17

Hon. Denise F. Molia

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION