Zachry v Comunale
2017 NY Slip Op 31080(U)
May 4, 2017
Supreme Court, Suffolk County
Docket Number: 5073/14
Judge: Jr., Paul J. Baisley

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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SUSAN ZACHRY,

Plaintiff,

-against-

WILLIAM F. COMUNALE,

Defendant.

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INDEX NO.: 5073/14
CALENDAR NO.: 201600022MV
MOTION DATE: 10/6/16
MOTION NO.: 001 CASEDISP

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 16-28 ; Replying Affidavits and supporting papers 29-30 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 001) of defendant William Comunale for summary judgment dismissing the complaint is granted.

Plaintiff Susan Zachry commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on the eastbound Long Island Expressway on June 22, 2012 when the vehicle owned and operated by defendant William Comunale struck the rear of the vehicle owned and operated by plaintiff while it was stopped in stop-and-go traffic. By her bill of particulars, plaintiff alleges that she sustained various personal injuries due to the collision, including disc herniations at level C4-C5 and level L4-L5, a bulging disc at level L5-S1, bursitis of the right shoulder, and cervical radiculopathy. Plaintiff alleges that she was confined to her home and bed for approximately three days, and intermittently thereafter for approximately 14 weeks as a result of the injuries she sustained in the accident. Plaintiff further alleges that she was incapacitated from her employment for approximately 112 days following the subject accident.

Defendant now moves for summary judgment dismissing the complaint on the basis that the injuries plaintiff alleges to have sustained as result of the subject accident do not meet the serious injury threshold requirement of §5102(d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical record concerning the injuries at issue, and the sworn medical report of Dr. Gary Kelman. At defendant's request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on October 7, 2015. Plaintiff opposes the motion on the grounds that defendant failed to meet her *prima facie* burden establishing that she did sustain a serious injury

within the meaning of Insurance Law §5102(d), and that the evidence in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject collision. In opposition to the motion, plaintiff submits her own deposition transcript and affidavit, uncertified copies of her medical reports regarding the injuries at issue, and the sworn medical reports of Dr. Albert Zilkha, Dr. Michael Setton, and Dr. David Weissberg. Plaintiff also submits the affidavit of her treating chiropractor, Dr. Gary Cullin, and the report of Dr. John Johnson, a chiropractor, who conducted an independent medical examination of plaintiff on June 4, 2103.

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], *affd* 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, defendant, by submitting plaintiff's deposition transcript and competent medical evidence, established a *prima face* case that plaintiff did not sustain a serious injury within the

meaning of Insurance Law §5102(d) (*see Toure v Avis Rent A Car Sys., supra*; *Gaddy v Eyler, supra; Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; *Green v Canada Dry Bottling Co. of N.Y., L.P.*, 133 AD3d 566, 20 NYS3d 94 [2d Dept 2015]). Defendant's examining orthopedist, Dr. Kelman, found that an examination of plaintiff's spine, shoulders, wrists, and hips revealed that she had full range of motion in those regions, that upon palpation of the paraspinal muscles there was no tenderness or muscle spasms, that there was no "giveway weakness," and that her muscle strength in her upper and lower extremities was 5/5. Dr. Kelman states in his medical report that the straight leg raising test was negative, that plaintiff was able to heel-toe walk, and that there was no atrophy of the intrinsic muscles. Dr. Kelman states that there was no effusion, crepitus, or tenderness in plaintiff's shoulders, that the impingement sign and O'Brien's test were negative, and that the Tinsel's sign and Phalen test were negative. Dr. Kelman opines that the sprains/strains that plaintiff sustained to her spine, right shoulder, wrists, and right hip as a result of the accident have resolved, and that she does not have an orthopedic disability causally related to the subject accident.

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of her daily activities were not curtailed (*see e.g. Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; *Kolodziej v Savarese*. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; *Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Plaintiff testified at an examination before trial that she was approximately 20 weeks pregnant with twins when the subject accident occurred, that her pregnancy was considered a "high risk" pregnancy, and that, because she was pregnant, she was unable to undergo any testing following the subject accident. Plaintiff testified that immediately following the accident she began treating with a physical therapist, acupuncturist, chiropractor, and massage therapists, but had to stop all treatment, because her obstetrician placed her on bed rest for approximately eight weeks prior to her going into premature labor. Plaintiff testified that she began receiving treatment, sporadically, once again in December 2012, after receiving clearance from her obstetrician, but that, with the exception of undergoing an electromyogram ("EMG") study, she still was unable to undergo any testing for her injuries, because she was breastfeeding, which she did for approximately six months. Plaintiff testified that her No-Fault benefits were terminated around July 2013, and that after her benefits were terminated she did not continue treating with any physician for the injuries she sustained in the subject accident, despite having private insurance. Plaintiff further testified that she lost approximately three days from her employment as a chief financial officer due to the injuries she sustained in the subject accident, that when she returned to work she returned in the same capacity and performing the same duties as she did prior to the accident, and that her daily activities did not change substantially following the accident.

Defendant, having made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). 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 "limitation of use" category, 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 as to whether she sustained a serious injury as a result of the subject accident (*Gaddy v Eyler*, *supra*; *Small v City of New York*, 148 AD3d 959, 49 NYS3D 176 [2d Dept 2017]; *Washington v Pichardo*, 140 AD3d 950, 32 NYS3d 508 [2d Dept 2016]). 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]). Plaintiff has submitted the medical report of Dr. Weissberg, her treating physician, who opines that she has sustained a permanent disability to her spine, wrists, and right hip; that her prognosis is guarded; that she is "prone to progressive degenerative disc disease which can leave her with chronic disabling pain in her neck and back regions"; and that she may require carpal tunnel releases and physical therapy. Plaintiff also submitted the affidavit of Dr. Cullin, her treating chiropractor, who states an examination of plaintiff showed that she had decreased range of motion in the cervical and lumbar regions of her spine, and that she had numbness in her wrists, which prevented her from performing her usual activities of daily living. Dr. Cullin in his report concludes that it is his expert chiropractic opinion that the herniated disc and bulging disc in plaintiff's spine were causally related to the subject accident.

Yet, despite these submissions and conclusions, plaintiff has failed to submit any medical evidence demonstrating that she sustained significant limitations in her spine, wrists or shoulders contemporaneous with the subject accident (*see Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). Dr. Cullin's initial examination of plaintiff occurred on December 12, 2012, and his final examination of her occurred on January 31, 2013. Of significance, Dr. Cullin states that the results of the EMG studies of plaintiff's lumbar spine performed on January 21, 2013 were normal. Notwithstanding the fact that Dr. Weissberg states plaintiff came under the treatment of different practitioners following her release from the

hospital after the accident, and that she received treatment until August 2012, he fails to state when he initially examined plaintiff following the subject accident, and more importantly, he failed to set forth either a qualitative assessment or quantified spinal range of motion findings during his initial examination demonstrating any range of motion limitations in plaintiff's spine, wrists or right hip (*see Perl v Meher*, *supra*; *Lewars v Transit Facility Mgt. Corp.*, *supra*). In fact, the first quantified range of motion findings that Dr. Weissberg states are from an examination of plaintiff on September 13, 2016, approximately four years after the subject accident. Furthermore, neither Dr. Weissberg nor Dr. Cullin are able to substantiate the extent or degree of the limitation to plaintiff's cervical and lumbar regions of her spine or her wrists caused by the alleged injury and its duration (*see Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]), since neither doctor examined her contemporaneously with the subject accident.

Plaintiff's submission of Dr. Johnson's report fails to raise a triable issue of fact because his report is inadmissible, since a chiropractor may not avail himself of the statute to affirm the contents of his report (*see* CPLR 2106; *Paul-Austin v McPherson*, 91 AD3d 924, 937 NYS2d 627 [2d Dept 2012]; *Vejselovski v McErlean*, 87 AD3d 1062, 929 NYS2d 760 [2d Dept 2011]; *Casco v Cocchiola*, 62 AD3d 640, 878 NYS2d 409 [2d Dept 2009]; *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]). In any event, even if the Court were to overlook the report's failure to comply with the statute, Dr. Johnson, who performed an independent medical examination of plaintiff on June 4, 2013, at the behest of plaintiff's insurer, states that the strains and sprains she sustained to her thoracolumbosacral spine and shoulders, wrists, and hips have resolved, and that the sprain/strain to her cervical spine is resolving, that she does not have a disability, that she is capable of performing all of her customary activities of daily living, and that her prognosis is good. More important, the range of motion limitations that Dr. Johnson observed in plaintiff's cervical spine's range of motion were insignificant within the meaning of §5102(d) of the Insurance Law (*see DiCariano v County of Rockland*, 111 AD3d 879, 976 NYS2d 116 [2d Dept 2013]; *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *Lively v Fernandez*, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). Of significance, Dr. Weissberg failed to reconcile his findings of significant and permanent limitations in plaintiff's spine, as well as the inability to perform her usual activities of normal daily living during his examination on September 16, 2016 with his own findings of full range of motion in plaintiff's right hip or the June 2013 findings of Dr. Johnson (*see Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; *Thomas v Weeks*, 61 AD3d 961, 878 NYS2d 182 [2d Dept 2009]; *Raleigh v Ram*, 60 AD3D 747, 874 NYS2d 258 [2d Dept 2009]).

Moreover, the medical reports of Dr. Zilkha, the radiologist who performed the MRI study of plaintiff's cervical and lumbar spine, and Dr. Setton, the radiologist who performed the MRI study of plaintiff's right shoulder, are insufficient to raise a triable issue as to whether plaintiff suffered a serious injury, because both doctors failed to opine as to causation regarding their radiological findings (*see Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; *Depena v Sylla*, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]). The mere existence of a disc bulge or herniated disc 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 Simanovskiy v Barbaro*, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Additionally, plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Leeber v Ward*, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). Finally, plaintiff failed to submit competent medical evidence demonstrating that the injuries she sustained prevented her from performing substantially all of her 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]). Indeed, as mentioned above, plaintiff testified that her daily activities were not substantially altered as a result of any of the alleged injuries she sustained due to the subject accident. The subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition are insufficient to raise a triable issue of fact (*see Rovelo v Volcy*, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011], *Young v Russell*, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; *Sham v B&P Chimney Cleaning & Repair, Co., Inc.*, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment is granted.

Dated: May 4, 2017

HON. PAUL J. BAISLEY, JR.
J.S.C.