Werthner v Lewis

2013 NY Slip Op 30505(U)

March 8, 2013

Supreme Court, Suffolk County

Docket Number: 10-11344

Judge: Hector D. LaSalle

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SHORT FORM ORDER

INDEX No. 10-11344
CAL. No. 12-00476MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-18-12 (#003 & # 004)
MOTION DATE 5-30-12 (#005)
MOTION DATE 7-18-12 (#006 & # 007)
ADJ. DATE 12-18-12
Mot. Seq. # 003 - MD
004 - XMD
005 - MD
006 - MG
007 - XMG; CASEDISP

---X

ROBERT J. WERTHNER,

Plaintiff,

- against -

PAUL D. LEWIS, MICHELLE L. LEWIS, CHRISTA I. SHIFFER, ANTHONY J. DIMARTINI & MIREAM E CRUZ,

Defendants.

---X

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment; these cross motions for summary judgment; and this motion to compel ; Notice of Motion/ Order to Show Cause and supporting papers 1-17; 33-41; 42-53 ; Notice of Cross Motion and supporting papers 18-32; 54-56 ; Answering Affidavits and supporting papers 57-65; 66-67; 68-69; 82-83 ; Replying Affidavits and supporting papers 72-73; 74-75; 76-77; 78-79; 80-81; 84-85 ; Other defendant Miream Cruz's affirmation in support - 70-71 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by the defendant Miream Cruz, the cross motion (#004) by the defendants Christa Shiffer and Anthony DiMartini, the motion (#005) by the defendant Miream Cruz, the motion (#006) by the defendants Paul Lewis and Michelle Lewis, and the cross motion (#007) by the defendants Christa Shiffer and Anthony DiMartini hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendant Miream Cruz seeking summary judgment in her favor on the issue of liability is denied, as moot; and it is

ORDERED that the cross motion by the defendants Christa Shiffer and Anthony DiMartini seeking summary judgment in their favor on the issue of liability is denied, as moot; and it is

ORDERED that the motion by the defendant Miream Cruz for, inter alia, an order compelling the plaintiff to provide the documents and information requested in the supplemental notice of discovery dated August 10, 2011 is denied, as moot; and it is

ORDERED that the motion by the defendants Paul Lewis and Michelle Lewis seeking summary judgment dismissing the complaint on the ground that the plaintiff failed to meet the "serious injury" threshold requirement of Insurance Law § 5102 (d) is granted; and it is

ORDERED that the cross motion by the defendants Christa Shiffer and Anthony DiMartini seeking summary judgment dismissing the complaint on the ground that the plaintiff failed to meet the "serious injury" threshold requirement of Insurance Law § 5102(d) is granted; and it is further

ORDERED that the Court, sua sponte, grants summary judgment dismissing the complaint against the defendant Miream Cruz.

The plaintiff Robert Werthner commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred in the right lane of eastbound Sunrise Highway, approximately one-half mile west of Exit 58 South, in the Town of Brookhaven on November 30, 2009. It is alleged that the accident occurred when the vehicle operated by the defendant Michelle Lewis and owned by the defendant Paul Lewis (hereinafter collectively referred to as the "Lewis defendants") struck the rear of the vehicle operated by the defendant Anthony DiMartini and owned by the defendant Christa Shiffer (hereinafter collectively referred to as the "DiMartini defendants"). As a result of the collision, the DiMartini vehicle was propelled forward and struck the rear of the vehicle operated by the defendant Miream Cruz. When the accident occurred the DiMartini vehicle was traveling at approximately 25 miles per hour in the right lane of eastbound Sunrise Highway and the plaintiff was a front seat passenger in the vehicle. By his bill of particulars, the plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject accident, including cervical and lumbar sprain/strain. The plaintiff alleges that as a result of the accident he underwent cervical spine surgery on January 20, 2010, and that he remained in the hospital until January 23, 2010. The plaintiff further alleges that he was confined to his bed and home for approximately two months immediately after the subject accident, and that he was confined to his bed and home for approximately six months following his spinal surgery.

Initially, the plaintiff commenced his action against the defendants Paul Lewis, Michelle Lewis, Christa Shiffer and Anthony DiMartini ("Action 1"). Thereafter, the plaintiff commenced a separate action, assigned index number 19006/10, against the defendant Mirearn Cruz ("Action 2"). By order of the court, dated March 4, 2011, Judge Cohalan granted the plaintiff's motion and the defendant Cruz's cross motion to consolidate Action 1 and Action 2, and determined that the consolidated matter shall be carried under index number 11344/10, and that the caption shall be stated as *Robert Werthner, plaintiff against Paul D. Lewis, Michelle L. Lewis, Christa I. Shiffer, Anthony J. DiMartini and Miream Cruz, defendants.*

The Lewis defendants now move for summary judgment on the basis that the injuries alleged by the plaintiff fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. The Lewis defendants, in support of the motion, submit copies of the pleadings, the plaintiff's deposition transcript, and the sworn medical reports of Dr. Isaac Cohen and Dr. Alan Greenfield. At the Lewis defendants' request, Dr. Cohen conducted an independent orthopedic examination of the plaintiff on November 10, 2011. Also, at the Lewis defendants' request, Dr. Greenfield performed an independent radiological review of the magnetic resonance images ("MRI") films of the plaintiff's cervical spine performed on October 9, 2009 and December 22, 2009. In addition, Dr. Greenfield independently reviewed the MRI films of the plaintiff's lumbar spine performed on October 10, 2009, December 22, 2009, and January 5, 2010. The DiMartini defendants cross-move for summary judgment on the basis that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision. The DiMartini defendants rely on the same evidence presented in support of the Lewis defendants' motion for summary judgment. The plaintiff opposes the motions on the ground that the evidence in opposition demonstrates that he sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. The plaintiff, in opposition to the motions, submits the sworn medical report of Dr. Barry Katzman, his uncertified medical reports, and the unsworn medical reports of Dr. Davida Panasci, Dr. Melissa Sapan and Dr. Cono Gallo.

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, the Lewis defendants and the DiMartini defendants, by submitting competent medical evidence and the plaintiff's deposition transcript, have established a prima facie case that the plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Estrella v Geico Ins. Co.***, __ AD3d __, 2013 NY Slip Op 00173 [2d Dept 2013]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Belliard v Leader Limousine Corp.***, 94 AD3d 931, 942 NYS2d 591 [2d Dept 2012]). The defendants' examining orthopedist, Dr. Cohen, used a goniometer to test the plaintiff's ranges of motion in his spine, shoulders and hands, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Cohen, during his examination of the plaintiff, found that the range of motion limitations in the plaintiff's lumbar spine were attributable to a pre-existing degenerative condition, and that the limitations in his cervical spine were attributable to the cervical spine fusion surgery that the plaintiff underwent on January 20, 2010, and were degenerative in nature (*see e.g.* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Dr. Cohen states in his medical report that palpation of the plaintiff's paraspinal muscles revealed no evidence of spasm, that the paravertebral muscles were supple and non-tender, that the straight leg raising test was negative, bilaterally, and that his heel-toe gait was normal. Dr. Cohen states that palpation of the scar from the bone grafting in the right posterior pelvic area demonstrated that it was well-healed and pain-free. Dr. Cohen further states that an examination of the plaintiff's hands revealed his hand grip, pinch and grasp were normal, that there was no evidence of a neurological deficit, atrophy, weakness, or trophic changes. Dr. Cohen opines that the spinal strains that the plaintiff sustained as a result of the subject collision have resolved, and that the examination of the plaintiff did not reveal any objective evidence of disability causally related to the subject accident.

Similarly, the medical reports of the defendants' radiologist, Dr. Greenfield, state that diffuse degenerative disc disease with multilevel degenerative disc bulging and herniations is present throughout the plaintiff's spine, and that the straightening of the plaintiff's cervical lordosis predates the subject accident. Dr. Greenfield further states that he made a comparison between the MRIs taken of the plaintiff's cervical and lumbar regions performed on October 9, 2009, and the MRIs performed on December 22, 2009,

that the findings on the MRI taken before the subject accident and the one taken after the accident were virtually identical.

The Lewis defendants and the DiMartini defendants, having made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to the plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury (*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 "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, the plaintiff has failed to raise a triable issue of fact as to whether he sustained an injury within the meaning of the serious injury threshold requirement of § 5102 (d) of the Insurance Law (*see* ***Tinyanoff v Kuna***, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Despite the fact that the plaintiff has submitted the affirmed medical report of Dr. Katzman, who found that the plaintiff sustained significant limitations to his spine and left shoulder, Dr. Katzman's report only is based on an examination of the plaintiff conducted on September 14, 2012, and fails to demonstrate that the plaintiff sustained any range of motion limitations contemporaneous with the subject accident (*see* ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]). Although the plaintiff is not required to proffer proof of a quantitative assessment contemporaneous with the accident (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Ortiz v Salahuddin***, __ AD3d __, 2013 NY Slip Op 00544 [1st Dept 2013]), he is required to offer proof in admissible form demonstrating that he sustained some form of impairment contemporaneous with the accident (*see* ***Ostroll v Nargizian***, 97 AD3d 1076, 949 NYS2d 283 [3d Dept 2012]). Significantly, Dr. Katzman's report does not state that he is aware of the plaintiff's prior medical history when concluding that the plaintiff's injuries are causally related to the subject collision (*cf.* ***Putnam v Sysco Corp.***, 101 AD3d 1571, 957 NYS2d 506 [1st Dept 2012]), nor does he address the findings of degenerative disc disease with multilevel degenerative disc bulging and herniations by the defendants' experts and, as such, his report is insufficient to rebut the defendants' prima facie showing (*see* ***Beltran v***

Powow Limo, Inc., 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]; *cf.* ***Perl v Meher***, *supra*; ***Snyder v Rivera***, 98 AD3d 1104, 951 NYS2d 233 [2d Dept 2012]). He also failed to address the defendants' experts' finding that the plaintiff's restricted range of motion in his cervical spine is attributable to the cervical spine surgery that he underwent (*see e.g.* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [1st Dept 2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]). 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]).

Moreover, 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, neither the Lewis defendants nor the DiMartini defendants submitted any of the uncertified medical reports that the plaintiff relied upon to attempt to raise a triable issue of fact as to whether he sustained an injury within the serious injury threshold requirement of § 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 the plaintiff in opposition are not sufficient to defeat defendants' motions 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]). In any event, the medical reports of the plaintiff's radiologists state that the plaintiff suffers from multilevel degenerative disc disease in his spine. Further, Dr. Panasci states in his report that there was no change in findings between the plaintiff's prior MRIs of his cervical and lumbar regions performed on October 9, 2009, and the MRIs taken of the same areas after the subject accident on December 22, 2009 (*see* ***Depena v Sylla***, *supra*). Thus, the plaintiff's medical evidence fails to demonstrate that he 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]).

Finally, the plaintiff failed to submit competent medical evidence demonstrating that he was rendered unable to perform substantially all of his normal daily living activities for at least 90 days of the 180 days immediately following the accident (*see* ***Parise v New York City Tr. Auth.***, 94 AD3d 839, 941 NYS2d 868 [2d Dept 2012]; ***Lanzarone v Goldman***, 80 AD3d 667, 915 NYS2d 144 [2d Dept 2011]; ***Hemsley v Ventura***, 50 AD3d 1097, 857 NYS2d 642 [2d Dept 2008]). Accordingly, the Lewis defendants' motion for summary judgment and the DiMartini defendants' cross motion for summary judgment dismissing the plaintiff's complaint on the ground that the plaintiff's injuries failed to meet the serious injury threshold requirement are granted.

Having determined that the plaintiff failed to sustain a serious injury within the meaning of the Insurance Law, the Court, sua sponte, grants summary judgment dismissing the complaint against the defendant Cruz (*see* CPLR 3212 [b]). The DiMartini defendants' and the defendant Cruz's motions seeking summary judgment in their favor on the issue of liability are denied, as moot. The defendant Cruz's motion

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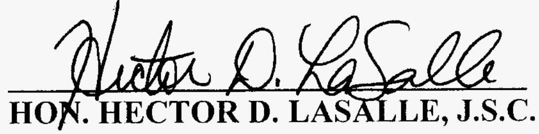
for an order compelling the plaintiff to provide the documents and information requested in the supplemental notice of discovery dated August 10, 2011 also is denied, as moot.

The foregoing constitutes the Order of this Court.

Dated: March 8, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**