Alam v Kasper
2014 NY Slip Op 31531(U)
May 29, 2014
Sup Ct, Suffolk County
Docket Number: 10-42343
Judge: W. Gerard Asher

[* 1]

SHORT FORM ORDER

INDEX No. 10-42343
CAL. No. 13-01875MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-10-13
ADJ. DATE 3-11-14
Mot. Seq. #002 - MD

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ROBIUL ALAM,

Plaintiff,

- against -

JANET KASPER, KEISHON F. HARRIS and "JOHN DOE",

Defendants.

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Upon the following papers numbered 1 to 21 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 - 19; Replying Affidavits and supporting papers 20 - 21; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Keishon Harris seeking summary judgment dismissing the complaint is denied.

Plaintiff Robiul Alam commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Horse Block Road and County Road 101 in the Town of Brookhaven on September 24, 2010. It is alleged that the accident occurred when plaintiff's vehicle, while attempting to make a left turn, was struck by the vehicle owned and operated by defendant Keishon Harris. As a result of the collision between the Harris and Alam vehicles, the Alam vehicle spun around and allegedly was struck in the rear by the vehicle owned and operated by defendant Janet Kasper.[1] It further is alleged that at the time of the accident, defendant

[1] By order, dated January 15, 2014, the undersigned granted defendant Janet Kasper's motion for summary judgment dismissing the complaint and all cross-claims against her on the bases that defendant Kasper was not a proximate cause of the subject accident's occurrence and that the Kasper vehicle was struck by plaintiff's vehicle when the accident occurred.

5-29-14

Harris ran the red traffic light controlling his direction of travel. By his bill of particulars, plaintiff alleges, among other things that he sustained various personal injuries, including lumbar radiculitis; lumbar disc disease; spinal stenosis at levels L3 through L5 with disc bulge; retrolistehesis at level L5-S1; and dysarthria. Plaintiff alleges that as a result of the injuries he sustained in the accident he was confined to his bed for approximately three days. Plaintiff further alleges that he was confined to his home and incapacitated from his employment for approximately one week due to the injuries he sustained in the collision.

Defendant Harris now moves for summary judgment on the basis that the alleged injuries sustained by plaintiff as a result of the subject accident fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, defendant Harris submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. David Weissberg and Dr. Mark Zuckerman. At defendant Harris's request, Dr. Weissberg conducted an independent orthopedic examination of plaintiff on March 22, 2012. Also at defendant Harris's request, Dr. Zuckerman conducted an independent neurological examination of plaintiff on March 20, 2012. Plaintiff opposes the motion on the grounds that defendant Harris failed to make a prima facie case that he did not sustain a serious injury as a result of the subject collision, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the 90/180" categories of the Insurance Law. In opposition, plaintiff submits his own affidavit and the affidavits of Dr. Richard Leahy and Dr. Richard Grosso.

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, defendant Harris, by submitting plaintiff's deposition transcript and competent medical evidence, established a prima face case that plaintiff did not sustain an injury within the meaning of § 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]), and, in any event, that plaintiff's alleged injuries were not caused by the subject accident (*see* ***Barkare v Kakouras***, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). Dr. Weissberg and Dr. Zuckerman each state in their reports that an examination of plaintiff reveals full range of motion in his spine and shoulders. Both doctors conclude that the cervical and lumbar sprains plaintiff sustained in the subject accident have resolved, that plaintiff does not have any residual objective orthopedic or neurologic findings or disability as a result of the accident, and that plaintiff may continue performing his normal activities of daily living, including working without restrictions. It is noted that, while Dr. Zuckerman found limitations in the range of motion of plaintiff's cervical spine during the examination, those limitations were insignificant within the meaning of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Sylla v Brickyard, Inc.***, 104 AD3d 605, 961 NYS2d 455 [1st Dept 2013]). Moreover, to the extent the findings of defendant Harris's experts cite different standards for normal range of motions and make different findings as to plaintiff's ranges of motion, such differences were not so significant as to affect defendant Harris's entitlement to summary judgment, since Dr. Weissberg and Dr. Zuckerman each concluded that plaintiff's range of motion was normal (*see* ***Brand v Evangelista***, 103 AD3d 539, 962 NYS2d 52 [2d Dept 2013]; ***Feliz v Fragosa***, 85 AD3d 417, 924 NYS2d 82 [1st Dept 2011]).

Therefore, defendant Harris shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he 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 to the motion, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether he sustained serious injuries to his spine under the limitations of use categories of the Insurance Law (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp., Inc.***, 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff's treating chiropractor, Dr. Leahy, opined in his affidavit, based upon his contemporaneous and recent examinations of plaintiff and his review of the magnetic resonance imaging ("MRI") examination of plaintiff's lumbar spine, that plaintiff's lumbar injuries and the observed range of motion deficits were significant and permanent (*see* ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Leahy further stated that the injuries to plaintiff's lumbar spine and the range of motion limitations were causally related to the subject accident (*see* ***Sanevich v Lyubomir***. 66 AD3d 665, 885 NYS2d 635 [2d Dept 2009]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). In addition, Dr. Grosso, the chiropractor who began treating plaintiff approximately six months after the termination of his No-Fault benefits, also opined, based upon his examinations of plaintiff and his review of plaintiff's lumbar and cervical MRI studies, that the disc pathologies seen on the MRI films and the range of motion limitations in plaintiff's spine are permanent in nature and are causally related to the subject accident. Although disc bulges and herniations, standing alone are not evidence or a serious injury under Insurance Law § 5104(d), evidence of disc bulges and herniations coupled with evidence of range of motion limitations, positive MRI findings and objective test results, is sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2d Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Thus, the affidavits of Dr. Leahy and Dr. Grosso raise a triable issue of fact as to whether plaintiff sustained a serious injury to his spine within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Plaintiff also provided an adequate explanation for his gap in treatment (*see* ***Pommells v Perez***, *supra*; ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]). Dr. Leahy explained that plaintiff was discharged from his care when his No-Fault benefits were terminated, that plaintiff's condition is chronic in nature, that the treatments plaintiff was receiving only helped to temporarily

alleviate the pain, and that the termination of the treatments at that point also served to determine the effect of reintegrating plaintiff into his normal routine without active treatment. In addition, plaintiff, in his affidavit and at his deposition, stated that he did not have health insurance and that it was difficult for him to find another medical provider to treat him due to his financial situation. Consequently, any discrepancy between plaintiff's expressed reasons for ceasing treatment and Dr. Leahy's account is a matter of credibility to be resolved by the trier of fact (*see* ***Khavosov v Castillo***, 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011; ***Barrett v New York City Tr. Auth.***, 80 AD3d 550, 914 NYS2d 269 [2d Dept 2011]). Accordingly, defendant Harris's motion for summary judgment dismissing plaintiff's complaint is denied.

Dated: May 29, 2014

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**