Karabec v Scelza
2015 NY Slip Op 31626(U)
August 17, 2015
Supreme Court, Suffolk County
Docket Number: 31232/2012
Judge: James C. Hudson
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Short Form Order

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Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x---x

KENNETH KARABEC,

Plaintiff,

- against -

VERONICA M. SCELZA and MICHAEL SCELZA,

Defendants.

x---x

INDEX NO.:31232/2012

SEQ. NO.:001-MG; CASEDISP

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Upon the following papers numbered 1 to 41 read on this motion for Summary Judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-16; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 17-39; Replying Affidavits and supporting papers 40-41 ; ~~Other ______; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by Defendants for summary judgment dismissing the complaint is granted.

Plaintiff Kenneth Karabec commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred on East Hoffman Avenue in the Town of Babylon on August 22, 2011. The accident allegedly happened when a vehicle owned by Defendant Veronica Scelza and driven by Defendant Michael Scelza collided with the rear of Plaintiff's vehicle as it was stopped for a red light. By his bill of particulars, Plaintiff alleges he suffered various injuries as result of the accident, including a herniated disc at level C6-C7, a disc protrusion at level C3-C4, a disc bulge at level C4-C5, and cervical and lumbar radiculopathy. He also alleges he suffered "aggravation and/or exacerbation of previously asymptomatic degenerative disc disease" in his cervical and lumbar regions due to the accident.

Defendants now move for an order granting summary judgment in their favor, arguing Plaintiff is precluded under Insurance Law § 5104 from recovering from non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). More particularly, Defendants assert that there is no medical evidence substantiating the allegations

Plaintiff suffered injuries within the "permanent loss" or the "limitation of use" categories of Insurance Law § 5102 (d), and that medical records demonstrate Plaintiff suffered from degenerative disc disease at the time of the accident. Further, Defendants argue that the sworn report of their medical expert, Dr. Gary Kelman, establishes a prima facie case that any injuries to Plaintiff's spine were not serious. At Defendants' request, Dr. Kelman, an orthopedic surgeon, conducted an examination of Plaintiff in July 2014, and reviewed certain medical records and reports relating to the injuries allegedly sustained in the subject accident. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcript of Plaintiff's deposition testimony, the sworn report of Dr. Kelman, and X-ray reports from August 2011 regarding Plaintiff's cervical and lumbar regions.

In opposition, Plaintiff contends Defendants' submissions are insufficient to meet their burden on the motion. Alternatively, Plaintiff offers the sworn medical report of Dr. Roy Shanon, Plaintiff's treating neurologist, as evidence that he sustained injury to his cervical spine within the "significant limitation of use" category. In addition to Dr. Shanon's report, which is dated February 5, 2015, Plaintiff's opposition papers include a sworn report, dated September 28, 2011, prepared by Dr. Shanon setting forth the findings of electrodiagnostic testing for radiculopathy performed on Plaintiff, and a sworn MRI report concerning Plaintiff's cervical spine prepared in October 2011. Plaintiff also submits his own affidavit, an uncertified copy of the police report for the subject accident, uncertified hospital records, and unsworn medical reports prepared by Dr. Magda Fahmy, a physiatrist, Dr. Greg Szerlip, an osteopath and pain management specialist, and Jay Riess, a chiropractor

It is for the court to determine in the first instance whether a Plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see **Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 moving for 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 a prima facie case 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]). When a Defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the Defendant's own witnesses, "those findings must be in admissible form, i.e., 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 also may 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]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a Defendant meets this burden, the Plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions are sufficient to meet their initial burden of establishing a prima facie case that Plaintiff did not sustain a serious physical injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). The affirmed report of Dr. Kelman constituted competent medical evidence that Plaintiff did not suffer injury to his cervical spine within the "permanent loss of use" category or the "limitation of use" categories (*see* ***Master v Boiakhtchion***, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Dr. Kelman's report states that Plaintiff presented at the July 2014 examination with complaints of pain in his neck, right shoulder and left biceps. It states, in relevant part, that an examination of Plaintiff's spine revealed no evidence of spasms or paraspinal tenderness; that Plaintiff's gait, motor strength, and reflexes were normal; and that sensation was intact in both the upper and lower extremities. The report further states that range of motion testing revealed normal joint function in Plaintiff's spine, and that orthopedic tests to assess cervical and lumbar nerve root irritation were negative. Dr. Kelman diagnoses Plaintiff as having suffered cervical and lumbar sprains in the accident. He concludes such injuries have resolved, and that there is no orthopedic evidence Plaintiff suffers from any sequelae as a result of the accident.

Moreover, Defendants submitted evidence, namely X-ray reports prepared less than two weeks after the subject accident, showing Plaintiff suffers from degenerative disc disease in his cervical region at level C6-C7 and in his lumbar region at level L5-S1 (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]; ***Kuperberg v Montalbano***, 72 AD3d 903, 899 NYS2d 344 [2d Dept 2010]). In addition, Defendants established a prima facie case that Plaintiff did not sustain a serious injury within the 90/180 category by presenting Plaintiff's deposition testimony that he missed only one day from work due to his alleged injuries (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]).

The burden, therefore, shifted to Plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). A Plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]). 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 of the Plaintiff 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.***, 98 NY2d 345, 746 NYS2d 865; ***Valera v Singh***, 89 AD3d 929, 932 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***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

Initially, the Court notes that the unsworn medical reports and uncertified hospital records included in the opposition papers were not considered in the determination of this motion, as they were not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Singh v Mohamed***, 54 AD3d 933, 864 NYS2d 498 [2d Dept 2008]). The sworn reports of Dr. Shanon failed to raise a triable issue of fact. Dr. Shanon's February 2015 report indicates, in part, that he examined Plaintiff on two occasions, August 31, 2011 and

February 3, 2015. It states that range of motion testing of Plaintiff's cervical region revealed 30 degrees of flexion (50 degrees normal), 20 degrees of extension (60 degrees normal), 20 degrees of right and left lateral flexion (45 degrees normal), and 20 degrees of right lateral rotation and 60 degrees of left lateral rotation (60 degrees normal). It further states that x-rays taken of Plaintiff's spine in August 2011 revealed degenerative disc disease in the cervical and lumbar regions, and that an MRI examination performed in October 2011 revealed degenerative changes in his cervical region, particularly a disc herniation at level C3-C4. Dr. Shanon concludes in his report that "[i]f the history of the accident is correct there was a cause and effect relationship between the patient's injuries sustained in a motor vehicle accident on August 2, 2011 including findings of cervical and lumbar radiculopathy," and that Plaintiff's condition is permanent.

However, as it is clear from the report that Dr. Shanon improperly relied on unsworn reports of other treating physicians, particularly the reports of Dr. Fahmy and Dr. Szerlip, his findings that Plaintiff suffers significant restrictions in cervical joint function and radiculopathy due to the subject accident are without probative value (*see **Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]). Further, Dr. Shanon failed to address in his February 2015 report the medical evidence showing that Plaintiff suffers from preexisting degenerative disc disease in his spine, particularly in his cervical region (*see **Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2d Dept 2009]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]). When a Defendant presents evidence that a Plaintiff's alleged pain and injuries are related to a preexisting condition, the Plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380; *see **Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124). If a Plaintiff had a preexisting medical condition, he or she must demonstrate that the subject accident aggravated the condition to such an extent that it produced a serious injury within the meaning of Insurance Law §5102 (d) (*see **Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2d Dept 2007]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***Suarez v Abe***, 4 AD3d 288, 772 NYS2d 317 [1st Dept 2004]; ***Matthews v Cupie Transp. Corp.***, 302 AD2d 566, 758 NYS2d 66 [2d Dept 2003]). Here, while Dr. Shanon states in his February 2015 report that X-ray and an MRI examinations conducted shortly after the accident revealed degenerative disc disease in Plaintiff's spine, he does not find that the accident aggravated such condition (*see **Creech v Walker***, 11 AD3d 856, 784 NYS2d 655 [3d Dept 2004]; *see also **Sternberg v Sipzner***, 74 AD3d 1054, 902 NYS2d 390 [2d Dept 2010]). Dr. Shanon's conclusions as to the cause and duration of Plaintiff's alleged spinal injuries, therefore, are rejected as conclusory, speculative and insufficient to meet the statutory threshold (*see **Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122; ***Iovino v Scholl***,

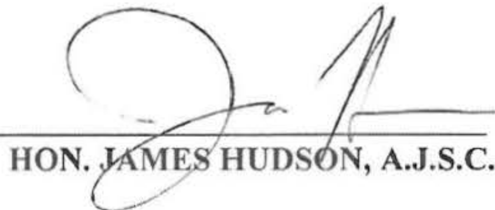
69 AD3d 799, 893 NYS2d 230 [2d Dept 2010]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2d Dept 2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]).

Furthermore, neither the 2011 MRI report regarding Plaintiff's cervical spine prepared by Dr. Elyiyahu Engelsohn nor the 2011 electrodiagnostic test report prepared by Dr. Shanon is sufficient to defeat summary judgment. The mere existence of a herniated or bulging disc, or radiculopathy, is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from the disc injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). Also, absent from the opposition papers is admissible medical proof of significant limitations in Plaintiff's spine sufficiently contemporaneous with the subject accident (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). Although the Court of Appeals has held contemporaneous quantitative range of motion measurements are not a prerequisite to recovery under the "limitation of use" categories, it also recognized "[a] contemporaneous doctor's report is important to proof of causation" (***Perl v Meher***, 18 NY3d 208, 218, 936 NYS2d 655; *see* ***Kahvejian v Pardo***, 125 AD3d 936, 4 NYS3d 133 [2d Dept 2015]; ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787). Finally, Plaintiff failed to submit any medical evidence showing that the injuries he allegedly sustained in the subject motor vehicle accident rendered him unable to perform substantially all of his normal daily activities for at least 90 of the 180 days immediately following such accident (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Accordingly, Defendants' motion for summary judgment dismissing the complaint based on Plaintiff's failure to meet the serious injury threshold is granted.

The foregoing constitutes the decision and order of the Court.

DATED: AUGUST 17, 2015
RIVERHEAD, NY



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

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION