Sanders v Carbone
2015 NY Slip Op 31751(U)
September 14, 2015
Supreme Court, Suffolk County
Docket Number: 12-23768
Judge: H. Patrick Leis III

SHORT FORM ORDER

INDEX No. 12-23768

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 16 - SUFFOLK COUNTY

PRESENT:

Hon. H. PATRICK LEIS, III.
Justice of the Supreme Court

MOTION DATE 9-11-14
ADJ. DATE 12-11-14
Mot. Seq. # 004 - MG; CASEDISP

LARRY SANDERS and MARIE SANDERS,	:	JOHN L. JULIANO, ESQ.
	:	Attorney for Plaintiffs
Plaintiffs,	:	39 Doyle Court
	:	East Northport, New York 11731
- against -	:	
	:	ADAMS HANSON FINDER HUGHES
CHRISTIAN CARBONE,	:	Attorney for Defendant
	:	One Executive Boulevard, Suite 280
Defendant.	:	Yonkers, New York 10701

Upon the following papers numbered 1 to 27 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19 - 25; Replying Affidavits and supporting papers 26 - 27; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

Plaintiff Larry Sanders commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred in the Town of Smithtown, at the intersection of Smithtown Boulevard and Metzner Road, on March 21, 2011. Plaintiff's wife, Maria Sanders, brought a derivative claim for loss of services. The accident allegedly happened when a vehicle driven by defendant Christian Carbone made a sudden left from Metzner Road and collided with the front of plaintiff's vehicle as it was traveling westbound on Smithtown Boulevard. By his bill of particulars, plaintiff alleges, in relevant part, that he suffered a herniated disc at level L5-S1 and facet arthropathy. Further, in response to questions as to whether he was claiming aggravation of a preexisting condition and the length of time such condition existed, plaintiff alleges in the bill of particulars that he had "injury to his buttocks, bruised and sacral spine area," and that such condition existed for "approximately three weeks."

Defendant now moves for an order granting summary judgment in his favor, arguing plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a

"serious injury" within the meaning of Insurance Law § 5102 (d). More particularly, defendant asserts plaintiff's cessation of medical treatment just three months after the subject accident is fatal to his claim that he suffered a serious injury within the "limitation of use" categories of Insurance Law § 5102 (d). He also asserts that medical evidence establishes plaintiff's alleged disc injury in his lumbar spine was not caused by the subject accident, and that deposition testimony establishes plaintiff did not suffer injury within the 90/180 category of Insurance Law § 5102. Defendant's submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition testimony, MRI reports concerning plaintiff lumbar region dated April 26, 2001 and September 3, 2011, and an affirmed report of Dr. Mathew Chacko. At defendant's request, Dr. Chacko, a neurologist, conducted an examination of plaintiff in November 2013. He also reviewed certain medical records relating to the injuries alleged in this action, as well as medical records concerning injuries plaintiff allegedly suffered as a passenger in a motor vehicle accident that occurred in March 2001.

Plaintiff opposes the motion, arguing Dr. Chacko's affirmed report, which contains findings of restricted movement in the lumbar spine, is insufficient to meet defendant's burden on the motion. Alternatively, plaintiff contends that the affirmed report of his expert, Dr. Enrico Mango, raises a triable issue as to whether he suffered injury within the "limitation of use" or the 90/180 categories of Insurance Law § 5102 (d). In opposition, plaintiff submits, inter alia, an uncertified copy of the police report regarding the subject accident, an affidavit of an employee of plaintiff's attorney who accompanied plaintiff during his examination by Dr. Chacko, and an affirmed medical report of Dr. Mango. The Court notes no affidavit or affirmation from a physician who treated plaintiff after the accident for his alleged injuries was included with the opposition papers.

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]).

Defendant's submissions are sufficient to meet his initial burden of establishing a prima facie case that plaintiff did not sustain 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). Here, defendant submitted competent medical evidence showing that plaintiff suffers from degenerative disc disease with diffuse facet arthropathy, and that the herniation in plaintiff's lumbar spine predated the subject accident (*see* ***Greenberg v Macagnone***, 126 AD3d 937, 7 NYS3d 185 [2d Dept 2015]; ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). Moreover, through plaintiff's deposition testimony, defendant established that plaintiff stopped receiving physical therapy and any other medical treatment for his alleged back injury just two or three months after the subject accident (*see* ***Pommells v Perez***, 4 NY2d 556, 574, 797 NYS2d 380 [2005]). In addition, plaintiff's deposition testimony that he did not miss any days from work due to his alleged injuries establishes prima facie that he did not sustain a serious injury within the 90/180 category (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274; ***Master v Boiakhtchion***, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]). In fact, despite alleging plaintiff suffered injury within the 90/180 category, the bill of particulars states plaintiff was not incapacitated from work due to the accident.

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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [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; ***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]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff's submissions in opposition to the motion failed to raise a triable issue of fact. Plaintiff, who is employed full time as a corrections officer, failed to offer any explanation for ceasing medical

treatment for his alleged spinal injuries two or three months after the subject accident (*see* ***Pommells v Perez***, 4 NY2d 556, 797 NYS2d 380; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2d Dept], *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]). Rather, plaintiff relies on the medical report of Dr. Mango to create an issue of fact regarding the cessation of treatment. Contradicting plaintiff's deposition testimony, Dr. Mango, who examined plaintiff on two occasions after the instant motion was made, namely August 14, 2014 and September 10, 2014, states in his report that plaintiff "was in physical therapy once a week with minimal improvements" in October 2011, and that he continued to seek treatment for symptoms related to the subject accident from his general practitioner, Dr. Chada, in October 2011 and April 2012. He states that range of motion testing of plaintiff's lumbosacral region performed on September 10, 2014 showed 25 degrees of flexion (40 degrees normal), 15 degrees extension (25 degrees normal), 10 degrees right and left lateral flexion (15 degrees normal), and 10 degrees right and left rotation (15 degrees normal); that the straight leg raise test was positive at 35 degrees on the right and 30 degrees on the left; and that spasm was detected on palpation of the lumbar region. Dr. Mango diagnoses plaintiff as suffering from a herniated disc at level l5-S1, chronic bilateral lumbosacral radiculopathy, and exacerbation of preexisting degenerative disc disease. He concludes that plaintiff is partially disabled, and that his injuries "are causally related to the motor vehicle accident of March 21, 2011 with the information provided."

Contrary to the assertions by plaintiff's counsel, Dr. Mango's report is insufficient to raise a triable issue of fact. Significantly, missing from such report are statements indicating the prior medical records and records, if any, other than the "September 2011 MRI scan," that were reviewed by Dr. Mango in connection with his independent examination of plaintiff, and whether such reports and records were in admissible form (*see generally* ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). Absent evidence indicating Dr. Mango relied on the sworn reports of plaintiff's treating physicians, his findings that plaintiff suffers from significant restrictions in spinal joint function due to the subject accident, and that the accident exacerbated the preexisting degenerative disc disease, are without probative value (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***Gorden v Tibulco***, 50 AD3d 460, 855 NYS2d 515 [1st Dept 2008]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]). Similarly, Dr. Mango's assertion that, contrary to what plaintiff testified to at his deposition, plaintiff continued to receive medical treatment from Dr. Chada in October 2011 and April 2012 for the injuries alleged in this action is insufficient to meet plaintiff's burden of presenting a reasonable explanation for ceasing medical treatment for his alleged injuries shortly after the accident (*see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***Sibrizzi v Davis***, 7 AD3d 691, 776 NYS2d 843 [2d Dept 2004]).

Further, Dr. Mango failed to address the medical evidence in the moving papers that plaintiff suffers from preexisting degenerative disc disease in his lumbar region and that he had been diagnosed in 2001, following a motor vehicle accident, as having a herniated disc at L5-S1 (*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; ***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, Dr. Mango's report simply states that images obtained using multiple projection radiographs revealed degenerative disc disease at levels L4-L5 and L5-S1, and that there was "[e]xacerbation of preexisting degenerative disc disease." Plaintiff did not plead a claim for exacerbation of prior disc disease, and Dr. Mango did not provide any objective basis for determining that there was an exacerbation of such condition (*see* ***Dorrigan v Cantalicio***, 101 AD3d 578, 957 NYS2d 47 [1st Dept 2012]; ***Seck v Minigreen Hacking Corp.***, 53 AD3d 608, 863 NYS2d 218 [2d Dept 2008]; ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468).

In any event, Dr. Mango's findings that plaintiff suffers from a herniation and lumbar radiculopathy are insufficient to defeat summary judgment. The mere existence of a herniated or bulging disc, and even 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 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). Thus, Dr. Mango's findings as to the cause, duration and significance of plaintiff's alleged spinal injuries 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]).

In addition, absent from the opposition papers is admissible medical proof of significant limitations in plaintiff's lumbar 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* ***Pryce v Nelson***, 124 AD2d 859, 2 NYS3d 214 [2d Dept 2015]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

According, defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 9/14/15

HON. H. PATRICK LEIS, III

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION