Sciacca v Jaycox
2015 NY Slip Op 31821(U)
September 18, 2015
Supreme Court, Suffolk County
Docket Number: 11-23535
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX No. 11-23535

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-21-15
ADJ. DATE 3-26-15
Mot. Seq. # 002 - MG; CASEDISP

KIMBERLY SCIACCA,

Plaintiff,

- against -

CHRISTINE JAYCOX, JAMES JAYCOX and SHELLEY M. MILNE,

Defendants.

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Upon the following papers numbered 1 to 59 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 57; Replying Affidavits and supporting papers 58 - 59; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Christine Jaycox and James Jaycox for summary judgment in their favor is granted.

Plaintiff Kimberly Sciacca commenced this action to recover damages for personal injuries she allegedly sustained as the result of a multi-vehicle accident that occurred in the Town of Islip on July 22, 2008. The accident allegedly happened on Nicolls Road, when a vehicle owned by defendant James Jaycox and driven by defendant Christine Jaycox struck the rear of a vehicle driven by defendant Shelley Milne, propelling it into the rear of the vehicle driven by plaintiff. By her bill of particulars, plaintiff alleges she suffered various injuries due to the accident, including herniations at levels L3-4, L4-5 and L5-S1 of the lumbar region; sprains and

strains in the cervical, thoracic and lumbar regions; and a traumatic hemangioma in the thoracic region. She further asserts that such injuries resulted in "serious injury" within the "limitation of use" and the 90/180 categories of Insurance Law § 5102 (d). The Court notes that by order dated June 23, 2014, a motion by Milne for summary judgment dismissing the complaint and the cross claims against her was granted.

The Jaycox defendants now move for summary judgment in their favor, arguing plaintiff is precluded under Insurance Law § 5014 from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants assert, in part, that plaintiff's own medical records show she exhibited full range of motion in both her cervical spine and her lumbar spine less than one year after the subject accident, that MRI examinations of her cervical spine and thoracic spine conducted after the accident showed no disc or soft tissue injuries, and that the 2013 report of defendants' expert, Dr. Nathan, shows plaintiff had normal range of motion in her spine. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition testimony, medical records relating to plaintiff's treatment at the emergency department of Brookhaven Hospital on the date of the accident, magnetic resonance imaging (MRI) reports regarding plaintiff's cervical and thoracic regions, a medical report of Dr. Rakesh Patel concerning an examination he conducted of plaintiff in February 2009, and an affirmed medical report of Dr. Jay Nathan. At defendant's request, Dr. Nathan, an orthopedic surgeon, conducted an examination of plaintiff in July 2013 and reviewed various medical records and reports relating the injuries alleged in this action.

Plaintiff opposes the motion, arguing that defendants' submissions are insufficient to make out a prima facie case of entitlement to judgment in their favor, particularly as Dr. Nathan's report includes a finding of restricted movement in plaintiff's lumbar spine. Alternatively, plaintiff contends that the medical evidence included in her opposition papers raises triable issues as to whether she suffers from injuries within the "limitation of use" and the 90/180 categories, and that her affidavit sufficiently explains why she ceased medical treatment for her alleged injuries. In opposition, plaintiff submits, among other things, affirmations and affirmed reports of Dr. Rakesh Patel, Dr. Alexandre DeMoura, Dr. Jonathan Lewin, and Dr. Rahave Polavarapu; affidavits of radiologists Dr. Steven Mendolsohn and Dr. Orland Ortiz; MRI reports concerning her thoracic spine and her lumbar spine; physical therapy treatment records from Brigitte Barnett Physical Therapy Center and Spagnoli Physical Therapy; and her own affidavit.

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* ***Carfi v Forget***, 101 AD3d 1616, 956 NYS2d 721 [4th Dept 2012]; ***Stone v Qamar***, 68 AD3d 566, 889 NYS2d 845 [1st Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Here, the affirmed report of Dr. Nathan states that plaintiff presented at the July 2013 examination with complaints of neck and back pain, and of numbness in her right leg. The report states, in relevant part, that range of motion testing of the plaintiff's cervical and lumbosacral regions revealed normal joint function in all planes, except a moderate restriction in lumbar flexion of 70 degrees (90 degrees normal), and that palpation of these regions revealed no muscle spasms and minimal vertebral tenderness. It states that plaintiff walked with a normal gait; that she exhibited normal motor strength, deep tendon reflexes and sensation in her upper and lower extremities; and that the straight-leg raise test, used to assess compression or irritation of the sciatic nerve, was negative. The report also states that plaintiff exhibited full range of motion in her shoulders, elbows, wrists and hands, that there was no evidence of rotator cuff weakness or spasms in her shoulders, and that she had normal grip strength and dexterity in her hands. Dr. Nathan

diagnoses plaintiff as having suffered sprains in the cervical and thoracic regions of her spine, and concludes there is no objective evidence that she suffers from any orthopedic disability due to the accident. Further, the 2011 reports regarding the MRI examinations of plaintiff's cervical and thoracic regions indicate there was no evidence of any disc bulges or herniations.

In addition, plaintiff's deposition testimony that she missed just two days of work due to her alleged injuries established a prima facie case that she did not sustain a serious injury within the 90/180 category (*see* ***Marin v Ieni***, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; ***Kabir v Vanderhost***, 105 AD3d 811, 962 NYS2d 703 [2d Dept 2013]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Moreover, through plaintiff's deposition testimony, defendants showed that plaintiff stopped receiving any medical treatment for her alleged injuries sometime in 2011 (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). To satisfy the "serious injury" threshold set by Insurance Law § 5102 (d), a plaintiff must present "objective evidence of an injury"; subjective complaints of pain are insufficient (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 350, 746 NYS2d 865; *see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, a plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints 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; ***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 fail to raise a triable issue of fact. Initially, the Court notes the October 7, 2008 MRI report concerning plaintiff's thoracic spine, purportedly affirmed by a radiologist who did not prepare such report, and the physical therapy records included with 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]; ***Irizzary v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). The affirmation and medical reports of plaintiff's treating orthopedist, Dr. Patel, are insufficient to defeat summary judgment. Although range of motion measurements of plaintiff's cervical region taken by Dr. Patel one week after the accident showed significant restrictions in joint function, there is no indication that he conducted any other objective testing of such region during the seven-month period that he treated her. In fact, his reports indicate that plaintiff initially presented with complaints of neck pain and headaches, and that she did not report back pain until November 2008. Furthermore, Dr. Patel's affirmation fails to address the finding during an examination of plaintiff he conducted on February 19, 2009 that she had full range of motion in her lumbar spine (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Maffei v Santiago***, 63 AD3d 1011, 886 NYS2d 29 [2d Dept 2009]; ***Thomas v Weeks***, 61 AD3d 961, 878 NYS2d 182 [2d Dept 2009]), or the findings of the MRI examination of her cervical spine that there was no evidence of herniations, bulges or other soft tissue injuries (*see* ***Komina v Gil***, 107 AD3d 596, 968 NYS2d 457 [1st Dept 2013]). In addition, there is no indication in the affirmation that Dr. Patel examined plaintiff again after the February 19, 2009 examination (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). Thus, Dr. Patel's conclusion that plaintiff suffers from a permanent consequential limitation of use or a significant limitation of use in her spine due to the subject accident, clearly tailored to meet the statutory requirements, fails to raise a triable issue as to whether she suffered a serious injury (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]; ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]).

The affirmation of Dr. DeMoura, an orthopedist employed by the New York Spine Institute, who examined plaintiff in February 2011, March 2011 and March 2015, also fails to demonstrate a triable issue of fact. Significantly, the report lacks probative value, as Dr. DeMoura improperly relied on the unsworn findings of Dr. Charles Kaplan, a co-employee at New York Spine Institute, who examined plaintiff in July 2011, in reaching his conclusion that plaintiff suffers from significant limitations in her cervical and lumbar regions due to the accident (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***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]). Moreover, it appears from the affirmation that Dr. DeMoura failed to review any of plaintiff's medical records, other than MRI reports relating to her lumbar spine, and personally obtained range of motion measurements of plaintiff's spine for the first time in March 2015. Thus, his opinion that she suffers significant restrictions in cervical and lumbar joint function due to the July 2008 motor vehicle accident is rejected as conclusory and speculative (*see* ***Pou v E&S Wholesale Meats, Inc.***, 68 AD3d 446, 890 NYS2d 47 [1st Dept 2009]; ***Piperis v Wan***, 49 AD3d 840, 854 NYS2d 489 [2d Dept 2008]; ***Vaughan v Baez***, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]).

Similarly, the reports of Dr. Polavarapu and Dr. Lewin, both of whom apparently conducted examinations for the No Fault insurance carrier, are insufficient to defeat summary judgment (*see* ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]). Both Dr. Polavarapu, who examined plaintiff in January and March 2009, and Dr. Lewin, who examined plaintiff in May 2009, diagnosed plaintiff as having suffered only spinal sprains, strains and contusions due to the subject accident. Both physicians also concluded that such injuries had resolved and that plaintiff does not suffer from any orthopedic disability. "Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d)" (***Rabolt v Park***, 50 AD3d 995, 995, 858 NYS2d 197). The Court notes that contrary to plaintiff's counsel's assertions, absent objective medical proof that plaintiff suffered injury in her cervical spine, Dr. Polavarapu's and Dr. Lewin's findings of range of motion restrictions in such region do not create an issue of fact (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 350, 746 NYS2d 865; *see* ***Komina v Gil***, 107 AD3d 596, 968 NYS2d 457). It further notes that the bare findings of Dr. Polavarapu and Dr. Lewin that plaintiff exhibited 60 degrees and 70 degrees of flexion in her lumbar spine out of a normal range of 90 degrees do not, in and of themselves, raise a triable issue as to whether she suffered injury within the "significant limitation of use" category, particularly as both physicians conclude plaintiff suffered only spinal sprains and strains.

Dr. Panasci's MRI report concerning plaintiff's lumbar spine is insufficient to defeat summary judgment. The mere existence of a herniated or bulging disc, or even a tear in a tendon, 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* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; ***Washington v Mendoza***, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]). Additionally, the report fails to address the issue of whether the alleged disc herniations in the lumbar region are causally related to the subject accident (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67). In fact, the report indicates the two herniations in plaintiff's lumbar spine are related to degenerative disc disease.

As to the causation issue created by plaintiff's substantial "gaps" in treatment, plaintiff simply asserts in her affidavit in opposition to the motion that she stopping receiving medical treatment "after [her] insurance cut off, as [she] could not afford to treat any longer." Although the Court of Appeals has rejected the argument that a plaintiff should have to submit evidence substantiating his or her explanation for terminating medical treatment (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]), he or she must still offer a "reasonable explanation" for doing so (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380). Here, the Court finds plaintiff's vague assertion insufficient to meet this minimal burden, as it is unclear whether such statement is intended to explain either the gap in treatment between February 2009 and March 2011, or the gap between July 2011 and March 2015, or both. It also

is unclear from the record whether plaintiff, who was 18 years old and living at home at the time of the accident, had health insurance coverage after any No-Fault benefits ended (*see* ***Windham v New York City Tr. Auth.***, 115 AD3d 597, 983 NYS2d 4 [1st Dept 2014]; *cf.* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1).

Finally, plaintiff failed to submit competent evidence that she suffered a nonpermanent injury that left her unable to perform her normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149). Contrary to the assertions by plaintiff's counsel, absent medical evidence of serious injury to her spine, plaintiff's affidavit, in which she vaguely alleges that she left her job and did not finish her college degree due to the accident, and that she continues to experience pain in her neck and back, is insufficient to raise a triable issue as to whether she suffered serious injury within the 90/180 category as a result of the accident, especially as her deposition testimony shows she left her job as a dog groomer in 2010 and that she completed two semesters of college immediately after the accident (*see* ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

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

Dated: September 18, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION