Bennett v Stanford
2015 NY Slip Op 31844(U)
September 14, 2015
Supreme Court, Suffolk County
Docket Number: 10-18840
Judge: John H. Rouse

SHORT FORM ORDER

INDEX No. 10-18840
CAL No. 14-01186MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice Supreme Court

MOTION DATE 12-10-14
ADJ. DATE 3-24-15
Mot. Seq. # 003 MG; CASEDISP

----------X

OLIVIA D. BENNETT,

Plaintiff,

- against -

MELISSA STANFORD and K. STANFORD,

Defendants.

----------X

HARMON, LINDER & ROGOWSKY
Attorney for Plaintiff
Three Park Avenue, Suite 2300
New York, New York 10004

RICHARD T. LAU & ASSOCIATES
Attorney for Defendants
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 16 - 28; Replying Affidavits and supporting papers 29 - 30; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment in their favor is granted.

Plaintiff Olivia Bennett commenced this action to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred in the Town of Babylon on July 7, 2009. The accident allegedly happened in the eastbound lanes of Dixon Avenue, when a vehicle owned by defendant Melissa Sanford and driven by defendant Kieran Stanford collided with the right side of plaintiff's vehicle as plaintiff, planning to make a right turn onto Great Neck Road, was moving from the left lane to the right lane of travel. By her bill of particulars, plaintiff alleges she suffered various injuries due to the accident, including disc bulges at levels C6-C7, T8-T9, T10-T11 and T11-T12, cervical and lumbar radiculopathy, and sprains and strains in her left shoulder and her spine.

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' submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition

testimony, the records relating to plaintiff's treatment at the Emergency Department of Good Samaritan Hospital Medical Center on the day of the accident, and the sworn medical reports of Dr. Lee Kupersmith and Dr. Alan Greenfield. At defendants' request, Dr. Kupersmith, an orthopedist, conducted an examination of plaintiff on September 11, 2012, and reviewed various medical records relating to the injuries allegedly sustained in the accident. Dr. Greenfield, a radiologist, reviewed the films from a magnetic resonance imaging (MRI) examination of plaintiff's left shoulder performed in September 2009.

In opposition, plaintiff submits the sworn medical reports of Dr. Donald Goldman, Dr. Jean-Marie Francois, Dr. Jean Claude Demetrius, and Dr. Steven Winter, as well as her own affidavit and an affirmation of Dr. Francois. Plaintiff argues that such medical evidence raises a triable issue as to whether she suffered serious injury to her spine within the "significant limitation of use" category of Insurance Law § 5102 (d). She further asserts that her affidavit, together with her deposition testimony and the report of Dr. Goldman, raises a triable issue as to whether she suffered injury within the 90/180 category, and sufficiently explains why she ceased medical treatment for her alleged injuries approximately six months after the subject accident.

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* ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [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]). Here, the affirmed report of Dr. Kupersmith states that plaintiff presented at the September 2012 examination with complaints of pain in her neck, back and left shoulder. The report states, in relevant part, that range of motion testing of the cervical and lumbosacral regions of plaintiff's spine revealed normal joint function, and that palpation of these regions revealed no muscle spasm and minimal 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 demonstrated full range of motion in her left shoulder, and that orthopedic tests to assess shoulder impingement were negative. Dr. Kupersmith diagnoses plaintiff as having suffered strains and sprains in the cervical, thoracic and lumbrosacral regions of her spine, as well as a strain of the left shoulder. He concludes that these soft tissue injuries have resolved, and that there is no objective evidence plaintiff suffers from a permanent impairment due to the accident. Further, defendants' examining radiologist, Dr. Greenfield, states in his report that the 2009 MRI examination of plaintiff's left shoulder revealed no evidence of any abnormality in the muscles, tendons, ligaments or superficial soft tissues, other than chronic tendinosis in the distal supraspinatus tendon and minimal effusion, and that the tendinosis was unrelated to the subject motor vehicle accident.

Moreover, through plaintiff's deposition testimony, defendant established that plaintiff stopped receiving medical treatment for her alleged injuries approximately six months after the subject accident (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). In addition, plaintiff's deposition testimony that she missed three weeks 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]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]).

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. Plaintiff, who at the time of the accident was employed at Capital One Bank, failed to adequately explain her cessation of medical treatment within six months of the accident (*see* ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2d Dept 2009]; ***Sibrizzi v Davis***, 7 AD3d 691, 776 NYS2d 843 [2d Dept 2004]). At her deposition, plaintiff testified she received medical treatment for her alleged injuries at Freeport Medical from July 9, 2009 to sometime in December 2009 or January 2010. She testified that she treated three times per week for approximately three months, and that, "[a]fter the minimum three months," she treated with Freeport Medical three or four more months until she "moved." However, in her affidavit in opposition to the motion, plaintiff avers that she received three or four months of medical treatment after the accident and that, although she had health insurance benefits through her employer, "[o]nce payment for my medical care was terminated by no fault [insurance], I had to stop treating with my doctors and therapists because I could not afford to pay for their care and treatment out of pocket." Plaintiff' affidavit, which contradicts her deposition testimony, raises only a feigned issue of fact as to her cessation of medical treatment (*see* ***De La Cruz v Hernandez***, 84 AD3d 652, 924 NYS2d 57 [1st Dept 2011]; ***Rosenblatt v Venizelos***, 49 AD3d 519, 853 NYS2d 578 [2d Dept 2008]; ***Hernandez-Vega v Zwanger-Pesiri Radiology Group***, 39 AD3d 710, 833 NYS2d 627 [2d Dept 2007]; ***Phillips v Bronx Lebanon Hosp.***, 268 AD2d 318, 701 NYS2d 403 [1st Dept 2000]; *cf.* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]). "A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (***Harty v Lenci***, 294 AD2d 296, 298, 743 NYS2d 97 [1st Dept 2002]).

Moreover, the affirmed report of Dr. Goldman, who examined plaintiff on one occasion, more than 5½ years after the subject accident, is insufficient as a matter of law to establish a significant limitation in cervical or lumbar joint function causally related to an injury suffered in the subject accident. The Court notes while Dr. Goldman states that plaintiff was treated after the accident by Dr. Francois and Dr. Demetrius, and that she underwent MRI examinations of her spine and left shoulder, as well as an electromyography (EMG) study of her cervical spine, he fails to specify the medical reports and records relating to plaintiff's alleged injuries that he actually reviewed. Here, while Dr. Goldman's report states range of motion testing of plaintiff's spine performed in February 2015 revealed approximately 20% decreased movement in cervical rotation and lumbar flexion, there is no objective medical evidence, such as an MRI or x-ray examination, showing plaintiff suffered injury - traumatic or otherwise – to such areas of her spine as a result of the accident (***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 [1st Dept

2013]). In fact, it is undisputed the MRI examinations of plaintiff's cervical and lumbar regions conducted in 2009 revealed no injuries or abnormalities, and that the MRI examination of plaintiff's left shoulder revealed only chronic inflamation in the supraspinatus tendon and minor swelling. Dr. Goldman's conclusion that plaintiff suffers from significant limitations in her cervical spine and lumbar spine resulting from injuries suffered in the subject accident, therefore, is rejected as speculative and conclusory (*see* ***Kabir v Vanderhost***, 105 AD3d 811, 962 NYS2d 703 [2d Dept 2013]; ***Islam v Apjeet Singh Makkar***, 95 AD3d 1277, 944 NYS2d 897 [2d Dept 2012]; ***Pou v E&S Wholesale Meats, Inc.***, 68 AD3d 446, 890 NYS2d 47 [1st Dept 2009]; ***Vaughan v Baez***, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]). In addition, Dr. Goldman's report does not raise an issue as to whether plaintiff suffered a serious injury to her left shoulder, as he failed to set forth any range of motion findings or a qualitative assessment of such shoulder (*see* ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]).

The affirmation and reports of Dr. Francois, whose billing records with Freeport Medical indicate she treated plaintiff from July 9, 2009 through January 26, 2010, also fail to raise a triable issue of fact. In addition to the lack of objective evidence of personal injury resulting from the accident, Dr. Francois' affirmation and reports do not contain any recent findings of limitations in plaintiff's spine or left shoulder (*see* ***Tinyanoff v Kuna***, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]; ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103). Dr. Francois' assertion in her affirmation that, contrary to what plaintiff testified to at her deposition, plaintiff stopped seeking medical treatment because her no fault benefits terminated is insufficient to meet plaintiff's burden of presenting a reasonable explanation for the cessation of medical care for her alleged injuries shortly after the accident (*see* ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; *cf.* ***Hernandez-Vega v Zwanger-Pesiri Radiology Group***, 39 AD3d 710, 833 NYS2d 627; ***Phillips v Bronx Lebanon Hosp.***, 268 AD2d 318, 701 NYS2d 403). Similarly, Dr. Demetrius's reports, which do not set forth any range of motion measurements, and merely set forth the findings of two neurologic examinations of plaintiff that he performed in August 2009, do not raise a triable issue of fact (*see* ***Kin Chong Ku v Baldwin-Bell***, 61 AD3d 938, 880 NYS2d 76 [2d Dept 2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]).

Dr. Winters' MRI report concerning plaintiff's thoracic 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 bulges in the thoracic 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 [2d Dept 2008]).

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 Chrabascz, 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 cervical spine, lumbar spine or left shoulder, plaintiff's affidavit, in which she avers she missed three weeks of work due to her injuries and continues to experience pain in her neck, back and left shoulder, is insufficient to raise a triable issue as to whether she suffered serious injury within the "limitation of use" categories or the 90/180 category as a result of 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]).

Accordingly, defendants' motion for summary judgment in their favor based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 9/14/15

JOHN H. ROUSE A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION