Love v Garcia
2016 NY Slip Op 30339(U)
February 29, 2016
Supreme Court, Suffolk County
Docket Number: 13-1189
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 13-1189
CAL. No. 15-00249MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-14-15
ADJ. DATE 7-2-15
Mot. Seq. #003MG;CASEDISP

---X

MARK LOVE,

Plaintiff,

- against -

SANTIAGO A. GARCIA,

Defendant.

---X

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 18 - 27; Replying Affidavits and supporting papers 28 - 29; 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 Mark Love commenced this action to recover damages for personal injuries he allegedly suffered as a result of a motor vehicle accident which occurred on Sunrise Highway in the Town of Hempstead on September 8, 2010. The accident allegedly happened when a vehicle driven by defendant Santiago Garcia collided with the rear of a vehicle in which plaintiff was riding as a passenger. By his bill of particulars, plaintiff alleges he suffered various injuries and symptoms due to the collision, including disc herniations at levels C5-C6, L3-L4 and L5-S1, disc bulges at levels T9-10 and T1-T11, headaches, and radicular pain. He further alleges he was confined to home for approximately two days due to his injuries.

Defendant now moves for summary judgment dismissing the complaint on the ground Insurance Law § 5014 precludes plaintiff from recovering for non-economic loss, as he did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d). More specifically, defendant argues, in part, that the reports of his medical experts show plaintiff suffered only spinal strains and sprains due to the subject accident, and that plaintiff's deposition testimony demonstrates he did not suffer injury within the"limitation of use" categories or the 90/180 category of Insurance Law § 5102 (d). He also argues that plaintiff, who was involved in two prior motor vehicle accidents, is unable to prove his alleged spinal injuries were proximately caused by the September 2010 collision. 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, and the sworn medical reports of Dr. Theresa Habacker and Dr. Peter Ross. At defendant's request, Dr. Habacker, an orthopedic surgeon, conducted an examination of plaintiff in November 2014 and reviewed various medical reports and records related to plaintiff's alleged injuries. Dr. Ross, a radiologist, reviewed the scans from magnetic resonance imaging (MRI) examinations of plaintiff's spine performed in February 2007 and February 2011.

Plaintiff opposes the motion, arguing defendant failed to make a prima facie case that he is entitled to summary judgment in his favor. Alternatively, plaintiff contends that medical evidence submitted in opposition to the motion raises triable issues as to whether he suffered injuries within the "limitation of use" categories or the 90/180 category. In opposition, plaintiff submits an affidavit of Ramiro Pinto, his treating chiropractor; affirmations and reports of Dr. Michelle Rubin and Dr. John Himelfarb, radiologists who performed MRI examinations of plaintiff's cervical and lumbar regions in February 2011; and his own affidavit. The Court notes the sur reply affirmation submitted by plaintiff without prior approval was not considered in the determination of this motion (*see* CPLR 2214 [c]).

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 establish 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]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; ***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. Habacker's affirmed report states that plaintiff presented at the November 2014 examination with complaints of neck pain, back pain, and lower back pain that radiates down his legs. It states, in relevant part, that range of motion testing revealed normal joint function in plaintiff's cervical and lumbosacral regions. It further states that palpation of plaintiff's spine revealed tenderness on the left side, but no muscle spasms or atrophy, and that plaintiff exhibited normal muscle strength, reflexes and sensation in his upper and lower extremities. Dr. Habacker diagnoses plaintiff as having suffered only sprains and strains in his cervical and lumbar regions, and concludes there is no objective evidence he suffers from any orthopedic disability.

Further, the reports of Dr. Ross show that plaintiff suffers from degenerative disc disease in the cervical and lumbar regions of his spine, and that the vertebral and disc abnormalities revealed in the February 2011 MRI examinations were chronic in nature and preexisted the September 2010 accident (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]; ***Gentilella v Board of Educ. of Wantagh Union Free School Dist.***, 60 AD3d 629, 875 NYS2d 128 [2d Dept 2009]). Moreover, through plaintiff's deposition testimony, defendant established that plaintiff stopped receiving chiropractic and other medical treatment for his alleged back injury approximately one year after the subject accident (*see* ***Pommells v Perez***, 4 NY2d 556, 574, 797 NYS2d 380 [2005]). In addition, plaintiff's deposition testimony that he missed approximately one week of

work immediately after the accident 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 [2d Dept 2015]; ***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). In fact, as mentioned earlier, though alleging plaintiff suffered injury within the 90/180 category, the bill of particulars states only that plaintiff "was incapacitated from employment for approximately two (2) days following the accident and partial to date."

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 are insufficient to defeat summary judgment. Contrary to the assertion by plaintiff's counsel, the affidavit of Dr. Pinto fails to raise a triable issue of fact as to whether plaintiff suffered a significant limitation in spinal function due to the accident. Significantly, while Dr. Pinto's affidavit sets forth range of motion measurements taken during an examination conducted on May 6, 2015, after the making of the instant motion, it does not include any range of motion measurements or provide other information as to plaintiff's spinal function 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). Here, in fact, there is no medical evidence plaintiff suffered significant limitations in spinal movement for any appreciable period of time after the accident (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]).

Moreover, Dr. Pinto failed to address Dr. Ross's finding that the 2007 and 2011 MRI studies of plaintiff's spine revealed degenerative disc disease that predated the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). He also failed to acknowledge that plaintiff was involved in two prior motor vehicle accidents (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 174 [2d Dept 2009]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2d Dept 2008]), or to explain the treatment he rendered to plaintiff (*see* ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]). Further, having stopped treating plaintiff sometime in 2011, Dr. Pinto's conclusion that the limitations in spinal joint function measured during the May 2015 examination are causally related to the subject accident 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, neither Dr. Pinto nor plaintiff explained the cessation of chiropractic and medical treatment approximately one year after the accident (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]; ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387).

The sworn MRI reports concerning plaintiff's cervical spine and lumbar spine also are insufficient to defeat summary judgment. The mere existence of a herniated or bulging disc 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). The MRI reports of Dr. Rubin and Dr. Himelfarb also do not address the issue of whether the herniated disc in plaintiff's cervical region and the disc bulges in his 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 [2d Dept 2008]). Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform their normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149), and his self-

serving affidavit is insufficient to raise a triable issue of fact (*see* ***Robinson-Lewis v Grisafi***, 74 AD3d 774, 902 NYS2d 170 [2d Dept 2010]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; ***Tobias v Chupenko***, 41 AD3d 583, 837 NYS2d 334 [2d Dept 2007]).

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

Dated: FEB 2 9 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** _____**NON-FINAL DISPOSITION**