Palmadessa v Tew
2016 NY Slip Op 32170(U)
September 15, 2016
Supreme Court, Suffolk County
Docket Number: 10-2563
Judge: W. Gerard Asher

SHORT FORM ORDER

INDEX No. 10-2563
CAL. No. 16-00225MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-29-16
ADJ. DATE 5-24-16
Mot. Seq. #005 - MG; CASEDISP

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AARON PALMADESSA,

Plaintiff,

- against -

JOHN TEW & HAGERMAN FIRE DISTRICT,

Defendants.

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 11 ; Answering Affidavits and supporting papers 12 - 16 ; Replying Affidavits and supporting papers 17 - 18 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing all claims against them is granted.

This action was commenced by plaintiff Aaron Palmadessa to recover damages for injuries he allegedly sustained on August 11, 2009, when the motor vehicle he was driving was struck by a motor vehicle driven by defendant John Tew while traveling through the intersection of Dunton Avenue and Atlantic Avenue in Bellport, New York. The vehicle operated by Mr. Tew was a marked fire department vehicle owned by defendant Hagerman Fire District. In his bill of particulars, plaintiff claims the following injuries were the result of said accident: disc herniations at C4-5 and C5-6 with ventral CSF impression and cord adjustment; a disc bulge at C6-7 with ventral CSF impression; disc bulges at L3-4, L4-5, and L5-S1; cervical spine sprain/strain; and lumbar spine sprain/strain.

Defendants now move for summary judgment dismissing the complaint on the ground that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as he did not suffer

"serious injury" within the meaning of Insurance Law § 5102 (d). More particularly, defendants assert plaintiff's own medical records and deposition testimony demonstrate he did not suffer a serious injury as a result of the accident. In support of their motion, defendants submit copies of the pleadings, the plaintiff's deposition testimony, and a sworn affirmation of Dr. Gary Kelman.

At his deposition, plaintiff testified that he was not taken to a hospital and was able to drive his car home from the accident scene, but sought medical treatment for pain in his lower back and neck "within a week or two" of the accident. He indicated that he sought treatment from Dr. Jeffrey Perry, who prescribed muscle-relaxing medication and physical therapy. Plaintiff testified that Dr. Perry ordered x-ray and MRI examinations of his neck and lower back, which were performed. Plaintiff stated that he also engaged in physical therapy at Dr. Perry's office three times a week for "three or four months." Plaintiff testified that he was diagnosed as having four herniated discs in his neck and "three or four bulging [discs] in my lower back." Plaintiff further testified that Dr. Perry recommended he receive injections, but he refused such treatment due to his fear of needles. Subsequent to discontinuing treatment with Dr. Perry in the spring of 2010, plaintiff testified that he began visiting a chiropractor named Dr. Joseph Merckling on a "sporadic" basis due to continued pain in his lower back and neck. Plaintiff indicated that he also receives occasional treatment from an acupuncturist named Anthony Cerabino and takes Advil "once or twice a month."

When questioned regarding the consequences of his injuries, plaintiff testified that he did not lose any time from work, that he was not homebound for any period of time, and that there is no life activity that he has been prevented from doing. He testified he has consistent dull pain in his lower back and neck every day. Plaintiff explained that his injuries have made heavy lifting, climbing, and long-distance driving more difficult, and have forced him to discontinue performing as a drummer with a musical band. Plaintiff also testified that during his daily employment, other workers now do the lifting and climbing that he had previously been able to do.

In a medical report submitted by defendants, Dr. Gary Kelman affirms that he performed an examination of plaintiff on June 29, 2015 at defendants' request. Beyond transcribing the complaints of neck and back pain previously stated by plaintiff, Dr. Kelman avers that he performed range-of-motion testing of the joint function in plaintiff's spine, measuring such movement with a hand-held goniometer. In charts documenting the range of motion of plaintiff's cervical spine and lumbar spine, Dr. Kelman reports results which correspond exactly with "normal" range of motion. Further, Dr. Kelman affirms plaintiff's cervical and lumbar sprains/strains are "resolved" and that, as of the date of his examination, there was "no evidence of a disability from an orthopedic standpoint."

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 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 a plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***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***, *supra*). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, defendants' submissions are sufficient to establish a prima facie case that plaintiff did not sustain serious physical injury within the "limitation of use" categories of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Santucci v Sousa***, 131 AD3d 1036, 16 NYS3d 469 [2d Dept 2015]; ***Master v Boiakhtchion***, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [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]). Defendants also met their burden regarding plaintiff's 90/180 claim through plaintiff's deposition testimony wherein he stated he no missed time from work, was not confined to his home, and was not prevented from performing any life activity during the 180 days following the accident (*see* ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]).

The burden then shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). 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 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.***, *supra*;

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***, *supra*; ***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, 797 NYS2d 380 [2005]; *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 argues that defendants failed to establish that he did not sustain a serious injury under Insurance Law § 5102 (d). In opposition, plaintiff submits multiple medical reports prepared by Dr. Jeffrey Perry, an affirmation of Dr. Robert J. Diamond, a copy of a magnetic resonance imaging (MRI) report prepared by Dr. Diamond, and various unsworn medical records prepared by Dr. Joseph R. Merckling, plaintiff's chiropractor.

In a sworn affirmation entitled "Final Evaluation," Dr. Jeffrey Perry avers that a physical examination of plaintiff conducted on April 13, 2016 revealed "muscle spasms, tenderness, and taut bands in the cervical paravertebral muscles and the lumbar paravertebral muscles." Dr. Perry states that range of motion testing of plaintiff's lumbar spine revealed: flexion of 70 degrees, rather than the normal 90 degrees; extension of 25 degrees rather than the normal 30 degrees; right and left rotation of 40 degrees rather than the normal 45 degrees; and right and left lateral flexion of 25 degrees rather than the normal 30 degrees. Dr. Perry, based on this examination conducted nearly seven years after the subject accident, concludes that plaintiff's condition is "chronic, permanent, and progressive" and that plaintiff has "sustained a significant loss of use with respect to his neck and lower back[,]. . . persistent loss of range of motion and persistent inability to perform all activities which he would like to do."

Plaintiff has failed to offer sufficient evidence to raise triable issues of material fact (*see* ***Gaddy v Eyler***, *supra*). The reports of Dr. Merckling lack probative value, as a chiropractor may not affirm the contents of his or her reports (*see* CPLR 2106; ***Vejselovski v McErlean***, 87 AD3d 1062, 929 NYS2d 760 [2d Dept 2011]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Legendre v Siqing Bao***, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; ***Doumanis v Conzo***, 265 AD2d 296, 696 NYS2d 201 [2d Dept 1999]). The sole admissible medical report is that which was prepared by Dr. Perry on April 16, 2016. All other medical reports of Dr. Perry are unsworn and, therefore, not in admissible form (***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Perdomo v Scott***, 50 AD3d 1115, 857 NYS2d 212 [2d Dept 2008]). As such, there is no admissible proof of substantial limitation in plaintiff's spinal movement contemporaneous with his accident (*see* ***Perl v Meher***, *supra*).

Regarding plaintiff's MRI report, "[t]he mere existence of herniated or bulging discs is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Rivera v Bushwick Ridgewood Props.***, 63 AD3d 712, 713, 880 NYS2d 149 [2d Dept 2009]). The reports prepared by Dr. Diamond fail to address the issue of whether plaintiff's disc herniations, disc bulges, and straightening of his cervical lordosis depicted in the MRI images are causally related to the subject accident (*see* ***John v Linden***, 124 AD3d

598, 1 NYS3d 274; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]).

Finally, plaintiff has submitted no evidence his injuries prevented him from engaging in his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of his accident, as required by Insurance Law § 5102 (d) (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff Aaron Palmadessa's failure to meet the serious injury threshold is granted.

Dated: Sept. 15, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

X FINAL DISPOSITION **____ NON-FINAL DISPOSITION**