Kloete v McArdle
2016 NY Slip Op 32178(U)
September 8, 2016
Supreme Court, Suffolk County
Docket Number: 13-34018
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

INDEX No. 13-34018
CAL. No. 15-01552MV

ORIGINAL
WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 1-25-16
ADJ. DATE 3-22-16
Mot. Seq. # 001 - MG; CASEDISP

KRISTINA KLOETE and KEITH KLOETE,

Plaintiffs,

- against -

PHILIP McARDLE,

Defendant.

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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 35; Replying Affidavits and supporting papers 36 - 37; 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 on the ground that plaintiff Kristina Kloete did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Kristina Kloete when her vehicle was rear-ended by a vehicle owned and operated by defendant. The accident allegedly occurred on the eastbound Long Island Expressway near exit 49 north in the County of Suffolk, New York, on November 1, 2013. By the bill of particulars, plaintiff Kristina Kloete alleges that, as a result of the subject accident, she sustained various serious injuries and conditions, including herniated discs at C4-C5 and C5-C6; bulging discs at C6-C7, T1-T2, and L4-L5; lumbar and cervical radiculopathy; right shoulder rotator cuff muscle/tendon strain; and thoracic and lumbosacral derangement.

Defendant now moves for summary judgment dismissing the complaint on the ground that Kristina Kloete did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a prima facie showing that Kristina Kloete did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the moving defendant's examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On April 24, 2015, approximately one year and six months after the subject accident, moving defendant's examining orthopedist, Dr. Gary Kelman, examined Kristina Kloete and performed certain orthopedic and neurological tests, including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in Kloete's cervical and lumbar region. Dr. Kelman also performed range of motion testing on Kloete's cervical, thoracic and lumbar spine and shoulders, using a goniometer to measure her joint movement. Dr. Kelman found that Kloete exhibited normal joint function in her cervical, thoracic and lumbar region and shoulders. Dr. Kelman learned that Kloete

underwent right shoulder surgery in 2000. Dr. Kelman opined that Kloete had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, Kristina Kloete testified that at the time of the accident, she worked as a nanny for a family; she missed two weeks from work; and that she returned to work on light duty. Plaintiff testified that after the subject accident, she was taken by ambulance to an emergency room and was discharged with pain medication on the same day. Within a week of the accident, she saw a physician at Orlin and Cohen Orthopedic Group. Within a week thereafter, she saw another physician at Orthopedic Sports Association. She received physical therapy for several months from November 2013 until March 2014. Kloete's deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met his initial burden of establishing that Kristina Kloete did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiffs 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 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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, 574, 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]).

Plaintiffs oppose the motion, arguing defendant's expert report is insufficient to meet his burden on the motion. Plaintiffs also argue that the medical reports prepared by Kristina Kloete's treating physicians raise a triable issue as to whether she suffered injury within the "significant limitation of use"

category of Insurance Law § 5102 (d). In opposition, plaintiffs submit the sworn medical reports of Dr. Harold Augenstein, Dr. James Liguori, Dr. Salvatore Corso, and Dr. John Stamatos.

The MRI reports, dated December 8, 2013 and February 9, 2014, of Dr. Augenstein indicate that Kristina Kloete has bulging discs and herniated discs at her cervical and lumbar region. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Moreover, Dr. Augenstein failed to proffer an opinion as to the cause of the disc pathology noted in his reports (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]).

The medical reports, dated December 9, 2013 and March 27, 2014, of Dr. Liguori indicate that Kristina Kloete has radiculopathy, bulging discs, and herniated discs in her cervical and lumbar regions. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, *supra*). Dr. Liguori provided neither evidence of range of motion limitations nor a qualitative assessment of Kristina Kloete's cervical or lumbar spine.

The medical reports, dated November 13, 2013 and November 18, 2013, of Dr. Corso indicate that Kristina Kloete has "decreased" range of motion in her cervical region. However, Dr. Corso failed to quantify the results of his range-of-motion tests (*see* ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Barnett v Smith***, 64 AD3d 669, 883 NYS2d 573 [2d Dept 2009]). According to the reports of Dr. Corso from December 2, 2013 and February 18, 2016, Kristina Kloete has "decreased" range of motion in her cervical region, and he recorded range of motion measurements, expressed in numerical degrees. However, Dr. Corso failed to compare these findings to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Tinyanoff v Kuna***, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]). Moreover, Dr. Corso failed to state how he measured the joint function in Kristina Kloete's cervical region. The Court can only assume that Dr. Corso's tests were visually observed with the input of Kristina Kloete. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]). With regard to the lumbar spine injury, Dr. Corso did not examine Kristina Kloete's lumbar region until March 24, 2014, almost five months after the accident, and submitted no objective medical evidence contemporaneous with the accident (*see* ***Henchy v VAS Express Corp.***, 115 AD3d 478, 981 NYS2d 418 [1st Dept 2014]; ***Soho v Konate***, 85 AD3d 522, 925 NYS2d 456 [1st Dept 2011]; ***Toulson v Young Han Pae***, 13 AD3d 317, 788 NYS2d 334 [1st Dept 2004]).

The operative reports, dated March 16, 2015 and April 9, 2015, of Dr. Stamatos indicate that cervical epidural steroid injections were administered due to Kristina Kloete's cervical radiculopathy. However, Dr. Stamatos failed to proffer an opinion as to the cause of the disc pathology noted in his reports (*see* ***Scheker v Brown***, *supra*; ***Sorto v Morales***, *supra*; ***Collins v Stone***, *supra*). Moreover, Dr. Stamatos provided neither evidence of range of motion limitations nor a qualitative assessment of Kristina Kloete's cervical spine.

Finally, plaintiffs failed to offer competent evidence that Kristina Kloete sustained nonpermanent injuries that left her unable to perform her 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 [2d Dept 2015]; ***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 [2d Dept 2009]).

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

Dated: SEP 0 8 2016

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION