Pickle v Johnson
2016 NY Slip Op 32288(U)
November 15, 2016
Supreme Court, Suffolk County
Docket Number: 13-62007
Judge: Arthur G. Pitts

SHORT FORM ORDER

INDEX No. 13-62007
CAL. No. 15-01760MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-1-16
ADJ. DATE 6-2-16
Mot. Seq. # 002 - MG; CASEDISP

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PAULA PICKLE,

Plaintiff,

- against -

JAREL M. JOHNSON,

Defendants.

---X

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Upon the following papers numbered 1 to 20 read on this motion summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14-20 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jarel Johnson for summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Paula Pickle commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of William Floyd Parkway and Linden Lane in the Town of Brookhaven on June 23, 2011. It is alleged that the accident occurred when the vehicle owned and operated by defendant Jarel Johnson crossed over the median into the northbound lane of travel and struck the front of the vehicle operated by plaintiff. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including an anterior labral tear of the left shoulder; disc herniations at levels C5 through C7, T12-S1(sic), and L5-S1; vertebral retrolisthesis at L2; and facet joint arthropathy at level L4-L5.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits a copy of the pleadings, plaintiff's deposition transcript, a certified copy of the police accident report with witness statement, and the sworn medical report of Dr. Gary Kelman. Dr. Kelman conducted an independent orthopedic examination of plaintiff on August 22, 2014. Plaintiff opposes the motion

on the ground that defendant failed to meet his prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits her own affidavit, and the sworn medical reports of Dr. Daniel Korman and Dr. Audrey Eisenstadt.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], 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 may also 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]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has established his prima facie entitlement to judgment as a matter of law on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Kelman, states in his medical report that an

examination of plaintiff revealed she has full range of motion in her spine, shoulders and knees, that there was no paraspinal tenderness upon palpitation of the paraspinal muscles, that there was no evidence of atrophy or intrinsic muscles, and that the straight leg raising test was negative. Dr. Kelman states that there was no evidence of tenderness, crepitus or effusion upon examination of plaintiff's right and left shoulders, and that the impingement sign was negative. Dr. Kelman states that there was no evidence of atrophy of the quadriceps of plaintiff's knees, that there was no effusion, and that the Lachman's test and Anterior Draw test were negative. Dr. Kelman opines that the strains/sprains that plaintiff sustained to her spine, left shoulder and knees as a result of the subject accident have resolved. Dr. Kelman concludes that plaintiff does not have any objective findings of an orthopedic disability, and that plaintiff is currently working and may continue to do so without restrictions or limitations.

Furthermore, plaintiff's deposition testimony establishes that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that she worked from home, that she only missed approximately one week from work following the accident, that upon her return to work she continued to perform the same duties as she did prior to the accident, and that, although she worked less hours, she did not lose any pay following the accident.

Therefore, defendant shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 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***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury within the meaning of Section 5102 (d) of the Insurance Law as a result of the subject collision (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]; ***Mack v Valfort***, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence submitted by plaintiff is insufficient to overcome defendant's prima facie showing. Plaintiff submits the report of Dr. Korman, who initially examined her on July 12, 2011, and found significant range of motion limitations in her spine, left shoulder and knees, and diagnosed plaintiff with, among other things, cervical, thoracic and lumbar myofascitis and spasm, and shoulder, knee and hip derangement. Dr. Korman re-evaluated plaintiff on November 22, 2011, and concluded that plaintiff sustained serious injuries to her left shoulder and spine, that her prognosis was poor, that she should continue with physical therapy on a "symptomatic" basis, that she continues to experience myofascial pain, and that her injuries are permanent and causally related to the subject accident. Dr. Korman recently evaluated plaintiff on February 25, 2016, and found significant ranges of motion limitations in her spine, left shoulder, and knees. Dr. Korman concluded that plaintiff's prognosis is poor, that she continues to experience chronic myofascial pain, that her injuries require a permanent alteration to her activities of daily living, and that her injuries are causally related to the subject accident.

However, Dr. Korman, in reaching his conclusions has impermissibly relied upon the unsworn reports of other doctors (*see* ***Marziotto v Straino***, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]). Significantly, as Dr. Korman only examined plaintiff three times, including the most recent examination, his conclusions that plaintiff's prognosis is poor and that her daily living activities are permanently altered as a result of the alleged injuries she sustained in the subject accident are speculative and without probative value (*see* ***Yun v Barber***, 63 AD3d 1140; 883 NYS2d 242 [2d Dept 2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2d Dept 2008]; ***Piperis v Wan***, 49 AD3d 840, 854 NYS2d 489 [2d Dept 2008]). Dr. Korman, in his recent examination, also fails to explain the decrease in plaintiff's ranges of motion in her spine and knees, since he last examined her in November 2011.

Additionally, the sworn medical report of Dr. Eisenstandt fails to raise a triable issue of fact as to whether plaintiff sustained a serious injury, since it merely states that plaintiff has, among other things, an anterior labral tear, no rotator cuff abnormality, a small T12-L1 herniation, and broad-based right paracentral C6-7 disc herniation extending into the right neural foramen. Such findings, however, are not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Carabello v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Sapienza v Ruggiero***, 57 AD3d 643, 869 NYS2d 192 [2d Dept 2008]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2d Dept 2008]). More importantly, Dr. Eisenstandt never set forth her opinion as to the cause of the findings that she made in her report, especially in regards to the anterior labral tear (*see* ***Feber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2d Dept

2009]; ***Luizzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2d Dept 2009]; ***Scotto v Suh***, 50 AD3d 1012, 857 NYS2d 185 [2d Dept 2008]).

Lastly, plaintiff failed to offer competent evidence demonstrating that the injuries she sustained prevented her from performing substantially all of her usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: Riverhead, New York
November 15, 2016

ARTHUR G. PITTS, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION