Fortune v Acosta
2016 NY Slip Op 32545(U)
November 15, 2016
Supreme Court, Suffolk County
Docket Number: 13-33041
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

INDEX No. 13-33041
CAL. No. 15-01386MV

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 11-10-15
ADJ. DATE 1-5-16
Mot. Seq. # 002- MD

MICHELINE FORTUNE,

Plaintiff,

- against -

CARLOS M. ACOSTA, RICHARD C. TUFARIELLO and CONCRETE CONNECTIONS, LTD.,

Defendants.

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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 1-14 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15-18 ; Replying Affidavits and supporting papers 19-20 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Micheline Fortune for summary judgment in her favor on the issue of whether she sustained a serious injury within the meaning of Insurance Law § 5102(d) is denied.

Plaintiff Micheline Fortune 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 Suffolk Avenue and Willoughby Street in the Town of Islip on July 25, 2013. It is alleged that the accident occurred when the vehicle operated by defendant Carlos Acosta and owned by defendants Richard Tufariello and Concrete Connections, Ltd. crossed over the double yellow line on Suffolk Avenue and struck the front of plaintiff's vehicle. At the time of the accident, defendant Acosta was operating the Concrete Connections vehicle under the influence of alcohol. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including herniated discs at levels C5 through C7, disc bulges at levels C2 through C5 and levels L2 through S1; cervical instability at levels C5 through C7; left shoulder tendinosis; rotator cuff impingement of the left shoulder; and a significant disfigurement to the left side of her neck. Plaintiff further alleges that as a result of the

injuries she sustained in the subject accident she was confined to her home and incapacitated from her employment for approximately nine months.

Plaintiff now moves for summary judgment on the basis that she sustained a medically determined injury that 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. In support of the motion, plaintiff submits copies of the pleadings, her own deposition transcript, her certified employment records, and her certified medical records regarding the injuries she allegedly sustained in the subject accident. In addition, plaintiff submits the sworn medical reports of Dr. Sebastian Lattuga, Dr. Richard Lechtenberg and Dr. Gary Kelman. Defendants oppose the motion on the ground that plaintiff has failed to demonstrate that she sustained an injury within the "90/180" category of the Insurance Law as a result of the subject accident, since she failed to proffer any competent medical evidence to establish her medical condition prior to the subject accident. Defendants submit the unsworn medical reports of Dr. Sebastian Lattuga.

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]).

A plaintiff moving for summary judgment on the issue of serious injury on the basis that his or her alleged injuries meet the serious injury threshold requirement of Insurance Law § 5102(d) bears the initial burden of proving that he or she sustained an injury pursuant to Section 5102(d) of the Insurance Law and that the injury was causally to the subject accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 20011]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]), and must tender evidence sufficient to eliminate all material issues of fact (*see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the plaintiff meets this burden, the burden then shifts to the defendant to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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."

Under Insurance Law § 5102(d), to qualify as a medically determined injury or impairment of a non-permanent nature, which prevents a plaintiff from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment objective medical, evidence must be presented of the plaintiff's curtailment, and it must be demonstrated that the plaintiff's activities were significantly curtailed (*see* ***Licari v Elliot***, *supra*; ***Nesci v Romanelli***, 74 AD3d 765, 902 NY2d 172 [2d Dept 2010]; ***Amato v Fast Repair, Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]). Additionally, a plaintiff must demonstrate through the use of competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Damas v Valdes***, *supra*; ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Based upon the adduced evidence, plaintiff has failed to demonstrate that she sustained an injury that rendered her substantially unable to perform her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Elshaarawy v U-Haul Co. of Miss.***, *supra*; ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]; *cf.* ***Autiello v Cummins***, 66 AD3d 1072, 890 NYS2d 652 [3d 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]). Plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the 90/180 category of the Insurance Law (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). The certified medical records of Sunrise Manor Center for Nursing, Perry Physical Medicine & Rehabilitation, P.C., and Dr. Barry Katzman are inadmissible, since the certification of the medical reports for Dr. Barry Katzman, Dr. Roger Kasendorf, Dr. Jeffrey Perry, and Dr. Demetrios Mikelis, by the records custodians Ken Kaplan, Mordy Berman and Diana Alban, is insufficient to properly place the medical conclusions and opinions contained in those reports before the Court (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]). The opinions and conclusions in Dr. Katzman's, Dr. Kasendorf's, Dr. Perry's, and Dr. Mikelis' reports were required to be sworn to or affirmed under the penalties of perjury, and since this was not done, the various opinions and conclusions of these doctors have not been submitted in a form necessary to meet plaintiff's initial burden on the motion (*see* ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). More importantly, plaintiff has not offered an "excuse for her failure to meet the strict requirement of tender in admissible form" (***Zuckerman v City of New York***, *supra*; *see* ***Merriman v Integrated Bldg. Controls, Inc.***, 84 AD3d 897, 922 NYS2d 562 [2d Dept 2011]).

While plaintiff has submitted the affirmed medical report of Dr. Sebastian Lattuga, dated October 1, 2015, which states that he treated plaintiff for more than 90 out of the first 180 days following the subject accident, that he has observed significant range of motion limitations in plaintiff's cervical spine, and that she has sustained medically determined injuries which have prevented her from "working,

driving, and performing substantially all of her usual daily activities for the entire 180 days immediately following the July 25, 2013 accident," she failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a contemporaneous examination (*see* ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Nesci v Romanelli***, *supra*). "The absence of a contemporaneous medical report invites speculation as to causation" (***Griffiths v Munoz***, 98 AD3d 997, 999, 950 NYS2d 787 [2d Dept 2012]). Moreover, Dr. Lattuga fails to state in his report what are the alleged medically determined injuries that plaintiff sustained as a result of the subject accident that prevented her from performing substantially all of her usual and customary daily activities. Despite Dr. Lattuga's report stating that he began treating plaintiff on October 16, 2013, Dr. Lattuga's initial examination of plaintiff occurred on February 10, 2014, and at that time plaintiff already was not working and had not been working since August 25, 2013. More significant is the fact that Dr. Lattuga's initial examination of plaintiff was outside of the 90/180 day period, and, therefore, his opinions and conclusions are rendered speculative and without probative value (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]). As a result, Dr. Lattuga is unable to substantiate the extent, degree, or whether plaintiff was unable to perform her usual and daily activities for the first 90 out of 180 days after the accident as a result of the alleged injuries she sustained to her cervical spine (*see generally* ***Caliendo v Ellington***, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]).

Furthermore, Dr. Lechtenberg, defendants' expert neurologist, opined in his sworn medical report that plaintiff did not have any neurologic deficits as a result of the subject accident. In fact, Dr. Lechtenberg states that, although there are noted limitations in plaintiff's spine, plaintiff voluntarily restricted her movements during the examination and that "the pattern of restriction was inconsistent with the report of surgical intervention in that she exhibited problems with left lateral rotation, whereas the surgical intervention would be expected to produce problems with right lateral rotation," and that the "'remarkable' inconsistency of the examination suggested [an] elaboration of [her] signs and symptoms." Dr. Lechtenberg concluded that plaintiff had no objective, clinical evidence of a neurologic impairment or disability. However, Dr. Kelman, defendants' expert orthopedist, stated in his medical report that, due to the symptom magnification by plaintiff, the fact that plaintiff refused to even perform any range of motion testing for her lumbar spine, and the fact that the attorney informed plaintiff, repeatedly during the examination, not to allow any testing that made her uncomfortable, the examination was limited, and, as a consequence, he was unable to even reach a conclusion as to whether plaintiff sustained a permanent orthopedic disability, because of plaintiff's failure to allow the performance of an adequate examination.

Additionally, plaintiff's deposition testimony fails to establish that she sustained an injury within the 90/180 category of the Insurance Law (*see* ***Kuperberg v Montalbano***, 72 AD3d 903, 899 NYS2d 344 [2d Dept 2010]; ***Sparacino v Incorporated Vil. of Port Jefferson***, 71 AD3d 758, 894 NYS2d 917 [2d Dept 2010]; ***Sanchez v Williamsburg Volunteer of Hatzolah***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]). Plaintiff testified at an examination before trial that she was involved in a "head on" collision when the vehicle operated by defendant Acosta crossed over the double yellow line, striking the front of her vehicle. She testified that she was removed from her vehicle by the ambulance personnel and taken to the hospital where she was treated and released. She testified that while at the hospital glass was

removed from her left eye, but that she did not sustain any permanent damage to her eye. Plaintiff testified that she began receiving physical therapy from Dr. Perry approximately three days after the subject accident, because she had pain in her neck, back and left shoulder. She testified that, since the accident, she has attended physical therapy three times a week and that she has not returned to work.

Here, the subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rovelo v Volcy***, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011]; ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; ***Sham v B&P Chimney Cleaning & Repair, Co., Inc.***, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]). Plaintiff has not submitted any admissible medical evidence demonstrating that she was informed by any doctor prior to August 25, 2013 that she was required to stop working as a result of the alleged injuries she sustained in the subject collision (*see e.g.* ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). Absent admissible medical evidence of serious injury to her spine and shoulders, plaintiff's deposition alleging she was informed to remain out of work by all of her doctors due the alleged injuries she sustained in the accident is insufficient to meet her initial burden on the motion (*see* ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). Indeed, one such note submitted by plaintiff from her employer states that she has not provided it with any updated information regarding her injuries or her failure to return to work since before February 2014. As a result, plaintiff has failed to substantiate her claim that she sustained nonpermanent injuries that left her unable to perform her normal daily living activities for at least 90 out of the first 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]).

Having determined that plaintiff failed to establish her initial burden, it is unnecessary for the court to consider whether defendants' opposition papers were sufficient to raise a triable issue of fact (*see* ***Bright v Moussa***, 72 AD3d 859, 898 NYS2d 865 [2010]; ***Alma v Samedy***, 24 AD3d 398, 805 NYS2d 417 [2005]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2005]; ***Bebry v Farkas-Galindez***, 276 AD2d 656, 714 NYS2d 734 [2000]). Accordingly, plaintiff's motion for summary judgment in her favor on the issue of whether she sustained a serious injury within the meaning of the Insurance Law is denied.

Dated: NOV 15 2016

A.J.S.C.
ANDREW G. TARANTINO JR.

___ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**