Guale-Torres v Quiles
2018 NY Slip Op 30340(U)
February 22, 2018
Supreme Court, Suffolk County
Docket Number: 15-17297
Judge: William G. Ford

[* 1]

SHORT FORM ORDER

INDEX 15-17297
CAL. No. 17-00707MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 7-20-17
ADJ. DATE 1-18-18
Mot. Seq. # 001 - MG; CASEDISP
 # 002 - MD

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MICHELE GUALE-TORRES,

Plaintiff,

- against -

CARMEN M. QUILES, THOMAS J. TRACY, MADELINE MOORE and WILLIE C. MOORE,

Defendants.

---X

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Upon the following papers numbered 1 to 30 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 21; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 26; Replying Affidavits and supporting papers 27- 28; 29 - 30; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by defendants Madeline Moore and Willie Moore for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (# 002) by defendants Carmen Quiles and Thomas Tracy for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle was involved in a three-vehicle accident with a vehicle owned by defendant Carmen Quiles and operated by defendant Thomas Tracy and a vehicle owned and operated by defendants Madeline Moore and Willie Moore. The accident allegedly occurred on February 19, 2015 on Middle Country Road in the Town of Brookhaven, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated and bulging discs in her cervical and lumbar regions, cervical, thoracic and lumbar sprain, and right carpal tunnel syndrome.

The Moore defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). Defendants Quiles and Tracy also move for summary judgment dismissing the complaint on the ground that plaintiff 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]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the Moore defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendants' 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 February 8, 2017, approximately two years after the subject accident, moving defendants' examining orthopedist, Dr. Gary Kelman, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test, the straight leg raising test, O'Brien's test, impingement sign, Tinel's sign, and Phalen's test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical, thoracic and lumbar regions. Dr. Kelman also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, shoulders and wrists, using a goniometer to measure her joint movement. Dr. Kelman found that plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions, shoulders and wrists. Dr. Kelman opined that plaintiff 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, plaintiff testified that after the subject accident, she was taken by ambulance to an emergency room and was discharged on the same day. She testified that following the accident, she did not miss any time from work. Within a month of the accident, she saw a chiropractor and received massage therapy and chiropractic treatment for several months. She also testified that there is no activity that she is unable to perform because of the accident, although she had difficulty in heavy lifting or long walking. Plaintiff'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, defendants Madeline Moore and Willie Moore met their initial burden of establishing that plaintiff 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]). To prove significant physical

limitation, a plaintiff must present either objective quantitative evidence of the loss of The burden, therefore, 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.***, *supra*; ***Mejia v DeRose***, *supra*; ***Laruffa v Yui Ming Lau***, *supra*). 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***, *supra*). 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]).

Plaintiff opposes the motion, arguing the Moore defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by her treating chiropractors, Dr. Jayesh Patel and Dr. Michael Campo, raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the medical reports of Dr. Patel and Dr. Campo, uncertified records from St. Charles Hospital and South Shore Chiropractic, and two sworn MRI reports of Dr. Steven Winter.

In his medical reports, Dr. Patel states that "I, Jayesh Patel, D.C.; being duly licensed to practice in the State of New York; hereby affirm under the penalty that: 1) the above report is my own, 2) the statements contained herein are true and accurate." Dr. Patel's report is insufficient to raise a triable issue of fact because it was not submitted in the proper form (*see* ***Paul-Austin v McPherson***, 111 AD3d 610, 974 NYS2d 281 [2d Dept 2012]; ***Vejselovski v McErlean***, 87 AD3d 1062, 1063, 929 NYS2d 760 [2d Dept 2011]).

In his affirmation which has been attached with his medical reports, Dr. Campo states that "Michael Campo, a doctor of Chiropractic duly licensed to practice medicine in the State of New York, hereby affirms the truth of the following mindful of the penalties for perjury and pursuant to rule 2106 C.P.L.R." Dr. Campo's affirmation is insufficient to raise a triable issue of fact because it was not submitted in the proper form (*see* ***Paul-Austin v McPherson***, *supra*; ***Vejselovski v McErlean***, *supra*).

Two MRI reports, performed on May 29, 2015, of Dr. Winter indicate that plaintiff had herniated and bulging 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***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Moreover, Dr. Winter 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]). Furthermore, the uncertified medical records from St. Charles Hospital and South Shore Chiropractic are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]).

Finally, plaintiff failed to offer competent evidence that she 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.***, *supra*).

Thus, the motion by the Moore defendants for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted. The motion by defendants Quiles and Tracy for summary judgment dismissing the complaint is denied, as moot.

Dated: February 22, 2018
Riverhead, New York

WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION