Verni v Nystrom & Sons Contr. Corp.
2018 NY Slip Op 30939(U)
May 15, 2018
Supreme Court, Suffolk County
Docket Number: 15-18799
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-18799
CAL. No. 17-01156MV

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

COPY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 8-25-17
ADJ. DATE 1-11-18
Mot. Seq. # 002 - MD

---X

RICHARD VERNI,

Plaintiff,

- against -

NYSTROM AND SONS CONTRACTING CORP., d/b/a NYSTROM CONSTRUCTION AND THEODORE E. NYSTROM,

Defendants.

---X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 8 ; Answering Affidavits and supporting papers 9 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Nystrom Construction and Theodore E. Nystrom for summary judgment dismissing the complaint against them is denied.

This action was commenced by plaintiff Richard Verni to recover damages for injuries he allegedly sustained on September 13, 2013, when the motor vehicle he was operating collided with a vehicle owned by defendant Nystrom Construction, and operated by defendant Theodore E. Nystrom. By his bill of particulars, plaintiff claims he suffered the following injuries and conditions as a result of said accident: disc herniations at levels L2-L3, L3-L4, and L4-L5; disc bulges at levels T10-T11, L1-L2, and L5-S1; and limited ranges of motion in his spine, left shoulder, and right foot.

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). In support of their motion, defendants submit copies of the pleadings, a transcript of plaintiff's deposition testimony, a report of an independent orthopedic evaluation conducted by Edward A. Toriello, M.D.

Plaintiff testified that he is employed as a "senior maintainer" by the Oceanside School District, located in Oceanside, New York. He indicated his primary duties include maintaining the ten buildings comprising the school district. He stated that at approximately 1:30 p.m. on the date in question, he was operating a driver's education vehicle, owned by the school district, having recently retrieved it from a local repair shop. Plaintiff testified he was traveling eastbound on Weidner Avenue in Oceanside, when he entered its intersection with Nassau Road. He described Nassau Road as running north and south, controlled by stop signs at the points it intersects the north and south sides of Weidner Avenue. Plaintiff stated that as he was driving through the intersection of Weidner Avenue, which was unregulated by any traffic control devices, and Nassau Road, at 28 miles per hour, he observed a pickup truck in his left eye's peripheral vision. Plaintiff testified that the pickup truck was traveling southbound on Nassau Road, entered its intersection with Weidner Avenue, and struck his vehicle on the driver's side door.

Plaintiff further testified that following the accident, he complained to police officers of pain in his head, shoulder, and back, as well as lacerations on his right hand. However, he stated that he declined first aid and transportation to the hospital by ambulance. Instead, he indicated that he was driven home by coworkers. Upon arriving to his home, he was driven to Brookhaven Memorial Hospital by his wife. Plaintiff testified that hospital staff performed a CAT scan to rule out a concussion, cleaned the lacerations to right hand, gave him pain medication, and released him the same day. He indicated he spent the next two days, Saturday and Sunday, in bed, but returned to work on Monday. Continuing to experience pain, plaintiff stated that he made an appointment to see a physician at Advanced Orthopedic in Patchogue, New York. A doctor at Advanced Orthopedic informed him that his left shoulder was "bruised," and that he should obtain an MRI of his right lower back. Plaintiff testified that he obtained the MRI, the doctor at Advanced Orthopedic examined the imaging data, and informed him that his pain was being caused by "a muscle there that runs alongside the sciatic nerve."

Plaintiff indicated that after visiting Advanced Orthopedic "[t]wo or three times," being told that surgery could not correct his malady, and that injections "could cause more pain that [he] was currently having," he began attending treatment sessions at Premier East Physical Therapy (Premier East). Questioned as to why he did not return to Advanced Orthopedic, plaintiff stated that the doctor there "basically told [him] there was nothing he could do for [him]." Plaintiff explained that a Dr. Chughtai at Premier East recommended that he undergo an MRI examination of his right foot, which plaintiff claimed had "pulled muscle feeling," and felt like it was "asleep." As to his left shoulder, plaintiff denied any MRI examination was performed, and testified that all pain in it resolved within three to six months. Plaintiff testified that Dr. Chughtai started him on a "three [to] five days a week" physical therapy regimen, which plaintiff attended for "at least the first couple of months [following the accident]." Plaintiff explained that while his physical therapy sessions eventually decreased in frequency, and that he attended them for "at least a year," he discontinued all medical treatment immediately thereafter. Asked why he halted treatment, plaintiff stated "[t]hat's the time the workers' compensation allotted to rehabilitate."

Dr. Edward Toriello supplied an affirmation and report on behalf of defendants. Therein, Dr. Toriello states that he performed an orthopedic medical evaluation of plaintiff on November 14, 2016. Dr. Toriello indicates that he performed measurements of plaintiff's various ranges of motion using a handheld goniometer, and that he compared plaintiff's ranges of motion to the guidelines contained in the American Medical Association's "Guides to the Evaluation of Permanent Impairment 5th Edition." Dr. Toriello states that he also reviewed plaintiff's bill of particulars, a series of reports drafted by a Dr. Asim, and an MRI report of plaintiff's lumbar spine dated November 21, 2013.

Dr. Toriello avers that goniometric testing of plaintiff's left and right foot/ankle, left and right shoulder, left and right wrist/hand, and thoracic spine revealed no deviation from normal ranges of motion. Testing of plaintiff's cervical spine revealed the following measurements: flexion to 48 degrees, where the normal range of motion is 50 degrees; extension to 26 degrees, where normal is 60 degrees; bilateral bending to 45 degrees, where normal is 45 degrees; and bilateral rotation to 80 degrees, where the normal range is 80 degrees. As to plaintiff's lumbosacral spine, range of motion testing revealed flexion to 42 degrees, where the normal range of motion is 60 degrees; extension to 25 degrees, where normal is 25 degrees; bilateral bending to 25 degrees, where normal is 25 degrees; and bilateral roation to 30 degrees, where normal is 30 degrees. Dr. Toriello avers that plaintiff complained of pain at the extremes of lateral bending, but that no paralumbar muscle spasm or CVA tenderness was present.

Dr. Toriello indicates plaintiff's lumbar spine MRI report dated November 21, 2013, reveals "degenerative changes, subligamentous bulging at T10-T11, a bulge at L1-L2, herniation at L2-L3, L3-L4, L4-L5 and a bulge at L5-S1." Dr. Toriello opines plaintiff's examination revealed "evidence of a resolved left shoulder strain, resolved cervical strain, resolved low back strain, resolved right foot contusion, resolved hand lacerations, and resolved thoracic strain." In conclusion, Dr. Toriello states that plaintiff has "no objective evidence of continued disability," that plaintiff "is able to work and do his normal daily living activities without restriction," and that plaintiff's "decreased range of motion is subjective, not correlated with objective findings such as spasm or atrophy."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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 Systems, Inc.***, 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]). 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]).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute 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* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced 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." A plaintiff's ability to perform certain activities will often disqualify him or her from asserting a 90/180 claim (*see* ***Feeney v Klotz***, 309 AD2d 782, 765 NYS2d 639 [2d Dept 2003] [plaintiff who missed no time from school after accident unable to make 90/180 claim]; ***Pierre v Nanton***, 279 AD2d 621, 719 NYS2d 706 [2d Dept 2001] [plaintiff's absence from work for four months after his accident does not establish 90/180 claim if not ordered by physician]).

Plaintiff asserts claims under the "permanent consequential limitation," "significant limitation of use," and 90/180 categories of serious injury pursuant to Insurance Law § 5102 (d). Here, defendants'

expert, Dr. Toriello, reported bulges and herniations in plaintiff's lumbosacral spine, as evidenced by a November 2013 MRI report. While it is axiomatic that "[t]he mere existence of a herniated or bulging disc . . . is 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" (***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 1009, 877 NYS2d 127 [2d Dept 2009]), Dr. Toriello's recent testing of plaintiff's lumbosacral spine revealed a 30 percent limitation to its range of motion in flexion (*see* ***Barnes v New York City Tr. Auth.***, 154 AD3d 800, 62 NYS3d 495 [2d Dept 2017]; ***India v O'Connor***, 97 AD3d 796, 948 NYS2d 678 [2d Dept 2012]). Despite Dr. Toriello's opinion that plaintiff's range of motion limitations were subjective, as no "paralumbar muscle spasm or CVA tenderness" was detected during the examination, he did not state that a limitation in plaintiff's ranges of motion could not exist independent of any spasms or tenderness. Further, Dr. Toriello did not explain whether the "degenerative changes" revealed in plaintiff's lumbar spine MRI examination are related to plaintiff's bulging discs, herniated discs, or limited range of motion. As such, Dr. Toriello's affirmation is insufficient to rebut, prima facie, plaintiff's allegations of significant restriction in his lower back as a consequence of the accident in question (*see* ***Protonentis v Battaglia***, 150 AD3d 1286, 52 NYS3d 888 [2d Dept 2017]). Thus, defendants have failed to establish a prima facie case of entitlement to summary judgment as to the "permanent consequential limitation" and "significant limitation of use" categories of serious injury (*see* ***Protonentis v Battaglia***, *supra*; *see also* ***Cervantes v McDermott***, ___AD3d___, 2018 NY Slip Op 01450 [2d Dept 2018]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Defendants having failed to establish a prima facie case, the Court need not review plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the motion by defendants for summary judgment dismissing the complaint against them is denied.

Dated: May 15, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION