Rosenfeld v Wisniewski
2018 NY Slip Op 31351(U)
June 25, 2018
Supreme Court, Suffolk County
Docket Number: 15-7692
Judge: William G. Ford

SHORT FORM ORDER

INDEX No. 15-7692
CAL. No. 17-00435MV

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 7-19-17
ADJ. DATE 12-7-17
Mot. Seq. # 001 - MG; CASEDISP

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FRANK S. ROSENFELD,

Plaintiff,

- against -

JAMES R. WISNIEWSKI and JUNE P. WISNIEWSKI,

Defendants.

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Attorney for Plaintiff:
THE ODIERNO LAW FIRM, P.C.
260 Broad Hollow Road, Suite 102
Melville, New York 11747-4773

Attorney for Defendants:
RICHARD T. LAU & ASSOCIATES
P.O. Box 9040
300 Jericho Quadrangle, Suite 260
Jericho, New York 11753

Upon the following papers numbered 1 to 22 read on this motion summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12-17 ; Replying Affidavits and supporting papers 18-19 ; Other Plaintiff's Sur-Reply 20-22 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants James Wisniewski and June Wisniewski for summary judgment dismissing the complaint is granted.

Plaintiff Frank Rosenfield commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on the westbound Southern State Parkway, near its exit with New York State Route 231, in the Town of Babylon on July 26, 2013. It is alleged that the accident occurred when the vehicle operated by defendant James Wisniewski and owned by defendant June Wisniewski struck the rear of the vehicle operated by plaintiff while it was stopped on the entrance ramp to the Southern State Parkway. By his bill of particulars, plaintiff alleges, among other things, that he

sustained various personal injuries as a result of the subject accident, including disc bulges at levels L1 through S1 and levels C3 through C7, and disc herniations at level L4/L5.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not meet the serious injury threshold of Section 5102(d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records concerning the injuries at issue, and the sworn medical report of Dr. Gary Kelman. Dr. Kelman, at defendants' request, conducted an independent orthopedic examination of plaintiff on December 14, 2016. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden demonstrating that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition shows that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits his own affidavit, the sworn affirmations of Dr. Steven Winter, and the affidavit of his treating chiropractor, Dr. Anthony Castellino.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

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 defendant has met this burden, 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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992])). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants established, prima facie, through the submission of plaintiff's deposition transcript and competent medical evidence, that plaintiff's alleged injuries do not come within the meaning of the serious injury threshold requirement of Section 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Kelman, states in his report that an examination of plaintiff reveals he has full range of motion in his spine, that upon palpation of the paraspinal muscles there is no evidence of spasm, tenderness or trapezius tenderness, that the sensory responses are intact throughout the upper and lower extremities, and that there was no atrophy of the intrinsic muscles. Dr. Kelman states that the straight leg raising test is negative, that plaintiff is able to arise on heels and toes, that he has a normal appearance and posture, and that no limp or antalgic gait was observed. Dr. Kelman opines that the strains and sprains plaintiff sustained to his spine as a result of the accident have resolved. Dr. Kelman further states that

plaintiff does not have an orthopedic disability causally related to the subject accident, that there is no that there are no permanent residuals as a result of the subject accident, and that plaintiff is capable of maintaining full employment without any restrictions.

Additionally, plaintiff's deposition testimony establishes that he did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Dutka v Odierno***, 145 AD3d 661, 43 NYS3d 409 [2d Dept 2016]; ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]). Plaintiff testified at an examination before trial that following the subject accident he returned to law school to complete his final year, and that he did not miss any classes, but did miss approximately one week from his internship as a result of the injuries he sustained in the accident. Plaintiff further testified that approximately six months after he began physical therapy and chiropractic treatments, he ceased all treatment, because he felt that the treatments were not working and he had reached a plateau, and that he has not sought any additional medical treatments since terminating treatment.

Defendants, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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 to the motion, plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury within the limitations of use or 90/180 categories of the Insurance Law as a result of the subject accident (*see* ***John v Linden***, *supra*; ***Inzalaco v Consalvo***, 115 AD3d 807, 982 NYS2d 165 [2d Dept 2014]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). 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, 873NYS2d 537 [1st Dept 2009]). The medical evidence proffered by plaintiff was insufficient to establish a serious injury or to defeat defendants' prima facie showing. Plaintiff has submitted the affirmed medical report of his treating chiropractor, Dr. Castellino, which concludes, based upon contemporaneous and recent examinations of plaintiff, that plaintiff sustained significant range of motion limitations to his spine as a result of the subject accident, that such limitations have created long standing and permanent effects on plaintiff's spinal condition and function, and that plaintiff will continue to suffer periods of remission and exacerbation and will require periodic treatment to aid in his pain relief. However, Dr. Castellino report is without probative value, since his findings do not raise a triable issue of fact as to whether plaintiff sustained a serious injury (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Mack v Valfort***, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). Dr. Castellino, in his affidavit, states that he only treated plaintiff for approximately 10 days, before plaintiff ceased treatment with him and sought care from another chiropractor, and that he then re-examined plaintiff on September 30, 2017, approximately four years after the subject accident. Thus, Dr. Castellino is unable able to substantiate the extent or degree of the limitation to plaintiff's spine caused by the alleged injuries and the duration thereof (see ***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]). Consequently, Dr. Castellino's conclusions that plaintiff's injuries have resulted in objective range of motion losses that are significant and permanent are speculative (*compare* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2014]; ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; ***Gould v Ombrellino***, 57 AD3d 608, 869 NYS2d 567 [2d Dept 2008]). In addition, Dr. Castellino's report impermissibly relies upon the unsworn reports of other doctors; therefore, plaintiff

may not rely upon the affidavit of Dr. Castellino to defeat defendants' motion for summary judgment (*see* ***Gonzales v Fiallo***, 47 AD3d 760, 848 NYS2d 182 [2d Dept 2008]; ***Porto v Blum***, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]).

Furthermore, the medical reports of Dr. Steven Winter merely establish that plaintiff sustained disc bulges and herniations to his spine. "The 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 disc injury and its duration" (***Stevens v Sampson***, 72 AD3d 793, 794, 898 NYS2d 657 [2d Dept 2010]; *see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Keith v Duval***; 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Dr. Winter's reports fail to address causation, since he does not attribute the disc bulges and herniations that he observed in plaintiff's spine to the subject accident (see ***Shaji v City of New Rochelle***, 66 AD3d 760, 886 NYS2d 764 [2d Dept 2009]; ***Scotto v Suh***; 50 AD3d 1012, 857 NYS2d 185 [2d Dept 2008]).

Finally, plaintiff failed to submit competent medical evidence demonstrating that the injuries he sustained prevented him from performing substantially all of his 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, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: June 25, 2018
Riverhead, New York

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION