Stewart v Hakam
2018 NY Slip Op 31678(U)
July 19, 2018
Supreme Court, Suffolk County
Docket Number: 16-593
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 16-593
CAL. No. 17-01328MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice Supreme Court

MOTION DATE 10-30-17
ADJ. DATE 1-24-18
Mot. Seq. # 002 - MG; CASEDISP

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KAREN STEWART AND STEPHEN STEWART, INDIVIDUALLY AND AS HUSBAND AND WIFE,

Plaintiffs,

- against -

SEAN K. HAKAM,

Defendant.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 24; Replying Affidavits and supporting papers 25 - 26; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sean Hakam for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Karen Stewart and Stephen Stewart, her husband, derivatively, as a result of a motor vehicle accident, which occurred on September 2, 2014, in the Town of Islip, New York. Plaintiff Karen Stewart alleges that, as a result of the accident, she suffered various injuries including straightening of the cervical lordosis and sprains to her cervical spine, thoracic spine, and right hip.

Defendant seeks an order granting summary judgment dismissing plaintiffs' complaint on the ground that Insurance Law §5104 precludes plaintiffs from pursuing a personal injury claim, because Karen did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d). Defendant submits, in support of the motion, copies of the pleadings, the bill of particulars, the transcript of Karen Stewart's deposition testimony, and the affirmations of orthopedic surgeon Edward Toriello, M.D. and radiologist Melissa Sapan

Cohn, M.D. In opposition, plaintiffs argue that issues of fact remain as to whether Karen Stewart sustained serious injuries. Plaintiffs submit, in opposition, the affidavit of chiropractor Keith Williams, D.C.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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 seeking 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, prima facie, that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

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 demonstrating 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, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming "serious injury," must offer some reasonable explanation for having done so to prevail on his or her claim (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]; ***Pommells v Perez***, *supra*; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]).

Defendant's submissions establish a prima facie case that the alleged injuries to plaintiff's spine and right hip do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Plaintiff's alleged 90/180-day injury was sufficiently refuted, prima facie, by her testimony that she was missed only six or seven days of work (*see* ***Ferazzoli v Hamilton***, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Additionally, defendant presented competent evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*).

The affirmed medical report of Dr. Toriello stated, in relevant part, that during an orthopedic examination he conducted approximately two years and three months after the accident, plaintiff exhibited significant limitation in her cervical spine. Dr. Toriello stated that during another examination he conducted approximately two years and eight months after the accident, plaintiff exhibited normal joint function in her cervical and thoracic spine, and that no muscle spasm or atrophy was detected in her cervical spine. He further stated that plaintiff exhibited normal joint function in her right hip, and that he detected no muscle weakness, instability, swelling, or tenderness. Dr. Toriello diagnosed plaintiff has

having suffered strains to her cervical and thoracic spine and a sprain to her right hip, and concludes that such strains and sprain have resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*).

In her affirmed medical report, Dr. Sapan Cohn opined that the x-ray of plaintiff's cervical spine taken on the day of the accident showed prominent prevertebral soft tissues of "uncertain significance," disc spare narrowing at C6-7 consistent with degenerative disc disease, and multilevel degenerative changes with osteophyte formation consistent with chronic and long-standing disease. Dr. Sapan Cohn concluded that while there was "nonspecific soft tissue changes[,] [t]here [was] no evidence of an acute fracture or traumatic subluxation," and that there was no acute traumatic injury related to the accident (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]).

Dr. Sapan Cohn further opined that the computed tomography ("CT") scan of plaintiff's cervical spine taken on the day of the accident showed an enlarged thyroid gland consistent with thyroid goiter, multilevel degenerative changes with osteophyte formation, and disc space narrowing at C6-7 "indicative of underlying degenerative disc disease." She opined that the thyroid goiter was incidental and not related to trauma. Dr. Sapan Cohn concluded that while plaintiff's CT scan showed mild degenerative changes, there was no evidence of a fracture or an acute traumatic injury related to the accident (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*).

Dr. Sapan Cohn further opined that the magnetic resonance imaging ("MRI") examination of plaintiff's cervical spine conducted two weeks after the accident showed mild straightening of the cervical lordosis, disc desiccation, disc space narrowing at C6-7, osteophyte formations with posterior spondylolytic riding at C5-6 and C6-7, and a thyroid goiter. Dr. Sapan Cohn stated that the straightening of the cervical lordosis may reflect muscle spasm or plaintiff's positioning within the coil necessary to perform the examination, and that disc desiccation indicated the beginning of degenerative disc disease. Similarly, Dr. Sapan Cohn explained that the osteophyte formations and disc space narrowing were degenerative. She concluded that the MRI examination showed degenerative changes throughout plaintiff's cervical spine and that there was no evidence for disc herniation or acute traumatic injury (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*).

Defendant having met his initial burden on the motion, the burden shifted to plaintiffs to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiffs failed to raise an issue of fact as to whether Karen Stewart's injuries constitute "serious injuries." Keith Williams' chiropractic report is inadmissable, because he may not avail himself of the statute to affirm the contents of his report (*see* CPLR 2106; ***Paul-Austin v McPherson***, 91 AD3d 924, 937 NYS2d 627 [2d Dept 2012]; ***Vejselovski v McErlean***, 87 AD3d 1062, 929 NYS2d 760 [2d Dept 2011]; ***Casco v Cocchiola***, 62 AD3d 640, 878 NYS2d 409 [2d Dept 2009]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]).

Assuming, *arguendo*, that Dr. Williams' chiropractic report was in admissible form, his findings are not based on contemporaneous and recent examinations, and, thus, fail to rebut defendant's prima facie showing that plaintiff Karen Stewart did not suffer a "serious injury" within the meaning of the

statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*). Moreover, Dr. Williams failed to address the findings of Dr. Sapan Cohn, who concluded that the conditions in Karen's cervical spine were degenerative in nature and unrelated to the subject accident. Dr. Williams also failed to discuss whether the pre-existing degenerative disc changes found by Dr. Sapan Cohn affected Karen's range of motion in her cervical spine (*see* ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*). Therefore, his conclusion that plaintiff's injuries and limitations were the result of the subject accident were speculative (*see* ***Casimir v Bailey***, *supra*).

Accordingly, the motion by defendant Sean Hakam for summary judgment dismissing the complaint is granted.

Dated: July 19, 2018

J.S.C.
HON. DAVID T. REILLY

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**