Floyd v County of Suffolk
2018 NY Slip Op 33061(U)
November 19, 2018
Supreme Court, Suffolk County
Docket Number: 15-1174
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 15-1174
CAL. No. 17-02215MV

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

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 4-18-18
ADJ. DATE 10-10-18
Mot. Seq. # 004 - MG; CASEDISP
005 - MD

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KRISTOFFER FLOYD and CLAUDINE MCDONALD,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, DAVIS NILES and SAVARIA DONNINO,

Defendants.

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Upon the following papers numbered 1 to 66 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 50; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 51 - 62; Replying Affidavits and supporting papers 63 - 64; 65 - 66; 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 by defendant Savaria Donnino for an Order granting summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (incorrectly denominated as a cross-motion) by defendants County of Suffolk and David Niles for an Order granting summary judgment dismissing the complaint on the ground that plaintiffs 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 allegedly sustained by plaintiffs when the bus in which they were passengers was struck in the rear by a vehicle operated by defendant Savaria Donnino (Donnino). The accident occurred on May 10, 2014, on Route 110, near the intersection with Arlington Street, in the Town of Huntington, New York. At the time of the accident, plaintiffs Kristoffer Floyd and Claudine McDonald were passengers in a bus owned by defendant County of Suffolk and operated by defendant David Niles. By the bill of particulars, Floyd alleges that, as a result of the accident, he sustained various serious injuries and conditions, including bulging discs in the lumbar region, and sprains in the thoracic and lumbar regions. McDonald alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated and bulging discs in the cervical and thoracic regions, and sprains in the cervical and thoracic regions.

Donnino moves for summary judgment dismissing the complaint on the ground that plaintiffs 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, Donnino made a prima facie showing that Floyd did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her 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 April 11, 2016, approximately two years after the subject accident, moving defendant's examining orthopedist, Dr. Gary Kelman, examined Floyd and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in Floyd's thoracic and lumbar regions. Dr. Kelman also performed range of motion testing on Floyd's thoracic and lumbar regions, using a goniometer to measure his joint movement. Dr. Kelman found that Floyd exhibited normal joint function. Dr. Kelman opined that Floyd 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 his deposition, Floyd testified that following the accident, he missed only one day from work. He testified there is no activity that he is unable to perform because of the accident, except for walking long distances. Floyd's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his 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, defendant met her initial burden of establishing that Floyd 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 he was not prevented from performing substantially all of his 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 Floyd 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). 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]).

Floyd opposes the motion, arguing moving defendant's expert report is insufficient to meet her burden on the motion. Floyd also argues that the treatment records prepared by his treating chiropractor, Dr. Cathy Amdur, raises a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, Floyd submits, *inter alia*, the uncertified medical records of Plainview Hospital, the treatment records of Copiague Chiropractic, and the sworn MRI report of Dr. Eliahu Engelsohn. The unsworn or uncertified medical reports submitted by Floyd 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]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Here, the treatment records of Copiague Chiropractic set forth Floyd's complaints and the findings, including significant limitations in his cervical and lumbar spine joint function, measured on May 19, 2014 and June 30, 2014. However, Floyd failed to submit any medical evidence of significant restrictions in cervical and lumbar joint function based on a recent examination (*see* ***Santos v Perez***, 107 AD3d 572, 574, 968 NYS2d 43 [1st Dept 2013]; ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Sham v B&P Chimney Cleaning & Repair Co.***, 71 AD3d 978, 900 NYS2d 72 [2d Dept 2010]). Copiague Chiropractic's treatment records, therefore, fail to raise a triable issue of fact.

In his report, Dr. Engelsohn opines that the magnetic resonance imaging (MRI) examination conducted on July 31, 2014, approximately three months after the subject accident, revealed that Floyd had bulging discs in his lumbar region. 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]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, Floyd failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform substantially all of his 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 branch of the motion by defendant Donnino for summary judgment dismissing the claim of Floyd on the ground that his injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Likewise, Donnino made a prima facie showing that McDonald did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her examining physician (*see* ***Bailey v Islam***, *supra*; ***Sierra v Gonzalez First Limo***, *supra*; ***Staff v Yshua***, *supra*). On May 11, 2016, Dr. Kelman examined McDonald and performed certain orthopedic and neurological tests,

including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in McDonald's spine. Dr. Kelman also performed range of motion testing on McDonald's spine, using a goniometer to measure her joint movement. Dr. Kelman found that McDonald exhibited normal joint function. Dr. Kelman opined that McDonald had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, *supra*).

Further, at her deposition, McDonald testified that at the time of the subject accident, she was unemployed. She testified that following the accident, she was not confined to her home or house. She testified there is no activity that she is unable to perform because of the accident, except for lifting something over 30 pounds and walking long distances. McDonald'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***, *supra*; ***Curry v Velez***, *supra*). Thus, Donnino met her initial burden of establishing that McDonald 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***, *supra*).

McDonald opposes the motion, arguing moving defendant's expert report is insufficient to meet her burden on the motion. McDonald also argues that the medical reports and treatment records prepared by her treating physicians and chiropractor raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, McDonald submits, *inter alia*, the uncertified medical records of Plainview Hospital, the treatment records of Copiague Chiropractic, the sworn sonogram report of Dr. Sanford Davis, and two sworn MRI reports of Dr. Steven Mendelsohn. The unsworn or uncertified medical reports submitted by Floyd are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, *supra*; ***Scheker v Brown***, *supra*; ***Karpinos v Cora***, *supra*).

Here, the treatment records of Copiague Chiropractic set forth McDonald's complaints and the findings, including significant limitations in her cervical and thoracic spine joint function measured on May 19, 2014 and June 30, 2014. However, McDonald failed to submit any medical evidence of significant restrictions in cervical and thoracic joint function based on a recent examination (*see* ***Santos v Perez***, *supra*; ***Vega v MTA Bus Co.***, *supra*; ***Sham v B&P Chimney Cleaning & Repair Co.***, *supra*). Copiague Chiropractic's treatment records, therefore, fail to raise a triable issue of fact.

In his report, Dr. Davis opines that the sonogram examination conducted on August 29, 2014 revealed that McDonald had inflamation in her cervical and thoracic regions. In his report, Dr. Mendelsohn opines that the MRI examinations conducted on June 19, 2014 and August 6, 2014 revealed that McDonald had herniated and bulging discs in her cervical and thoracic regions. As discussed above, the mere existence of a herniated or bulging disc is not evidence of serious injury (*see* ***Pierson v Edwards***, *supra*; ***Byrd v J.R.R. Limo***, *supra*).

Finally, McDonald 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***, *supra*; ***Il Chung Lim v Chrabaszcz***, *supra*; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Thus, the branch of the motion by defendant Donnino for summary judgment dismissing the claim of McDonald on the ground that her injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Accordingly, the motion by defendant Donnino is granted and the plaintiffs' complaint is dismissed. The motion by defendants County of Suffolk and Niles for summary judgment dismissing the complaint on the issue of serious injury is denied, as moot.

Dated: November 19, 2018

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION