Taylor v Nicosia
2018 NY Slip Op 34338(U)
August 2, 2018
Supreme Court, Nassau County
Docket Number: Index No. 605323/16
Judge: James P. McCormack
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SUPREME COURT- STATE OF NEW YORK

PRESENT: ***Honorable James P. McCormack***
Justice

_____x

TRIAL/IAS, PART 23
NASSAU COUNTY

ANDREW S. TAYLOR,

Plaintiff(s), **INDEX NO: 605323/16**

-against-

Motion Submitted: 5/21/18
Motion Seq.: 001

VINCENT J. NICOSIA,

Defendant(s). **XXX**

_____x

The following papers read on these motions:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Vincent J. Nicosia (Nicosia), moves this court for an order, pursuant to CPLR §3212, for summary judgment dismissing the complaint on the grounds that the injuries sustained by Plaintiff, Andrew S. Taylor (Taylor), fail to satisfy the serious injury threshold requirement of Insurance Law § 5102(d). Taylor opposes the motion.

This is an action to recover for personal injuries allegedly sustained by Taylor in a motor vehicle accident on December 7, 2015 on Prospect Avenue in East Meadow, County of Nassau. Taylor alleges Nicosia made a left turn in front of him causing

Taylor's vehicle to hit Nicosia's vehicle. As a result of the accident, Taylor claims he suffered serious injuries.

Taylor commenced this action by service of a summons and complaint dated July 14, 2016. Issue was joined by service of an answer dated October 7, 2016. The case certified ready for trial on November 1, 2017 and a note of issue was filed on January 23, 2018.

In his bill of particulars, Taylor alleges, *inter alia*, disc herniations, right shoulder injury and pain and right knee injury and pain.

In seeking summary judgement, Nicosia relies upon; the pleadings; the bill of particulars; Taylor's deposition testimony; Taylor's X-ray and MRI results; and the affirmed medical report of Dr. Howard Levin, an orthopedic surgeon, who examined Taylor as part of an independent medical examination (IME) on October 24, 2017.

At the time of the IME, Taylor complained of pain to his neck and lower back. He described the pain level as a three out of 10. Using a goniometer, Dr. Levin found normal ranges of motion of Taylor's cervical spine, lumbar spine, right shoulder, left shoulder, right knee and left knee. The results of all neurological testing were normal. He noted no tenderness or spasm in the cervical or lumbar spine. Dr. Levin found that Taylor had sustained a cervical spine strain, a lumbar spine strain, a right shoulder sprain and a left knee contusion. These injuries were causally related to the accident and all have been resolved. Dr. Levin found no orthopedic disability.

Defendant submits Taylor's x-rays and an MRI report. An x-ray of the cervical

spine taken three days after the accident found "normal radiographs of the cervical spine". An x-ray of the lumbar spine taken three days after the accident found "mild degenerative disc disease of the L4-L5 and L5-S1 levels." The right knee x-ray taken three days after the accident showed no fracture, dislocation or opaque foreign bodies. It did find joint effusions present. An MRI of the right knee taken one month after the accident found ""Small amount of synovial fluid at the level of the patellofemoral articulation. Trace fluid at the inferior aspect of Hoffa's fat pad. Trace fluid at the popliteus hiatus."

Defendants also submit Taylor's deposition transcript. Taylor stated that after the accident he missed approximately one and half months of work. He stated that, due to persistent back and neck pain, there are certain things he can no longer do, such as mow his lawn, shovel his driveway or play sports. He went to physical therapy for a period of time, but has had no treatment since early in 2017.

"Serious injury" is defined in Insurance Law § 5102(d) as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a claimed injury falls within the statutory definition of serious injury is, in the first instance, a question of law for the court which may be decided on a summary judgment motion *(Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]; *Carter v. Adams*, 123 A.D.3d 967, 967 [2nd Dept. 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 1502 (d). (*Gaddy v. Eyler*, 79 N.Y.2d 955, 956-57 [1997]; *Young Mi Hwang v. Vasconex-Vallejo*, 124 A.D.3d 769, 769 [2nd Dept. 2015]; *Datiskashvili v. Vijungco*, 121 A.D.3d 637, 638 [2nd Dept. 2014]; *Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]).

As a proponent of the summary judgment motion, Nicosia had the initial burden of establishing that Taylor did not sustain a causally related serious injury under the permanent loss of use of a body organ, member, function or system, significant limitation of use of a body function or system and 90/180-day categories (*see Toure v Avis Rent a Car Sys.,* 98 N.Y.2d 345, 352 [2002]). Evidence submitted in support of a motion for summary judgment must be in admissible form. (*Pagano v. Kinsbury*, 182 A.D.2d 268, 270 [2nd Dept. 1992]; see also *Friends of Animals v. Assoc. Fur. Mfrs.,* 46 N.Y.2d 1065, 1067 [1979]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 563 [1980]). A defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Id.*) A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the

alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 N.Y.3d 536, 537 [2003]).

In support of summary judgment, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, the expert must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2nd Dept. 2006]). Further, "[t]he mere existence of a bulging or herniated 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" (*Rivera v Bushwick Ridgewood Props. Inc.*, 63 AD3d 712 [2nd Dept. 2009]; *Smeja v Fuentes,* 54 AD3d 326 [2nd Dept. 2008]; *see Sharma v Diaz*, 48 A.D.3d 442 [2nd Dept. 2008]*; Kearse v New York City Tr. Auth.*, 16 A.D.3d 45 [2nd Dept. 2005]). Once the defendant has made the required showing, the burden shifts to plaintiff to rebut the presumption that there is no issue of fact as to the threshold serious injury question. (*Franchini v. Palmieri*, 1 N.Y.3d 537, 537 [2003]).

Herein, Nicosia has met his *prima facie* burden of showing that Taylor did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent a Car Sys., supra; Gaddy v Eyler,* 79 N.Y.2d 955, 956-957 [1992]). Nicosia submitted competent medical evidence establishing, *prima facie*, that the alleged injuries to Taylor's cervical spine, lumbar spine right shoulder and right knee did not constitute serious injury under the permanent loss of use of a body

organ, member, function or system, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of Insurance Law § 5102(d). (*Durand v Urick,* 131 A.D.3d 920 [2nd Dept. 2015]; *Lacombe v Castellano*, 134 A.D.3d 905 [2nd Dept. 2015]; *Chang Min Li v 3511 System, Inc.*, 121 A.D.3d 1032 [2nd Dept. 2014]; *Abbott-Barish v Ahmad*, 107 A.D.3d 920 [2nd Dept. 2013].

The burden now shifts to Taylor to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious (*Perl v Meher,* 18 N.Y.3d 208, 218-219 [2011]). To satisfy the statutory standard for serious injury, a plaintiff must submit objective and admissible proof of the duration of the alleged injury, and the extent or degree of the limitations associated with the alleged injury. (*Dufel v. Green,* 84 N.Y.2d 795, 798 [1995]; *Rovelo v. Volcy*, 83 A.D.3d 1034, 1035 [2nd Dept 2011]). Neither subjective complaints of pain nor a self-serving affidavit of the plaintiff are sufficient to meet this requirement. (*Washington v. Mendoza*, 57 A.D.3d 972, 973 [2nd Dept. 2008]; s*ee Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 N.Y.2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 A.D.3d 278, 279 [1st Dept. 2005]).

A plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that he did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 A.D.3d 270, 271 [1st Dept. 2006] *lv to appeal denied* 8 N.Y.3d 808 [2001]). Plaintiff must come forth with

objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 A.D.3d 978 [2nd Dept. 2010]; *Cornelius v Cintas Corp.* 50 A.D.3d 1085 [2nd Dept. 2008]; *Sharma v Diaz, supra*; *Amato v Fast Repair, Inc.*, 42 A.D.3d 477 [2nd Dept. 2007]) and upon medical proof shortly after the subject accident (*Perl v Meher, supra*).

"[E]ven when there is medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury – such as a gap in treatment, an intervening medical problem or a pre-existing condition – summary dismissal of the complaint may be appropriate" (*Pommells v Perez,* 4 N.Y.3d 566, 572 [2005]). Whether a limitation of use or function is significant or consequential 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 a body part (*Dufel v Green*, 84 N.Y.2d 795, 798 [1995]).

To prove the extent or degree of physical limitation with respect to the limitation 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, 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 or system (*Perl v Meher, supra; Estrella v Geico Ins. Co.*, 102 A.D.3d 730, 731 [2nd Dept. 2013). A mild, minor or slight

limitation of use is considered insignificant within the meaning of insurance Law §5102(d) (*Il Chung Lim v Chrabaszcz*, 95 A.D.3d 950, 951 [2nd Dept. 2012]).

Further, in order to defeat a summary judgment motion, a plaintiff's opposition, "to the extent that it relies solely on the findings of the plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished." *(Pagano v. Kinsbury*, 182 A.D.2d at 270; *supra; see also Zuckerman v. City of New York,* 49 N.Y.2d 557, 563 ([1980]).

Once a plaintiff establishes proof that an injury meets at least one category of the no-fault threshold, it is unnecessary to address whether the plaintiff's proof in regard to other alleged injuries is sufficient to defeat defendant's *prima facie* showing (*Linton v Nawaz*, 14 N.Y.3d 821, 822 [2015]).

In opposition to the motion, Taylor 1) A series of medical records and physical therapy records 2) the affirmation of Dr. Joseph Gregorace D.O. and 3) an affidavit from Taylor.

Initially, the court notes that Taylor claims, in his affidavit, that his gap in treatment, from early 2017 until around the time this motion was filed, was because he was advised that he had reached maximum medical benefit from such treatment. However, there is no medical record supporting this assertion, nor does Dr. Gregorace state that in his lengthy, detailed, 22 page affirmation. The absence of support of that claim is fatal to the attempt to raise an issue of fact. (*Zinger v. Zylberg,* 35 AD3d 851 [2d Dept. 2006]).

The court further notes that the X-ray of Taylor's lumbar spine taken three days after the accident notes degenerative disc disease. However, Dr. Gregarace does not address that finding anywhere in his affirmation, or in any of his prior reports. Where there is a finding of degenerative disc disease, and the plaintiff fails to address it in the opposition papers, any finding by plaintiff's experts that the injuries are causally related to the accident are rendered speculative. (*Rashid v. Estevez*, 47 AD3d 786 [2d Dept. 2008]).

Further, Nicosia has met his *prima facie* showing that Taylor did not sustain a serious injury under the 90/180 category set forth in Insurance Law 5102(d).

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (*Kuperberg v Montalbano*, 72 AD3d 903 [2d Dep't. 2010]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dep't. 2008]). Herein, Taylor states that after the accident he missed one and half months of work before returning full time. He further testified that he has persistent pain and can no longer do certain household chores such as mowing the lawn and shoveling snow. He also has limitations in his recreational activities as the pain he experiences prevents him from playing sports, and has caused him to gain 50 pounds.

"When construing the statutory definition of a 90/180-day claim, the words

'substantially all' should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment" (*Thompson v Abbasi*, 15 AD3d 95 [1st Dep't. 2005]; *Gaddy v Eyler, supra*).

Furthermore, a plaintiff's allegations of recreation and daily activities including an inability to lift objects, carry things, walk, sit and socialize are generally insufficient to demonstrate the 90/180-day claim (*see Omor v Goodman*, 295 AD2d 413 [2d Dep't. 2002]; *Lauretto v County of Suffolk*, 273 AD2d 204 [2d Dep't. 2015]).

Taylor offered no credible medical evidence establishing he was disabled, unable to work or unable to perform daily activities for the first 90 out of 180 days. While he complains of certain limitations, none of the limitations are medically determined, as required by the statute. (*Sainte-Aime v. Ho*, 274 A.D.2d 579 [2nd Dept. 2000]).

Under the circumstances extant, Taylor's submissions fail to raise a factual issue as to whether he sustained serious injury within any of the categories of serious injury delineated in Insurance Law §5102 (d).

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment pursuant to CPLR §3212 is GRANTED in its entirety. The complaint is dismissed.

This constitutes the decision and order of this court.

Dated: August 2, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
AUG 06 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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