Bailey v Koop
2019 NY Slip Op 34353(U)
July 8, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 608834/2017
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 608834/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 07/31/2018
SUBMIT DATE: 03/07/2019
Mot. Seq.: #001 - MG

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SHADAE BAILEY,

Plaintiff,

- against -

JASON KOOP AND RED TOP MANAGEMENT TRANSPORT INC.,

Defendant(s).

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Upon the following papers read on this motion for an order granting defendants summary judgment dismissing the complaint; Notice of Motion and supporting papers (Doc #9-19); Affirmation in Opposition and supporting papers (Doc #26-29); it is,

ORDERED that the motion by defendants Jason Koop and Red Top Management Transport Inc. for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Shadae Bailey as a result of a motor vehicle accident which occurred on January 6, 2017, in the Town of Islip, Suffolk County, New York, at the intersection of Union Boulevard and Windsor Avenue. The accident allegedly occurred when a vehicle driven by defendant Jason Koop and owned by defendant Red Top Management collided with the front of plaintiff's vehicle as it was traveling westbound on Union Boulevard. By her bill of particulars plaintiff alleges she suffered various injuries, including disc herniations in her cervical spine and lumbar spine, and sprain to her thoracic spine.

Defendants now move for an order granting summary judgment dismissing plaintiff's complaint on the ground that Insurance Law § 5104 precludes plaintiffs from pursuing a personal injury claim, because plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion defendants submit copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, and the affirmations of neurologist Edward M. Weiland, M.D., orthopedist Salvatore Corso, M.D., and radiologist Mark Decker, M.D. In opposition, plaintiffs argue that issue of fact remain as to whether plaintiff sustained serious injuries. Plaintiffs submit, in opposition, the affidavit of chiropractor John B. Rinaldi, the medical records of Stand-Up MRI of Deer Park, P.C., and plaintiff's deposition transcript.

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 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [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 [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 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070 [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 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87 [2d Dept 2011], *citing Pagano v Kingsbury*, 182 AD2d 268 [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 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431 [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 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848 [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 [2011]; *Toure v Avis Rent A Car Systems, Inc., supra*; *McEachin v City of New York*, 137 AD3d 753 [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 [2005]; *Hayes v Vasilios*, 96 AD3d 1010 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751 [2d Dept

2012]; *Stevens v Sampson*, 72 AD3d 793 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093 [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 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500 [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 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920 [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 [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 [2013]; *Pommells v Perez*, *supra*; *David v Caceres*, 96 AD3d 990 [2d Dept 2012]).

Defendants' submissions establish a prima facie case that the alleged injuries to plaintiff's spine 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 the bill of particulars and her deposition testimony where she stated that she missed only two days of work (*see Ferazzoli v Hamilton*, 141 AD3d 686 [2d Dept 2016]; *Pryce v Nelson*, *supra*; *Strenk v Rodas*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). Additionally, defendants 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*).

Dr. Weiland's affirmed medical report stated, in relevant part, that during an April 2018 neurological examination plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions. Dr. Weiland reported that plaintiff tested negative in all objective tests including the Foraminal compression test, the Shoulder decompression test, the Soto-Hall test, as well as the Romberg's, the Babinski's and Clonus objective tests, and the Waddell test, the Fabere-Patrick sign and the Straight leg raise. Finally Dr. Weiland determined that plaintiff's alleged injury to the cervical spine, thoracic spine and lumbosacral spine were resolved and that plaintiff had no neurologic disability.

The affirmed medical report of Dr. Corso stated, in relevant part, that during an orthopedic examination he conducted a little more than one year after the accident, plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions, and noted right paravertebral tenderness in the cervical spine, as well as right and left paravertebral tenderness in the lumbar spine, but no tenderness in the thoracic spine. No spasm was detected upon palpation in any region of her spine. Dr. Corso found plaintiff exhibited normal joint function in her left hip and she tested negative on the Tredelenburg's sign, Ely's test, Gaenslen's test and Patrick's test with no tenderness or soft tissue swelling. Regarding plaintiff's left ankle and food Dr. Corso notes the Anterior drawer test, Helbing sign, Keen sign, Morton test and Strunsky sign to have all been negative with no soft tissue swelling , effusion, or gross visible deformities. Finally, Dr. Corso found "no objective findings" of alleged injury to the cervical spine, thoracic spine, lumbar spine, left shoulder, left hip or left foot/great toe based upon the examination.

In his affirmed medical reports, Dr. Mark Decker opined that the MRIs of plaintiff's lumbar spine and cervical spine, taken approximately two months after the accident, showed no evidence that an acute traumatic injury was sustained. Dr. Decker concluded that the findings in plaintiff's MRIs were degenerative and long standing, not causally related to the date of the accident, and there was no evidence of an acute traumatic injury related to the accident (*see Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*; *Gouvea v Lesende*, 127 AD3d 811 [2d Dept 2015]).

Defendants having met their initial burden on the motion, the burden shifted to plaintiff 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*). Plaintiff failed to raise an issue of fact as to whether her injuries constitute "serious injuries." The MRI report of plaintiff's cervical spine, purportedly performed by Dr. Steven Winter on March 13, 2017, revealed that plaintiff had a bulging disc at C3/4, a herniated disc at C4/5 and bulging disc at C6/7. The MRI report of plaintiff's lumbar spine, purportedly performed the same date by Dr. Steven Winter, revealed that plaintiff had a herniated disc at L5-S1 and disc bulges associated with T10/11 through L4/5. The mere fact that plaintiff suffers from herniated or bulging discs, 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 [2005]; *Hayes v Vasilios*, 96 AD3d 1010 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751 [2d Dept 2012]; *Stevens v Sampson*, 72 AD3d 793 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093 [2d Dept 2010]).

Further, neither the affidavit of plaintiff's chiropractor, Dr. Rinaldi, nor plaintiff's deposition testimony provide an explanation for the gap between the apparent cessation of medical treatment in August 2017 and the re-examination conducted in December 2018 (*see Phillips v Zilinsky*, *supra*; *Hasner v Budnik*, 35 AD3d 366 [2d Dept 2006]; *Bycinthe v Kombos*, 29 AD3d 845 [2d Dept 2006]). Dr. Rinaldi's conclusions regarding causation, duration and significance of plaintiff's injuries, therefore, are rejected as speculative and tailored to meet the statutory requirements (*see Zinger v Zylberberg*, 35 AD3d 851[2d Dept 2006]; *Hasner v Budnik*, *supra*; *Bennett v Genas*, 27 AD3d 601 [2d Dept 2006]; *Vaughan v Baez*, *supra*; *Medina v Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]) and offer insufficient rebuttal for the medical testimony presented by the doctors' affirmations submitted by defendants. Although plaintiff testified that she stopped treatment in June 2017 because she had lost her job as a result of the accident as a result of being absent during a probationary period, she further testified she had a new job in September 2017 yet she gave no testimony as to resuming treatment nor that she was unable to perform her new job.

Accordingly, the motion by defendants Jason Koop and Red Top Management for summary judgment dismissing the complaint is granted.

This constitutes the Order and decision of the Court.

Dated: July 8, 2019

Hon. Robert F. Quinlan, J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION