Dunmore v Guthrie
2019 NY Slip Op 34712(U)
September 4, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 611786/18
Judge: Vincent J. Martorana
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SHORT FORM ORDER **INDEX NO: 611786/18**

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

LAWRENCE DUNMORE,

Plaintiff,

- against-

JOHN GUTHRIE,

Defendant.

ORIG. RETURN DATE: 4/4/19
ADJOURNED DATE: 5/23/19
MOTION SEQ. NO.: 001 - MOTD
002 - MD

PLTF'S/PET'S ATTY:
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Upon the following papers read on this motion for summary judgment and this cross motion to amend pleadings ; Notice of Motion and supporting papers by defendant dated March 1, 2019 ; Notice of Cross-Motion and supporting papers by plaintiff dated April 24, 2019 ; Affirmation/affidavit in opposition and supporting papers_; Affirmation/affidavit in reply and supporting papers by defendant dated May 16, 2019; Other: defendant's memorandum of law ; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that Defendant's motion seeking summary judgment dismissing Plaintiff's complaint based upon Plaintiff's failure to meet the "serious injury" threshold defined in Insurance Law §5102(d) is denied in part and granted in part. Plaintiff's cross motion to amend is denied with leave to renew upon proper papers.

The within action was commenced by filing of a summons and complaint seeking to recover damages for injuries allegedly sustained as a result of a motor vehicle accident which occurred on January 8, 2018. Issue was joined and discovery was conducted. Defendant now seeks summary judgment dismissing Plaintiff's complaint for failure to meet the "serious injury" threshold defined in Insurance Law §5102(d). Plaintiff cross-moves to amend its complaint to add a cause of action for punitive damages based upon the fact that Defendant was driving while legally intoxicated, with a blood alcohol level in excess of 0.18 (alleged to be 0.26), at the time of the accident.

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."

Plaintiff's Supplemental Bill of Particulars dated January 30, 2019 sets forth Plaintiff's injuries as follows: "...serious injuries which were caused and/or aggravated by the incident: Left shoulder impingement with reduction

in range of motion and cortisone injections. Further, plaintiff has sustained a serious injury in accordance with New York State Insurance Law Section 5102(d) in that he sustained: a permanent loss of use of a body organ, member, function or system, specifically his left shoulder and lumbar spine; a significant limitation of use of a body function or system specifically his left shoulder and lumbar spine; and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the materials acts which constitute such person' [sic] usual and customary daily activities for not less than 90 days during the 180 days immediately following the incident."

In his Bill of Particulars dated July 17, 2018, Plaintiff's injuries are described, in part, as "lumbar herniation at L5-S1 pain and spine dysfunction, with a large restriction of movement and nerve root compression." Such injuries were described as "permanent and were caused and/or exacerbated by this accident." Additionally, Plaintiff averred, "Plaintiff was confined to home and out-of-work except for health care visits until 6/25/18."

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]).

In support of his summary judgment motion, Defendant argues that Plaintiff's claims under the 90/180 day category of serious injury and Plaintiff's claims with respect to permanent consequential or significant limitation must fail because Defendant's expert, Radiologist Dr. Cohn, reviewed Plaintiff's MRI on December 15, 2018 and she concluded in her affirmed report that Plaintiff's left shoulder and L1-S1 complaints are the result of degenerative changes, not acute traumatic injury. Therefore, any injuries alleged to be suffered by Plaintiff are not causally related to the accident. No physical examination of Plaintiff was made and no other medical evidence was provided. Defendant also argues that there is no evidence to support a permanent loss of use claim because there is no evidence that Plaintiff has lost total use of his left shoulder or back.

In opposition, Plaintiff provides a report of his treating orthopedist, Dr. Cherney, who found Plaintiff to have suffered acute traumatic injury as a result of the subject accident and who, upon examination nine days after the accident, found Plaintiff to be temporarily totally disabled and unable to work. Plaintiff's deposition testimony

FILED: SUFFOLK COUNTY CLERK 09/06/2019 12:05 PM
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establishes that he missed 168 days of work after the accident. Dr. Cherney's later examination of Plaintiff on March 27, 2019, found limitations in range of motion of Plaintiff's shoulder, measured by a hand-held goniometer, as follows: passive abduction was 110 degrees (170 to 180 being normal); which represents a 35-39% reduction in range of motion and passive external rotation was 75 degrees (90 degrees being normal); which represents at 17% reduction in range of motion. Plaintiff's treating physical medicine and rehabilitation specialist, Dr. Song, found measurable reductions in range of motion of flexion and extension of the lumbar spine which has improved somewhat over time but as of May 30, 2018, Plaintiff's lumbar flexion range of motion was 17% below normal (improved from a 33% reduction in February 2018) and extension was 33% below normal (improved from 50% in February 2018). Plaintiff also submits an affirmation of Spine Surgeon Dr. Basra, indicating that he believes Plaintiff's spinal injuries to be the result of the accident here at issue.

Defendant's moving papers are insufficient to establish that Plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d). Furthermore, Defendant's argument is largely focused on lack of causation as the basis for challenging Plaintiff's permanent consequential limitation and significant limitation of use claims. Defendant has presented insufficient evidence to establish lack of causation and has failed to present competent medical evidence establishing, *prima facie*, that Plaintiff did not sustain a serious injury resulting in significant limitation of use of a body function or system (***Hernandez v. Pagan Corp***., 174 AD3d 513, 101 NYS3d 637, 638 [2d Dept. 2019]; ***Jung Han v. Dragonetti Landscaping***, 174 AD3d 791, 102 NYS3d 884, 885 [2d Dept. 2019]; ***Manton v. Lape***, 173 AD3d 731, 732, 99 NYS3d 677 [2d Dept. 2019]; ***Flood v. Fillas***, 172 AD3d 1175, 1176, 98 NYS3d 865, 866 [2d Dept. 2019]). As Defendant has failed in his burden, the Court need not review the sufficiency of Plaintiff's submissions; however it is worth noting that there is ample objective medical evidence provided by Plaintiff to raise a triable issue of fact as to the issue of causation as well as the issue of limitation. 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]). Here, Plaintiff continued treatment, established a limitation in range of motion and established the duration of that limitation by submission of affirmed medical reports of treating physicians. It is unclear whether or not Plaintiff still seeks to recover on a theory of permanent loss of use of his shoulder and spine. To the extent that he does, there is no evidence in the record to support this claim. Summary judgment dismissing any permanent loss of use claim is granted. However, the remainder of Defendant's motion seeking summary judgment is denied.

Plaintiff's cross-motion is also denied. Plaintiff seeks to amend his complaint to add a cause of action for punitive damages. Leave to amend pleadings should be freely given absent surprise or prejudice (CPLR §3025[b];

McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp., 59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]; ***Rosicki, Rosicki & Assocs., P.C. v. Cochems***, 59 AD3d 512, 514, 873 NYS2d 184 [2d Dept. 2009]). A court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (***Rosicki,*** *supra*; ***Bank of Smithtown v. 219 Sagg Main, LLC***, 107 AD3d 654, 655, 968 NYS2d 95, 97 [2d Dept. 2013]). Although a Plaintiff in a negligence case may assert entitlement to a punitive damage award as a measure of damages under certain circumstances, such as where "'wanton and reckless' conduct evincing heedlessness and an utter disregard for the safety of others" is at issue, New York State does not recognize a separate cause of action seeking such damages (***Gershman v. Ahmad***, 156 AD3d 868, 868–69, 67 NYS3d 663, 665 [2d Dept. 2017] (quoting *Chiara v. Dernago,* 128 A.D.3d 999, 1003, 11 NYS3d 96, quoting *Schragel v. Juszczyk,* 43 AD3d 1375, 1375, 844 NYS2d 532). Punitive damages constitute part of a total claim for damages, not as a separate cause of action for pleading purposes (***Fiesel v. Nanuet Properties Corp.***, 125 AD2d 292, 292, 508 NYS2d 576 [2d Dept.1986]; ***Paroff v. Muss***, 171 AD2d 782, 567 NYS2d 502 [2d Dept 1991]; ***Sylvester v. Stephens***, 148 AD2d 523, 524–25, 539 NYS2d 27 [2d Dept. 1989]). Here, Plaintiff's motion is denied on the basis that the amended complaint seeks to assert a cause of action not recognized under New York law, rather than seeking to add the facts which would underpin a punitive damages claim along with a demand for punitive damages as a measure of overall damages. As such, Plaintiff's cross motion is denied with leave to renew upon proper papers (***Sylvester,*** *supra*).

Based upon the foregoing, Defendant's summary judgment motion (001) is granted to the extent that any claims of permanent loss of use are dismissed. Defendant's summary judgment motion is denied in all other respects. Plaintiff's cross-motion seeking leave to amend (002) is denied with leave to renew upon proper papers.

Dated: Riverhead, New York
September 4, 2019

VINCENT J. MARTORANA, J.S.C.

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