Hallett v Town of Islip
2019 NY Slip Op 34764(U)
February 7, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-612890
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX No. 16-612890
CAL. No. 18-00224MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-14-18
ADJ. DATE 9-6-18
Mot. Seq. # 003 - MG; CASEDISP

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DEBRA A. HALLETT,

Plaintiff,

- against -

TOWN OF ISLIP and LIAM MILLIGAN,

Defendant.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15-23 ; Replying Affidavits and supporting papers 24-25 ; Other ____; it is,

ORDERED that the motion by defendants Town of Islip and Liam Milligan seeking summary judgment dismissing the complaint is granted.

Plaintiff Debra Hallett commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Veterans Memorial Highway and Johnson Avenue in the Town of Islip on June 4, 2015. It is alleged that the accident occurred when a truck owned by defendant Town of Islip and operated by defendant Liam Milligan struck the rear-end of the vehicle plaintiff was riding in as a back seat passenger while it was stopped at a red traffic light on Veterans Memorial Hospital. At the time of the accident, defendant Milligan was operating the truck in the course of his employment with the Town of Islip. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries and conditions as a result of the subject collision, including sciatica of the left leg and disc bulging at levels L4 through S1.

Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's General Municipal Law § 50-h hearing and deposition transcripts, uncertified copies of plaintiff's medical records concerning the injuries at issue, and the sworn medical report of Dr. Michael Winn and Dr. Jean-Robert Desrouleaux. At defendants' request, Dr. Winn performed an independent radiological review of the magnetic resonance imagines ("MRI") films of plaintiff's lumbar spine taken on June 30, 2015. Also at defendants' request, Dr. Desrouleaux conducted an independent neurological examination of plaintiff on January 8, 2018. Plaintiff opposes the motion on the grounds that defendants failed to make a *prima facie* case, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits her own affidavit, the sworn medical report of Dr. Daniel Kohane, and the affidavit of Dr. Paul Beberman.

It is well-established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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 under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the

alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant, through the submission of plaintiff's deposition transcript and competent medical evidence, has established a *prima facie* case of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Dunbar v Prahovo Taxi, Inc.***, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]; ***Chery v Jones***, 62 AD3d 742, 879 NYS2d 170 [2d Dept 2009]). Defendant's examining orthopedist, Dr. Desrouleaux, used a goniometer to test plaintiff's ranges of motion in her spine, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Desrouleaux states in his medical report that an examination of plaintiff reveals full range of motion in her spine, that there was no evidence of muscle spasms, or tenderness upon palpation of the paraspinal muscles, that sensory testing of the upper and lower extremities is intact, and that there was no evidence of atrophy of the intrinsic muscles. Dr. Desrouleaux states that the straight leg raising test is negative, that plaintiff's muscle strength is 5/5, and that there was no observation of antalgic gait or limp. Dr. Desrouleaux opines that plaintiff suffers from pre-existing lumbar degenerative disease, and that the exacerbation of such condition that she experienced as a result of the accident has resolved. Dr. Desrouleaux further states that plaintiff does not have an orthopedic disability causally related to the subject accident, that she has reached maximum medical improvement and does not require any additional orthopedic treatment, that her prognosis is good, and that she is capable of working without restrictions.

Likewise, defendant's expert radiologist, Dr. Winn, states in his medical report that a review of plaintiff's MRI films of her lumber spine shows a normal MRI of the lumbar spine without any evidence of disc bulges or herniations, and that there are no findings on the examination that are causally related to the subject accident.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that she sustained injuries within the limitations of use categories and within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at a General Municipal Law § 50-h hearing and an examination before trial that at the time of the accident she was unemployed and that she was in the process of searching for employment. Yet, she also testified that the injuries she sustained in the accident did not prevent her from continuing to search for employment within the technology industry or eventually accepting employment as an assistant project manager at Computer Associates, and performing the required duties of the position without restrictions. She testified that following the accident she was diagnosed with psoriatic arthritis, and that, although the accident did not cause the arthritis, it did aggravate it. Plaintiff further testified that she ceased all medical treatment for the injuries she sustained in the subject accident in January 2016, and that she currently does not have any medical appointments scheduled for treatment related to any injuries sustained in the accident.

Therefore, defendants shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), 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 the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations 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 of the plaintiff 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, the evidence submitted by plaintiff failed to raise a triable issue of fact as to whether she sustained an injury to the lumbar region of her spine within the limitations of use categories of the Insurance Law (*see* ***Dutka v Odierno***, 145 AD3d 661, 43 NYS3d 409 [2d Dept 2016]; ***Boettcher v Ryder Truck Rental, Inc.***, 133 AD3d 625, 19 NYS3d 86 [2d Dept 2015] ***Krerimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Of significance, plaintiff has failed to submit any evidence establishing that she sustained significant range of motion limitations in her lumbar spine based upon a recent examination (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 26 NYS3d 188 [2d Dept 2016]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]). Moreover, the sworn medical reports of plaintiff's physicians fail to address the findings of defendants' examining experts that plaintiff suffered from a longstanding and degenerative disc disease in her lumbar spine, which was not caused by the subject accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Inzalaco v Consalvo***, 115 AD3d 807, 982 NYS2d 165 [2d Dept 2014]; ***Faulkner v Steinman***, 28 AD3d 604, 813 NYS2d 529 [2d Dept 2006]). Therefore, plaintiff's physicians' opinions that the injuries to her lumbar spine were caused by the subject accident are rendered speculative, and are without probative value (*see* ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]; ***Lorthe v Adeyeye***, 306

AD2d 252, 760 NYS2d 530 [2d Dept 2003]; ***Ginty v MacNamara***, 300 AD2d 624, 751 NYS2d 790 [2d Dept 2002]). Futhermore, plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). Thus, plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: February 7, 2019

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION