Ciancarelli v Rosales
2019 NY Slip Op 34804(U)
December 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-2653
Judge: George Nolan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 17-2653
CAL. No. 18-02401MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 3-6-19 (003)
MOTION DATE 4-25-19 (004)
MOTION DATE 5-16-19 (005)
ADJ. DATE 5-16-19
Mot. Seq. # 003 - MD
004 - MD
005 - MD

FELICE CIANCARELLI and PAULA CIANCARELLI,

Plaintiffs,

- against -

JESSICA M. ROSALES,

Defendant.

DELL & DEAN, PLLC
Attorney for Plaintiffs
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

RUSSO & TAMBASCO
Attorney for Defendant
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers read on these e-filed motions for summary judgment and to amend the bill of particulars: Notice of Motion/ Order to Show Cause and supporting papers by defendant, filed January 22, 2019; by plaintiffs, filed April 15, 2019; by defendant, filed May 1, 2019 ; Answering Affidavits and supporting papers by plaintiffs, filed May 9, 2019 ; Replying Affidavits and supporting papers by defendant, filed May 13, 2019 ; Other __; it is,

ORDERED that the motions by defendant Jessica Rosales and the motion by plaintiffs Felice Ciancarelli and Paula Ciancarelli are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Jessica Rosales for summary judgment dismissing the complaint against her is denied; and it is further

ORDERED that the motion by plaintiffs Felice Ciancarelli and Paula Ciancarelli to supplement and amend the bill of particulars is denied; and it is further

ORDERED that the motion by defendant Jessica Rosales for summary judgment dismissing the complaint against her is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Felice Ciancarelli and Paula Ciancarelli as a result of a motor vehicle accident, which occurred on February 1, 2016, on Route 109, in North Lindenhurst, New York. Plaintiffs allege, in relevant part, that Ms. Ciancarelli suffered various injuries as a result of the motor vehicle accident, including a sprain and a tear of the infraspinatus in her left shoulder, and a tear of the supraspinatus in her right shoulder.

Plaintiffs move to supplement and amend their bill of particulars to include that Ms. Ciancarelli sustained a linear intrasubstance tear in the infraspinatus in her left shoulder and a partial thickness tear in the supraspinatus in her right shoulder. Plaintiffs submit, among other things, copies of the pleadings, the bill of particulars, the transcript of Ms. Ciancarelli's deposition testimony, the affirmed medical report of radiologist Eric Postal, M.D., the supplemental bill of particulars, and the radiology reports of Zwanger Pesiri Radiology.

Pursuant to CPLR 3025 (b), a party may amend or supplement his or her pleading at any time by leave of court or by stipulation of all parties. In this case, by stipulation dated April 17, 2019, the parties agreed to resolve plaintiffs' motion by including the right shoulder injury in the bill of particulars. Plaintiffs' motion, therefore, is denied, as moot.

Defendant seeks an order granting summary judgment dismissing the claims of Ms. Ciancarelli on the ground that she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings, the bill of particulars, the transcript of Ms. Ciancarelli's deposition testimony, and the affirmed medical reports of orthopedic surgeon Willie Thompson, M.D. and radiologist Eric Postal, M.D. Defendant subsequently moved for summary judgment dismissing Ms. Cianarelli's claims on the same grounds as her previous motion. Defendant references the parties' stipulation permitting defendant to file an amended motion to include evidence pertaining to Ms. Ciancarelli's left shoulder. Defendant submits the notice of motion and affirmation in support of the motion for summary judgment it seeks to amend, a stipulation of the parties, dated April 17, 2019, and the affirmed medical report of Dr. Postal. The Court shall consider the report of Dr. Postal to be a supplement to the original motion. Therefore, the amended motion is denied, as academic.

In opposition, plaintiffs argue that triable issues of fact remain as to whether Ms. Ciancarelli sustained serious injuries. Plaintiffs submit, in opposition, Ms. Ciancarelli's affidavit, the affirmed medical report of Sunil Butani, M.D., and the medical records of Advanced Physical Therapy and City Practice Group of New York, LLC, and South Shore Orthopaedic Associates, P.C.

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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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" (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [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 (***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [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 (***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [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 (***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 (***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [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 (***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [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 (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010];

Simanovskiy v Barbaro, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" 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 (***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [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" (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant's submissions failed to establish a prima facie case that the alleged injuries to Ms. Ciancarelli's shoulders 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*). Defendant has presented competent medical evidence that none of Ms. Ciancarelli'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*). In his affirmed medical report, Dr. Postal opined that the magnetic resonance imaging ("MRI") examination of Ms. Ciancarelli's right shoulder conducted approximately six weeks after the accident showed moderate degeneration of the acromioclavicular joint. The examination also showed tendinosis of the supraspinatus, infraspinatus, and subscapularis, with partial tears of the supraspinatus. Dr. Postal opined that such features "suggest chronicity." In addition, Dr. Postal noted that the nondisplaced tear of the anterosuperious glenoid labrum was also "suspected chronic." Dr. Postal concluded that he did not suspect a recent injury (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]). In his affirmed medical report, Dr. Postal opined that the MRI examination of Ms. Ciancarelli's left shoulder conducted approximately six weeks after the accident showed moderate degeneration of the acromioclavicular joint. The examination also showed tendinosis of the supraspinatus, infraspinatus, and subscapularis, with partial tears of the supraspinatus and infraspinatus. Further, Dr. Postal concluded that he did not suspect a recent injury (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*).

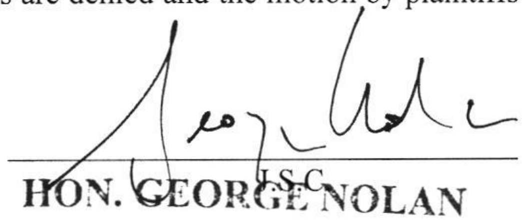
The affirmed medical report of Dr. Thompson states, in relevant part, that during her examination, Ms. Ciancarelli exhibited normal joint function in her shoulders and tested negative in the Hawkins-Kennedy impingement maneuver, apprehension, and supraspinatus isolation tests. Dr. Thompson also noted that no heat, swelling, effusion, erythema, or crepitus was detected. Dr. Thompson diagnosed plaintiff as having suffered a sprain to her shoulders, and concluded that such sprains have resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*).

Defendant failed to submit admissible evidence negating the elements of Ms. Ciancarelli's claim under the 90/180 category of Insurance Law § 5102 (d) (*see* ***Xin Fang Xia v Saft***, __ NYS3d __, 2019 NY Slip Op 08248 [2d Dept 2019]; ***Ji Hae Kim v Quintanilla***, 175 AD3d 476, 107 NYS3d 353 [2d Dept 2019]). Ms. Ciancarelli testified on June 15, 2018 that she scheduled to return to work in mid-February 2016 following a previous injury, but was unable to due to injuries stemming from the subject accident and

subsequently retired. She also testified that while she was not confined to bed, she was confined to home for a few months. The bill of particulars, dated June 26, 2017, clearly set forth that plaintiff was confined to bed and home for approximately six months following the accident. Dr. Thompson did not examine plaintiff until more than two years after the accident and more than one year after the bill of particulars was served on defendant, and did not relate his medical findings that there was "no evidence of causally related orthopedic disability" to the 90/180 category of Insurance Law § 5102 (d) (*see* ***Reynolds v Wai Sang Leung***, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; ***Menezes v Khan***, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; ***Takaroff v A.M. USA, Inc.***,63 AD3d 1141, 882 NYS2d 265 [2d Dept 2009]; ***Rahman v Sarpaz***, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; ***Delayhaye v Caledonia Limo & Car Serv., Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; ***Greenidge v Righton Limo, Inc.***, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]). Similarly, Dr. Postal did not address Ms. Ciancarelli's claim under the 90/180 category. Thus, defendant failed to make a prima facie showing that Ms. Ciancarelli's claim for damages due to nonpermanent injuries is barred under the No-Fault Insurance Law (*see* ***Reynolds v Wai Sang Leung***, *supra*; ***Negassi v Royle***, 65 AD3d 1311, 885 NYS2d 760 [2d Dept 2009]; ***Ismail v Tejeda***, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; ***Takaroff v A.M. USA, Inc.***, *supra*). Having determined that defendant failed to meet her prima facie burden, it is unnecessary to consider whether plaintiffs' papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motions by defendant Jessica Rosales are denied and the motion by plaintiffs is denied.

Dated: 12-5-2019



HON. GEORGE NOLAN
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**