

Dauti v Ramos-Gonzalez
2012 NY Slip Op 31427(U)
May 10, 2012
Sup Ct, Nassau County
Docket Number: 19924/10
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ABIDIN DAUTI,

Plaintiff,

- against -

MARIANELA RAMOS-GONZALEZ,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 19924/10
Motion Seq. Nos.: 01, 02
Motion Dates: 02/10/12
03/26/12

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02) Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion and Exhibit	3
Reply Affirmation	4
Reply Affirmation	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting her summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendant's motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the issue of liability and the issue of serious injury. Defendant opposes plaintiff's cross-motion.

This action arises from a motor vehicle accident which occurred on February 28, 2010, at approximately 10:50 a.m., at or near the intersection of Old Country Road and Front Street in New Cassel, Nassau County, New York. The accident occurred when plaintiff, while riding a bicycle, was struck by a 2006 Ford Escape SUV owned and operated by defendant. Plaintiff commenced this action by the filing and service of a Summons and Verified Complaint on or about October 4, 2010. Issue was joined on or about December 7, 2010.

The Court will first address plaintiff's motion (Seq. No. 02) for summary judgment on the issue of liability.

Briefly, it is plaintiff's contention that the accident occurred when he was riding his bicycle eastbound on the shoulder of Old Country Road when the defendant, exiting the parking lot of a Starbucks and intending to make a right turn onto westbound Old Country Road, failed to see plaintiff approaching on her right side and struck plaintiff's bicycle with the right front portion of her SUV. Said impact caused plaintiff to fall off his bicycle to the ground and sustain personal injuries. Plaintiff claims that defendant admitted at her Examination Before Trial ("EBT") that she did not see plaintiff. *See* Plaintiff's Affirmation in Support Exhibit A.

Plaintiff argues that, pursuant to New York Vehicle and Traffic Law § 1143, "every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist...upon any roadway and shall give warning by sounding the horn when necessary. Pursuant to VTL § 1143, '[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.'" Plaintiff submits that the record establishes that, in spite of defendant's familiarity with the accident location, the clear weather conditions, the lack of visibility obstructions and the

lack of sun glare, defendant did not see what there was to be seen, did not sound her car's horn, did not apply her car's brakes and did not otherwise take any steps to avoid causing the subject accident. Plaintiff contends that "[d]efendant's testimony is unequivocal in that there was nothing whatsoever that prevented her from seeing the Plaintiff as he approached from her right and nothing preventing her from avoiding causing the subject accident." Plaintiff further contends that defendant was the negligent party in that she failed her duty to exercise reasonable care under the circumstances to avoid an accident and that defendant cannot come up with a non-negligent explanation for striking plaintiff's bicycle thereby causing plaintiff's injuries.

In opposition to plaintiff's liability motion, defendant argues that "[i]t is well-settled that the issue of comparative negligence is generally a question for the jury to decide.... Where, as here, the record fails to establish plaintiff's complete freedom from comparative negligence, an award of summary judgment is not appropriate." Defendant argues that, based upon plaintiff's EBT testimony, "a question of fact has been raised as to whether plaintiff is in violation of Vehicle and Traffic Law § 1234(a), which, in pertinent part, states as follows: Upon all roadways, any bicycle...shall be driven...near the right-hand curb or edge of the roadway or upon a usable right-hand shoulder. A common sense application of the facts of this case to the applicable law necessarily leads to the conclusion that plaintiff- operating his bicycle on a busy roadway against the flow of traffic - certainly violated Vehicle and Traffic Law § 1234(a). There can thus be no mistake that triable issues of fact remain as to whether plaintiff used reasonable care to avoid the impact." *See* Defendant's Affirmation in Support Exhibit D.

In reply to defendant's opposition, plaintiff argues that "[d]efendant has utterly failed to offer any non-negligent explanation for her failure to see the Plaintiff prior to colliding with him,

offering only speculation of alleged comparative negligence....Defendant has failed to refute any of the evidence in the record as to her liability to Plaintiff, instead offering mere speculation and a photograph which was never exchanged, not produced at any deposition or otherwise authenticated, and is therefore inadmissible and of no probative value.”

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable

issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Plaintiff, in his motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra*.

After applying the law to the facts in this case, the Court finds that defendant has met her burden and demonstrated an issue of fact which precludes summary judgment. Defendant has raised the issue of fact as to whether or not plaintiff was negligent in operating his bicycle on the wrong side of the road in violation of New York State Vehicle and Traffic Law § 1234(a).

Therefore, based upon the foregoing, that portion of plaintiff's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendant is hereby **DENIED**.

The Court will now address defendant's threshold motion (Seq. No. 01) and that portion of plaintiff's cross-motion (Seq. No. 02) that also deals with the threshold issue.

As a result of the subject accident described above, plaintiff claims that he sustained the following injuries:

Posterior disc herniations at C2-3;

Central posterior disc herniation at C3-4;

Posterior disc herniation at C4-5;

Posterior disc herniation at C5-6 deforming the ventral cord;

Posterior disc herniation at C6-7 impinging the ventral cord;

Cervical sprains and strains;

Severe restricted range of motion at the cervical spine;

Cervical myofascitis;

Cervical spine derangement;

Cervical spine spasms;

Bilateral C5-6 radiculopathies;

Right median sensorimotor neuropathy;

Right ulnar motor neuropathy;

Left median sensorimotor neuropathy;

Left cervical radiculitis;

Left shoulder derangement;

Left shoulder rotator cuff tendonitis with labrum tear;

Left shoulder strain;

Tear of posterior labrum;

Left shoulder partial tear and/or tendonitis of the distal infraspinatus tendon involving its articular surface, without retraction;

Severe restricted range of motion of the Left Shoulder;

Head injury;

Hematoma to head;

Swelling to scalp;

Post traumatic headaches;

Abrasions along the face, both hands and left lower leg;

Post traumatic syndrome;

Post traumatic stress disorder;

Candidate for left shoulder surgery. *See* Defendant's Affirmation in Support Exhibit C.

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the

plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that, as a consequence of the above described automobile accident, he has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law and which fall within the following statutory categories of injuries:

- 1) permanent loss of a body organ, member, function or system; (Category 6)
- 2) a permanent consequential limitation of use of a body organ or member; (Category 7)
- 3) a significant limitation of use of a body function or system; (Category 8)
- 4) 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. (Category 9).

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the

limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler, supra; Licari v. Elliot, supra.* A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra.* A claim raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories can be made by an expert’s designation of a numeric percentage of a plaintiff’s loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems, supra.* In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff’s limitation to the normal function, purpose and use of the affected body organ, member, function or system. *See id.*

Finally, to prevail under the “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” category, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102(d)) “which would have caused the alleged limitations on the plaintiff’s daily activities.” *See Monk v. Dupuis, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001).* A curtailment of the plaintiff’s usual activities must be “to a great extent rather than some slight curtailment.” *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co., 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).*

Inasmuch as plaintiff has failed to allege and claim that he has sustained a “total loss of use” of a body organ, member, function or system, it is plain that his injuries do not satisfy the “permanent loss of use” category of Insurance Law. *See* New York State Insurance Law § 5102(d); *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d (2001).

Similarly, any claims that plaintiff’s injuries satisfy the 90/180 category of Insurance Law § 5102(d) are also contradicted by his own EBT testimony wherein he states that there are no activities that he did on a regular basis before the accident that he can no longer do at all or that he does less of now, except for gardening. Plaintiff further testified that he was not, in fact, confined to his bed or home for any length of time as a result of the subject accident, despite the fact that the Verified Bill of Particulars indicates that he was confined to home and bed for three months following the subject accident. *See* Defendant’s Affirmation in Support Exhibit D. Further, nowhere does plaintiff claim that, as a result of his alleged injuries, he was “medically” impaired from performing any of his daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001)) or that he was curtailed “to a great extent rather than some slight curtailment.” *See Licari v. Elliott, supra. See also Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 (3d Dept. 2002). In light of these facts, this Court determines that plaintiff’s injuries do not satisfy the “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” category of Insurance Law. *See* New York State Insurance Law § 5102(d). Accordingly, that portion of plaintiff’s cross-motion (Seq. No. 02), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the issue of

serious injury is hereby **DENIED**.

Thus, the Court will restrict its analysis to the remaining two categories as they pertain to plaintiff; to wit, a permanent consequential limitation of use of a body organ or member (Category 7) and a significant limitation of use of a body function or system (Category 8).

With the aforementioned guidelines in mind, the Court will now turn to the merits of defendant's motion. In support of her motion (Seq. No. 01), defendant submits the pleadings, plaintiff's Verified Bill of Particulars, the transcript of plaintiff's EBT testimony and the affirmed report of Robert Israel M.D., who performed an independent orthopedic medical examination of plaintiff on November 8, 2011.

Defendant first assert that plaintiff's admissions in his EBT testimony regarding the minimal treatment he received after the subject accident is evidence that he failed to sustain a "serious injury" as a result of said accident. Defendant states that "[f]ollowing the incident plaintiff was taken by ambulance to Nassau University Medical Center....Plaintiff testified that he complained of a scrape on his left cheek and pain in his left shoulder, neck and back.... While at the emergency room, plaintiff was examined by a doctor, no medications were prescribed, no devices were provided, and he was released....Plaintiff next sought medical attention one week later, when he saw a doctor in Hempstead....Plaintiff admitted that it was his attorney that referred him to the facility in Hempstead....Plaintiff testified that he treated with this physician, whose name he could not recall, for three months....He received physical therapy, hot packs, and massages for his neck, back, left shoulder and left leg....Plaintiff testified that he went for therapy four times per week for three months and then discontinued treatment at his doctor's advice....The doctor in Hempstead referred plaintiff to a physician in East Meadow, whose name plaintiff could not remember, one month after the accident occurred....Plaintiff saw this doctor on only one

occasion....The physician in Hempstead also referred plaintiff to a doctor in Westbury, whose name plaintiff could not recall....The physician in Westbury examined plaintiff's neck, back, and shoulders on two occasions....Plaintiff testified that this doctor advised him 'you're not that bad. You're getting better.'...Plaintiff was also referred for three MRI(s) of his neck, back, and shoulders....Plaintiff testified that he received no further treatment and has no future medical appointments scheduled with any other health care providers..." See Defendant's Affirmation in Support Exhibit D.

Dr. Robert Israel, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of plaintiff on November 8, 2011. See Defendant's Affirmation in Support Exhibit E. Dr. Israel performed quantified and comparative range of motion tests on plaintiff's cervical spine, thoracic spine, lumbar spine, left shoulder and left hip. Range of motion testing, conducted by way of a goniometer, revealed no deviations from normal. Dr. Israel's diagnosis was "[r]esolved sprain of the cervical spine. Resolved sprain of the thoracic spine. Resolved sprain of the lumbar spine. Resolved sprain of the left shoulder. Resolved sprain of the left hip. Based upon my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record....The claimant is capable of work activities and ADLs without restrictions." See *id.*

The Court notes that, in preparing for his examination of plaintiff, Dr. Israel reviewed a number of defendant's medical records. See Defendant's Affirmation in Support Exhibit E. Included in said records were a report of plaintiff's MRI of his cervical spine which was performed on March 26, 2010 and a report of plaintiff's MRI of his left shoulder which was performed on March 26, 2010. See *id.* See also Plaintiff's Affirmation in Support Exhibit D. According to the report of plaintiff's MRI of his cervical spine, plaintiff was diagnosed with

“[p]osterior central disc herniation at the C2-3 level, Central posterior disc herniation at the C3-4 level, Central posterior disc herniation at the C4-5 level, Posterior disc herniation at the C4-5 level favoring the right side, Posterior disc herniation with associated bony ridging at the C5-6 level favoring the right side impinging upon and mildly deforming the ventral aspect of the cord.” *See* Plaintiff’s Affirmation in Support Exhibit D. According to the report of plaintiff’s MRI of his left shoulder, plaintiff was diagnosed with “[p]artial tear and/or tendonitis of the distal infraspinatus tendon involving its articular surface, without retraction....Findings consistent with a tear of the posterior labrum; clinical correlation is recommended.” *See id.*

Despite the fact that Dr. Israel reviewed said MRI reports and was aware of the diagnosis contained in same, he failed to address, in any manner, plaintiff’s diagnosed disc herniations or the partial tear in plaintiff’s left shoulder.

Additionally, defendant failed to provide the Court with any report from a radiologist who conducted independent film reviews of plaintiff’s MRIs and addressed the findings in said MRIs.

Based upon the above, the Court finds that defendant has failed to established a *prima facie* case that plaintiff did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

Where a defendant fails to demonstrate that she has met her *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

Accordingly, defendant’s motion (Seq. No. 01), pursuant to CPLR § 3212 and Article 51

of the Insurance Law of the State of New York, for an order granting her summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) is hereby **DENIED**. Thus, the matter shall proceed with plaintiff's claims as to the remaining two statutory categories of "serious injury" as defined by New York State Insurance Law § 5102(d) - permanent consequential limitation of use of a body organ or member (Category 7) and a significant limitation of use of a body function or system (Category 8).

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on May 22, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 10, 2012

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE