Rodriguez v DePace
2014 NY Slip Op 30175(U)
January 8, 2014
Supreme Court, Suffolk County
Docket Number: 11-31745
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 11-31745
CAL. No. 13-00407MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 6-28-13
ADJ. DATE 8-13-13
Mot. Seq. # 001 - MD

JANETH RODRIGUEZ, Plaintiff, - against - PAUL DEPACE, Defendant.	TINARI, O'CONNELL & OSBORN, LLP Attorney for Plaintiff 320 Carleton Avenue, Suite 6800 Central Islip, New York 11722 RICHARD T. LAU & ASSOCIATES Attorney for Defendant P.O. Box 9040 Jericho, New York 11753-9040

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 26; Replying Affidavits and supporting papers 27 - 28; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Paul DePace seeking summary judgment dismissing the complaint is denied.

Plaintiff Janeth Rodriguez 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 Randall Road and Whiskey Road, Ridge, New York, on September 21, 2010. Plaintiff, by her complaint, alleges that, as she was traveling northbound on Randall Road, the vehicle owned and operated by Paul DePace crossed over into her lane of travel, striking the front of her vehicle. Plaintiff further alleges that prior to the collision defendant was traveling southbound on Randall Road and that she brought her vehicle to a complete stop when she noticed defendant's vehicle crossing over the double yellow lines in the middle of the road. In addition, plaintiff, by her bill of particulars, alleges, among other things, that she sustained numerous personal injuries as a result of the subject collision, including disc bulges at levels C3 through C7 and L5-S1; cervical and lumbar radiculitis; cervical and lumbar sprains/strains; and lacerations and scars to the right knee. Plaintiff further alleges that as a result of the injuries she sustained in the collision she was confined to her home and bed, as well as incapacitated from her employment, for two days.

Defendant now moves for summary judgment on the basis that the injuries allegedly sustained by plaintiff as a result of the subject accident fail to meet the "serious injury" threshold requirement of § 5102(d) of the Insurance Law. Defendant, in support of the motion, submits copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records regarding the alleged injuries at issue, and the affidavit of Robert Zucconi, plaintiff's insurance claims adjuster. In addition, defendant submits the sworn medical report of Dr. Isaac Cohen, who at defendant's request conducted an independent orthopedic examination of plaintiff on January 24, 2013. Plaintiff opposes the motion on the grounds that defendant failed to establish a prima facie case that she did not sustain a serious injury within the meaning of the statute as a result fo the subject collision, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of uses" categories and the "90/180" category of the Insurance Law. Plaintiff, in opposition, submits her own affidavit, an uncertified copy of the police accident report, and uncertified copies of her medical records. Plaintiff also submits the affidavit of her treating chiropractor, Dr. Michael Campo, and the affirmed medical reports of Dr. Allen Rothpearl.

It has long been 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 made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject accident through the submission of his medical expert's report, and plaintiff's medical records and deposition testimony (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]; *see also* ***Rivera v Gonazalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Matthews v Cupie Transp. Corp.***, 302 AD2d 566, 758 NYS2d 66 [2d Dept 2003]). Defendant's examining orthopedist, Dr. Cohen, states in his medical report that an examination of plaintiff reveals full range of motion in her spine and right knee, that her paravertebral muscles are supple with no evidence of tenderness or muscle spasm upon palpation of the paraspinal muscles, that her muscle strength is 5/5, and that there is no evidence of muscle atrophy. Dr. Cohen states that the normal cervical and lordotic curvature throughout plaintiff's spine is maintained, that the straight leg raising test is negative, and that there is no evidence of swelling, tenderness or instability in plaintiff' right knee. Dr. Cohen opines that the sprains and contusions that plaintiff sustained in the subject collision have resolved, that the examination of plaintiff was unremarkable, and that plaintiff's functional capacity of her spine and upper and lower extremities is completely normal. Dr. Cohen further states that plaintiff does not have any evidence of an orthopedic disability, and that she is currently working and performing her normal activities of daily living without restrictions.

In addition, the photographs submitted by defendant established that the scarring on plaintiff's right knee did not constitute a "significant disfigurement," which is defined as unattractive, objectionable, or the object of pity and scorn," under § 5102(d) of the Insurance Law (*see* ***Maldonado v Piccirilli***, 70 AD3d 785, 894 NYS2d 119 [2dDept 2010]; *cf.* ***Borquist v Hyde Park Cent. School Dist.***, 107 AD3d 926, 966 NYS2d 888 [2d Dept 2013]; ***Onder v Kaminiski***, 303 AD2d 665, 757 NYS2d 571 [2d Dept 2003]).

Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, the burden shifts to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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]).

Plaintiff, in opposition to defendant's prima facie showing, has raised a triable issue of fact as to whether she sustained a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Amaro v American Med. Response of N.Y., Inc.***, 99 AD3d 563, 952 NYS2d 184 [1st Dept 2012]; ***Bernier v Torres***, 79 AD3d 776, 913 NYS2d 299 [2d Dept 2010]; ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2d Dept 2008]; *cf.* ***Palma v Rosa***, 78 AD3d 461, 901 NYS2d 74 [1st Dept 2010]). Plaintiff submitted the affidavit of her treating chiropractor, Dr. Campo, who treated plaintiff from October 13, 2010 through December 29, 2010, and states that, at the time of her last treatment she had not fully recovered from her injuries. Moreover, the affidavit of Dr. Campo revealed that, contemporaneous with the subject accident, plaintiff had significant limitations in her lumbar and cervical regions, which limitations were specifically quantified, and that these limitations still were present when plaintiff was re-examined on June 10, 2013, almost three years after the accident. Dr. Campo states plaintiff's injuries are chronic and permanent, and will require future palliative care to treat the permanent symptoms of chronic pain. In addition, Dr. Campo explained that the type of injury that plaintiff sustained to her spinal discs is indicative of a disc syndrome, which produces significant pain and irritation, and predisposes plaintiff to spinal disc degeneration, spinal instability and eventual osteoarthritis. Dr. Campo concludes that plaintiff suffers from restrictions of motion in her spine and will continue to do so in the future, and that plaintiff's injuries are the direct result of the subject collision.

Furthermore, Dr. Rothpearl, the radiologist who performed the MRI studies of plaintiff's cervical and lumbar spines, states in his report that there is marked straightening of the cervical and lordotic curvature of plaintiff's spine, that plaintiff has sustained disc bulges at levels C3 through C7 and L5-S1, that disc material approximates the ventral thecal sac, and that there is contour abnormality of the thecal sac due to encroachment by the annulus fibrosus of the disc in her cervical spine. Although disc bulges and herniations, standing alone are not evidence of a serious injury under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see e.g.* ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]; ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]).

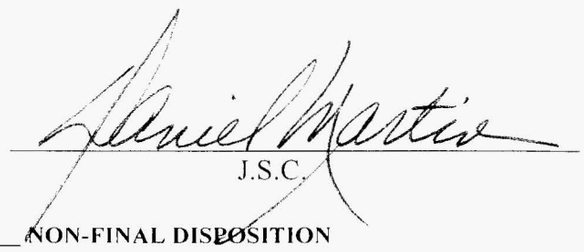
Therefore, plaintiff's expert's opinion conflicts with those of defendant's expert, Dr. Cohen, who found that there was no significant limitation in plaintiff's ranges of motion in her spine. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*see* ***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see also* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2004]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]).

Contrary to defendant's contention, plaintiff adequately explained the significant gap in her treatment history by stating in her affidavit that she stopped treatment after her no-fault benefits were denied and that she could not afford to personally pay for further treatment (*see* ***Mitchell v Casa Redimis Concrete Corp.***, 83 AD3d 1015, 921 NYS2d 543 [2d Dept 2011]; ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; ***Jules v Barbecho***, 55 AD3d 548, 866 NYS2d 214 [2d Dept 2008]; *see also* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Echevarria v G & G Classic, Inc.***, 91 AD3d 902, 937 NYS2d 608 [2d Dept 2012]).

Finally, although plaintiff failed to refute defendant's prima facie showing that she did not sustain an injury to her right knee or a significant disfigurement within the meaning of the Insurance Law as a result of the subject accident (*see* ***Lynch v Iqbal***, 56AD3d 621, 868 NYS2d 676 [2d Dept 2008]; ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]; ***Losieau v Maxwell***, 256 AD2d 450, 682 NYS2d 450 [2d Dept 1998]; ***Spevak v Spevak***, 213 AD2d 622, 623, 624 NYS2d 232 [2d Dept 1995]; ***Prieston v Massaro***, 107 AD2d 742, 484 NYS2d 104 [2d dept 1985]; *see also* Insurance Law § 5102[d]), once a plaintiff establishes proof an injury meets at least one category of the no-fault threshold , it is unnecessary to address whether plaintiff's proof in regards to other alleged injuries are sufficient to defeat defendant's prima facie showing (*see* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 593 [2010]; *see also* ***Angeles v American United Transp., Inc.***, 110 AD3d 639, 973 NYS2d 644 [1st Dept 2013]; ***McClelland v Estevez***, 77 AD3d 403, 908 NYS2d 192 [1st Dept 2010]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: January 8, 2014



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION