Martinez v Gargiullo
2014 NY Slip Op 31639(U)
May 29, 2014
Supreme Court, Suffolk County
Docket Number: 11-35463
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 11-35463

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-12-13
ADJ. DATE 3-3-14
Mot. Seq. # 001 - MD
002 - MD
003 - MD

YANIRA MARTINEZ and DALINDA MARTINEZ,

Plaintiffs,

- against -

DANIEL GARGIULLO, RICHARD GARGIULLO, THOMAS CERRA, RICHARD CERRA and KRISTEN McENANEY,

Defendants.

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Upon the following papers numbered 1 to 47 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-11; 12-19; 20-28 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 29-41 ; Replying Affidavits and supporting papers 42-43; 44-47 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the defendants Thomas Cerra and Richard Cerra, the motion (#002) by the defendant Kristen McEnaney, and the motion (#003) by the defendants Daniel Gargiullo and Richard Gargiullo hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendants Thomas Cerra and Richard Cerra seeking summary judgment dismissing the complaint is denied; and it is

6-19-14

ORDERED that the motion by the defendant Kristen McEnaney seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by the defendants Daniel Gargiullo and Richard Gargiullo seeking summary judgment dismissing the complaint is denied.

The plaintiff Yanira Martinez commenced this action to recover damages for injuries allegedly sustained by her as a result of a four-car accident that occurred at the intersection of Earle Ovington Boulevard and Hempstead Turnpike in the Town of Hempstead on March 10, 2010. The plaintiff's sister, Dalinda Martinez, also instituted a cause of action for property damage.

By her bill of particulars, the plaintiff alleges, among other things, that she sustained numerous personal injuries as a result of the subject accident, including cervical and lumbar radiculopathy; bulges at levels C5/C6 and L5/L5; antalgic gait; impingement of the right and left shoulder. The plaintiff alleges that she was confined to her home and bed, intermittently, for approximately 10 months as a result of the injuries she sustained in the subject collision. The plaintiff additionally alleges that she was incapacitated from her employment as a home care aide for approximately two weeks following the accident, and that, at the time of the accident, she was a full time student at Nassau Community College, but had to withdraw from her classes, after missing approximately 10 months from school due to the injuries she sustained in the accident.

The Cerra defendants now move for summary judgment on the basis that the injuries the plaintiff alleges to have sustained due to the subject collision fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, the Cerra defendants submit copies of the pleadings, the plaintiff's deposition transcript, and the sworn medical report of Dr. Matthew Skolnick. At the Cerra defendants' request, Dr. Skolnick conducted an independent orthopedic examination of the plaintiff on July 30, 2013. The defendant McEnaney and the Gargiullo defendants also move for summary judgment, arguing that the plaintiff's injuries fail to meet the serious injury threshold requirement of Insurance Law §5102 (d). In addition to relying on the same evidence as submitted by the Cerra defendants on their motion for summary judgment, the defendant McEnaney also submits the sworn medical report of Dr. Joseph Margulies. At the request of the defendant McEnaney, Dr. Margulies conducted an independent orthopedic examination of the plaintiff on July 15, 2013.

The plaintiff opposes the motions on the grounds that the defendants failed to make a prima facie case that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition to the motions demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motions, the plaintiff submits her own affidavit, unsworn copies of her medical records regarding her treatment for the injuries at issue, the sworn medical report of Dr. Ahmed Eleman, and the affidavit of Dr. Ronald Mazza.

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, the defendants, through the submission of the plaintiff's deposition transcript and competent medical evidence, established a prima face case that the plaintiff did not sustain an injury within the meaning of Insurance Law § 5102(d) (*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]), and, in any event, that the plaintiff's alleged injuries were not caused by the subject accident (*see* ***Barkare v Kakouras***, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). The defendants' examining orthopedists, Dr. Skolnick and Dr. Marguiles, each found that the plaintiff has full range of motion in her spine and shoulders, and that the sprains and contusions she sustained to her spine and shoulders as a result of the accident were resolved. In addition, each orthopedist concludes that she is not disabled, that there is no need for any additional orthopedic treatment or physical therapy, and that plaintiff is capable of performing her usual daily living activities and working full-time without any restrictions.

The defendants, having made a prima facie showing that the plaintiff did not sustain a serious

injury within the meaning of the statute, shifted the burden to the plaintiff to come forward with evidence demonstrating the existence of a triable issue of fact as to whether she sustained a serious injury (*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]).

In opposition, the submission by the plaintiff of the unsworn medical reports, which were not relied upon by the defendants in their motions for summary judgment (*see* ***Zelman v Mauro***, 81 AD3d 936, 917 NYS2d 581 [2d Dept 2011]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 285 [2d Dept 2005]), and the affirmation of Dr. John Rigney, the radiologist who reviewed the MRI studies of the plaintiff's cervical and lumbar regions, and shoulders, but who failed to opine as to causation, were insufficient to rebut the defendants' prima facie showing (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]]). However, with the submission of the affidavit of Dr. Ronald Mazza, the plaintiff's treating chiropractor, she raised a triable issue of fact in opposition to the defendants' prima facie showing as to wether she sustained serious injuries to her spine under the limitations of use categories of the Insurance Law (*see* ***Perl v Meher***, *supra*; ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Sforza v Big Guy Leasing Corp.***, 561 AD3d 659, 858 NYS2d Dept 233 [2d Dept 2008]). Dr. Mazza, in his affidavit, concludes, based upon his contemporaneous and recent examinations of the plaintiff, and his review of the MRI examinations of the plaintiff's spine, that her injuries were permanent and that the observed range of motion deficits were significant (*see* ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Mazza further states that the injuries to the plaintiff's spine and the range of motion limitations are causally related to the subject accident (*see* ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Moreover, Dr. Mazza opines that the injuries she sustained in the subsequent accident on February 11, 2011, were merely an exacerbation of the injuries to her spine suffered in the accident on March 10, 2010 (*see* ***Littel ve Ajah***, 97 AD3d 801,

949 NYS2d 109 [2d Dept 2012]). Consequently, Dr. Mazza's affidavit is sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to her spine within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Accordingly, the defendants' motions for summary judgment dismissing the plaintiff's complaint for failure to sustain a serious injury within the meaning of Insurance Law § 5102 (d) are denied.

Dated: May 29, 2014

W. Gerard Asher
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION