

**Campos v Sabella**

2015 NY Slip Op 30279(U)

February 19, 2015

Supreme Court, Suffolk County

Docket Number: 11-30780

Judge: Ralph T. Gazzillo

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request, Dr. Chacko conducted an independent neurological examination of plaintiff on March 19, 2013. Additionally, at defendant's request, Dr. Lastig performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's lumbar spine obtained on July 27, 2009, October 21, 2010 and April 21, 2011, and of plaintiff's cervical spine obtained on July 23, 2009, October 21, 2010 and April 21, 2011. Dr. Lastig also performed an independent radiological review of the MRI studies of plaintiff's left knee conducted on October 7, 2010 and April 27, 2011, of her left shoulder MRI study conducted on April 27, 2011, and of her right shoulder MRI study conducted on October 10, 2010. Defendant also submits copies of plaintiff's medical records concerning the injuries at issues.

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 Eycler*, 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, by submitting plaintiff's deposition transcript and competent medical evidence, established a prima facie case that plaintiff did not sustain an injury within the meaning of § 5102(d) of the

Insurance Law (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eycler*, *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 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]). Defendants' examining orthopedist, Dr. Katz, used a goniometer to test plaintiff's ranges of motion in her spine, shoulders, right wrist and left knee, 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. Katz states in his medical report that an examination of plaintiff reveals that she has full range of motion in her spine, left knee, shoulders and right wrist; that the strains with radiculitis and contusions to plaintiff's spine, knee and right shoulder sustained as result of the subject accident have resolved; that she is capable of performing her activities of daily living without restriction; that she is not disabled and is capable of gainful employment; and that she does not show any signs of permanence relative to her spine, right wrist or left knee. Dr. Katz additionally states that his review of the MRI film of plaintiff's right shoulder indicates that she suffers from degenerative changes to the rotator cuff and acromion, and that it did not reflect any evidence of acute trauma casually related to the subject accident. As a result, Dr. Katz states, from a causally related perspective, "it is difficult to understand the reason for the performance of the right shoulder arthroscopic surgery that plaintiff underwent approximately one month after the subject accident, since she alleged that she was a seat belted driver with her arm by her side." Dr. Katz opines that the pathology described by the surgeon who performed her surgery "clearly occurs when the arm is overhead and not when it is restrained by one's side." Furthermore, Dr. Katz states that the surgery was unnecessary and not causally related to the subject accident, because the MRI films of plaintiff's right shoulder did not reveal a tear of the rotator cuff, nor was there a labral tear.

Likewise, Dr. Chacko, defendant's examining neurologist, states in his report that an examination of plaintiff reveals full range of motion in her spine; that there is no tenderness or muscle spasm upon palpation of the paraspinal muscles; that the straight leg raising test is negative; that plaintiff walks with a normal gait; that there is no signs of cerebellar dysfunction; that the motor examination is normal; and that the strength in her upper and lower extremities is normal. Dr. Chacko further states that the examination did not reveal any objective neurological evidence of any neurological sequelae, that there is no evidence of cervical or lumbar radiculopathy, and that plaintiff does not have any radicular or any other specific neurological complaints.

Further, Dr. Lastig, defendant's examining radiologist, states in his report that plaintiff's lumbar spine MRI examination is unremarkable, that there is no evidence of focal disc herniations or annular bulges, and that a comparison of the MRI studies conducted on July 27, 2009, October 21, 2010 and April 21, 2011 shows that there has been no significant interval change between each study, and that there are no findings on the any of the studies causally related to the subject accident. In addition, Dr. Lastig states that a review of plaintiff's cervical spine MRI studies shows that she suffers from multilevel disc dessication and multilevel degenerative disc disease in her cervical spine, that there is a tiny midline disc herniation at level C6/C7, that the cervical spine is straight, and that the prevertebral soft tissues are normal. Dr. Lastig further states that a comparison of the MRI studies of plaintiff's cervical spine performed on July 23, 2009, October 21, 2010 and April 21, 2011 show that there has been no significant interval change, and that there are no findings on the studies causally related to the subject accident. Additionally, Dr. Lastig states that

the MRI examination of plaintiff's right shoulder does not reveal any evidence of a rotator cuff tear, nor does it show a labral tear or an osseous injury. However, Dr. Lastig does states that plaintiff's right shoulder MRI study shows evidence of degeneration or tendinopathy of the supraspinatus tendon, which is not causally related to the subject accident.

Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden 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 the motion argues 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, and that the evidence submitted in opposition raises triable issues of fact as to such. In opposition to the motion, plaintiff submits her own affidavit and the sworn medical report of Dr. Alvin Stein, Dr. Joseph Perez and Dr. John Himelfarb.

In opposition to the motion, plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject collision (*see Licari v Elliott, supra; Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; *Mack v Valfort*, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). 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 causally 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]). The medical evidence proffered by plaintiff was insufficient to establish a serious injury or to defeat defendant's prima facie showing. Moreover, plaintiff's affidavit is insufficient to raise a triable issue of fact as to whether she sustained a serious injury, since there is no objective medical evidence supporting the allegation of

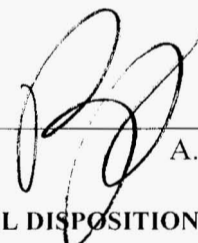
significant joint restriction in her spine or left knee, or that she sustained a labral tear of the right shoulder which are causally related to the subject accident (*see Ferber v Madorran*, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2008]; *Smeja v Fuentes*, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]).

Although plaintiff has submitted the affirmed medical reports of Dr. Joseph Perez showing that she sustained range of motion limitations in her spine and right shoulder contemporaneous with the subject accident, she failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a recent examination (*see Estrella v GEICO Ins. Co.*, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; *Nesci v Romanelli*, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]). While Dr. Alvin Stein states that he examined plaintiff again on September 16, 2014, approximately four years after the subject accident, and that her right shoulder injury is permanent and will continue to cause her to have range of motion limitation in her daily life, he failed to state when his initial examination of plaintiff occurred or what his objective findings were during such examination and, as a result, he is unable to substantiate the extent or degree of the limitation to plaintiff's right shoulder, left knee or spine caused by the alleged injuries and their duration (*see Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]). Additionally, Dr. Stein in his report attempts to affirm the medical report of Dr. Perez, which is impermissible and fails to properly place the reports or the records contained therein before the Court (*see Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]).

Furthermore, the medical report of Dr. John Himelfarb, the radiologist, who performed the MRI studies of plaintiff's left knee, right shoulder, and cervical and lumbar regions of her spine is insufficient to raise a triable issue as to whether plaintiff suffered a serious injury to those regions, because he failed to opine as to causation regarding his radiological findings (*see Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; *Depena v Sylla*, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d 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, defendant's motion for summary judgment dismissing the complaint is granted

Dated: 2/19/15

  
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A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION