Beckman v Podolsky
2015 NY Slip Op 30904(U)
May 18, 2015
Supreme Court, Suffolk County
Docket Number: 6309/2011
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX NO. 6309/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DIERDRE BECKMAN,

Plaintiff,

-against-

KATRINA PODOLSKY,

Defendant.

ORIG. RETURN DATE: JUNE 20, 2013
FINAL SUBMISSION DATE: AUGUST 1, 2013
MTN. SEQ. #: 001
MOTION: MD

PLTF'S/PET'S ATTORNEY:
FALK & KLEBANOFF, P.C.
392 WOODFIELD ROAD
WEST HEMPSTEAD, NEW YORK 11552
516-564-4200

DEFT'S/RESP ATTORNEY:
RICHARD T. LAU & ASSOCIATES
P.O. BOX 9040
300 JERICHO QUADRANGLE EAST
SUITE 260A
JERICHO, NEW YORK 11753-9040
516-229-6000

Upon the following papers numbered 1 to 6 read on this motion FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by defendant, KATRINA PODOLSKY, for an Order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York, granting summary judgment to defendant dismissing the complaint of plaintiff, DIERDRE BECKMAN, on the ground that plaintiff did not sustain causally related "serious injuries" in the subject May 17, 2009 accident as defined in Insurance Law § 5102 (d); and thus, her claim for non-economic loss is barred by Insurance Law § 5104 (a), is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff DIERDRE BECKMAN.

This is an action for alleged personal injuries sustained in a motor vehicle accident that occurred on May 17, 2009 (the "Accident").

Plaintiff commenced the action by the filing of a summons and verified complaint on February 22, 2011. Defendant appeared in this action by service of a verified answer dated September 14, 2011.

By way of her Verified Bill of Particulars, plaintiff alleges she sustained the following injuries, all of which she believes to be permanent: mid and low back severe pain and spasm involving lumbar praspinal [sic] musculature bilaterally; pain and spasm involving the thoracic paraspinal musculature; pain in the lumbosacral region and both sacroiliac jionts [sic]; pain in sciatic notches; range of motion in Lumbar spine, flexion 0 to 30 degrees, extension 0 to 10 degrees, left and right rotation 0 to 10 degrees, left and right lateral flexion 0 to 15 degrees; straight leg raise positive bilaterally at 50 degrees producing lower back pain and radiation of pain into both buttocks; Kemp's test positive bilaterally; Gainslen's test positive bilaterally; acute/post-traumatic thoraco lumbar sprain with attendant myofascitis and bilateral sciatic radiculopathy; lumbosacral sprain/strain; thoracic sprain/strain; sciatic neuritis and muscle spasms.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff cannot meet the "serious injury" threshold requirement of Insurance Law § 5102 (d). Under New York law, there is no right of recovery for non-economic loss in an action arising out of negligence in the use or operation of a motor vehicle in New York State absent evidentiary proof of "serious injury" as that term is defined in Insurance Law § 5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function

or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion 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.*, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant's argument is based upon three sources of proof, to wit: the plaintiff's deposition, the emergency room record of Good Samaritan Hospital, and defendant's physician's IME of plaintiff.

EMERGENCY MEDICAL TREATMENT

Plaintiff was seen in the Good Samaritan Hospital emergency department as a walk-in the day after the Accident, at which time she complained of intermittent midline back pain. Upon examination, plaintiff was observed to be in no apparent distress with normal range of motion in all four extremities and no midline tenderness of her lumbar spine. A lumbosacral x-ray was ordered and found mild degenerative disc disease L5-S1 with disc space narrowing noted; otherwise unremarkable x-rays of the lumbosacral spine. Plaintiff's pain level at the time of her completion of the ER visit was characterized by her as 3 out of 10.

PLAINTIFF'S DEPOSITION

Plaintiff readily admits that she was confined to bed for three days and missed one day of work immediately after the Accident. She further alleges that due to an issue with her shoulder she is unable to swim as often as she did before the Accident, and is unable to workout at her gym where she alleges four days per week prior to the Accident. She testified she did both aerobic exercise and weight training. She claims her weight training consisted of the use of dumbells to a maximum of 25 pounds.

DEFENDANT'S IME OF PLAINTIFF

The defendant proffers the July 24, 2012 report of the independent orthopedic examination of the plaintiff performed by Dr. Lee M. Kupersmith. Dr. Kupersmith examined the thoracic and lumber spine with minimal tenderness to palpation and no evidence of spasm. He reported that plaintiff was able to forward flex to 60 degrees (normal 60 degrees), extension of the spine 25 degrees (normal 25 degrees), lateral rotation to the left and right to 30 degrees (normal 30 degrees), and lateral flexion to the right and left of 25 degrees (normal 25 degrees). She had 5/5 strength in the bilateral upper and lower extremities with 2+ deep tendon reflexes throughout. She had negative straight leg raises on the right and left, both in the seated and supine positions. There were no sensory deficits in the upper or lower extremities. Dr. Kupersmith reported all ranges of motion were done visually, as well as with the use of a handheld goniometer and are based upon the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition from 2002.

The doctor further reported that plaintiff denied any new complaints upon completion of the examination, and left the room independently and without difficulty. The doctor's diagnosis was thoracic sprain/strain resolved; lumbosacral sprain/strain resolved.

The doctor further reported that plaintiff did suffer a temporary impairment as a result of a motor vehicle accident. She did have a temporary impairment with regard to the mid and low back for approximately two months after the Accident, at which time her condition would have resolved and pre-Accident status would have ben reached. The claimant does not have any permanent impairment.

Upon careful review and consideration of the moving party's evidentiary submissions, it is determined that defendant has established *prima facie* entitlement to summary judgment dismissing the complaint on the basis that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Based on defendant's submission, they have met their *prima facie* burden of demonstrating entitlement to judgment as a matter of law by showing, through the affirmed reports of their medical experts and plaintiff's deposition testimony, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the Accident (*see Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Seongho Choi v Guerrero*, 82 AD3d 1080, 918 NYS2d 897 [2d Dept 2011]; *Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]; *Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). It is indisputable that plaintiff's alleged injuries are not "total" and, thus, do not constitute a serious injury under the permanent loss of use category set forth in Insurance Law § 5102 (d) (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 294, 727 NYS2d 378 [2001]). Morever, based on defendant's evidence, none of the injuries plaintiff allegedly sustained constitute a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Quintana v Arena Transport, Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]). Defendant also established *prima facie* that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; *Rico v Figuero*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Thus, the burden shifts to plaintiff to submit competent evidence based upon objective medical findings and diagnostic tests to raise an issue of fact necessary to satisfy the threshold requirement that a serious injury was sustained (*see Gaddy*, 79 NY2d 955).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). In this regard, "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important: *see Countermine v Galka*, 189 AD2d 1043, 1045, 593 NYS2d 113) 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" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353, 746 NYS2d 865 [2002]; *Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]).

CHIROPRACTIC TREATMENT

Plaintiff began treatment with Carl A. Pesa, a chiropractor, on May 11, 2009, four days after the Accident. The chiropractic treatment continued until September 16, 2009, at which time further approval for chiropractic treatment was denied by the No-Fault carrier according to the affidavit of Dr. Pesa. Dr. Pesa's records show subjective complaints of pain for plaintiff. Dr. Pesa also reports objective findings consisting of pain. Dr. Pesa reports "[r]ange of motion in the lumbar spine was moderately restricted due to pain (25%-50% loss)." The doctor's records do not report specific findings on specific motions relative to the normal ranges for specific motion activity. The range of motion references as contained in the Verified Bill of Particulars seem to be derived from an undated report from Dr. Pesa. There is no statement of any finding in relation to normal versus that demonstrated by plaintiff.

NEUROLOGIST

Plaintiff, according to her deposition, was referred to Dr. Hausknecht, a neurologist, by Dr. Pesa. The parties agree that no MRI was obtained even though plaintiff was referred for an MRI by Dr. Hausknecht, on the single occasion upon which plaintiff saw him. When asked to explain why the MRI was not undertaken, plaintiff stated in her deposition that she did not like him and did not intend to go back to him. The record shows no additional consultation or treatment for plaintiff by any other medical professional.

DR. PESA'S REPORTS

Defendant, in response to the motion, submits two reports authored by plaintiff's prior treating chiropractor, Carl A. Pesa. One report is undated and the second is dated June 13, 2013, and reflects the findings made upon examination that date. Dr. Pesa's range of motion findings concerning the lumbar spine directly contradict the range of motion findings of Dr. Kupersmith. Regarding the lumbar spine ROM findings, Dr. Pesa reported:

> Range of motion evaluation in the lumbar spine performed with an inclinometer is as follows: Flexion was 0 to 60 degrees (normal 90 degrees). Extension was 0 to 20 degrees (normal 30 degrees). Left lateral flexion was 0 to 30 degrees (normal 45 degrees). Right lateral flexion was 0 to 30 degrees (normal 45 degrees). Left rotation was 0 to 20 degrees (normal 30 degrees). Right rotation was 0 to 20 degrees (normal 30 degrees).

This Court finds that plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Pesa attesting to the fact that plaintiff had significant limitations in range of motion of her lumbar spine, both contemporaneous to the Accident and in a recent examination, in which Dr. Pesa concluded, based upon the findings, that plaintiff's limitations were significant and permanent and resulted from trauma causally related to the Accident (*see Ortiz v Zorbas*, 62 AD3d 770, 878 NYS2d 442 [2d Dept 2009]; *Azor v Torado*, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2009]). As such, plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102 (d) as a result of the Accident (*see Khavosov v Castillo*, 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011]; *Mahmood v Vicks*, 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; *Compass v GAE Transp., Inc.*, 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]; *Evans v Pitt*, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010]; *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]).

Although there was some suggestion that plaintiff's spinal injuries were caused by degeneration, the Appellate Division, Second Department has recently held that even if a plaintiff's doctor does not specifically address the findings in the reports submitted by the defendant that the abnormalities in the tested areas were degenerative rather than traumatic, the findings of the plaintiff's doctor that the plaintiff's injuries were indeed traumatic and were causally related to the collision is sufficient, as it implicitly addressed the defendant's contentions that the injuries were degenerative (*see Fraser-Baptiste v New York City Transit Authority*, 81 AD3d 878, 917 NYS2d 670 [2d Dept 2011]; *Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]).

With respect to the issue of a gap in treatment, it appears that the plaintiff was not treated from September of 2009 until she next saw Dr. Pesa in June of 2013. In this regard, the Court of Appeals held in *Pommells v Perez*, 4 NY3d 566, 830 NE2d 278, 797 NYS2d 380 (2005) that while "the law surely does not require a record for needless treatment in order to survive summary

judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" (*see also Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]). Here, plaintiff satisfactorily explained the gap in treatment by submitting an affidavit of Dr. Pesa stating that she was no longer eligible for No-Fault benefits and she could not afford to pay for his medical bills (*see Abdelaziz v Fazel*, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; *Garza v Taravella*, 74 AD3d 1802, 905 NYS2d 392 [4th Dept 2010]; *Domanas v Delgado Travel Agency, Inc.*, 56 AD3d 717, 868 NYS2d 132 [2d Dept 2008]; *Jules v Barbecho*, 55 AD3d 548, 866 NYS2d 214 [2d Dept 2008]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that defendant's motion for summary judgment dismissing plaintiff's complaint is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 18, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**