

**Mullady v Oehler**

2015 NY Slip Op 31016(U)

May 27, 2015

Supreme Court, Suffolk County

Docket Number: 12-26246

Judge: Joseph Farneti

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

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 8-29-14  
ADJ. DATE 11-20-14  
Mot. Seq. # 003 - MG  
# 004 - XMG; CASEDISP

-----X  
BRIANA M. MULLADY,

Plaintiff,

- against -

ALLIE DUPONT OEHLER, JAY J. SWARTZ  
and MARILYN ATKINSON,

Defendants.  
-----X

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Upon the following papers numbered 1 to 61 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34; Notice of Cross Motion and supporting papers 35 - 42; Answering Affidavits and supporting papers 43 - 59; Replying Affidavits and supporting papers 60 - 61; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the defendants Allie DuPont Oehler and Jay Swartz seeking summary judgment dismissing the complaint against them is granted; and it is further

**ORDERED** that the cross-motion by the defendant Marilyn Atkinson seeking summary judgment dismissing the complaint against her is granted.

The plaintiff Briana M. Mullady 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 State Route 3 and Wilson Road in the Town of Saranac on October 8, 2010. The accident allegedly occurred when the vehicle owned by the defendant Jay Swartz and operated by the defendant Allie DuPont Oehler

struck the rear of the vehicle operated by the defendant Marilyn Atkinson while it was stopped in traffic waiting to execute a left turn onto Wilson Road. At the time of the accident, plaintiff was a back seat passenger in the Swartz vehicle. By her bill of particulars, the plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including disc bulges at levels C3 through C7 and level L4/L5; a herniated disc at level C3/C4; cervical and lumbar radiculopathy; chondromalacia of the right knee; lumbar and cervical strain/sprain; and aggravation and exacerbation of previous asymptomatic lumbar and cervical conditions.

The defendants Jay Swartz and Allie DuPont Oehler (hereinafter known as “the Swartz defendants”) now move for summary judgment on the basis that the plaintiff failed to sustain an injury within the meaning of the serious injury threshold requirement of Section 5102 (d) of the Insurance Law as the result of the subject accident. In support of the motion, the Swartz defendants submit copies of the pleadings, the plaintiff’s deposition transcript, a certified copy of the police accident report, photographs of the plaintiff from her Facebook page, and the sworn medical reports of Dr. Edward Toriello, Dr. Richard Lechtenberg and Dr. Scott Coyne. At the Swartz defendants’ request, Dr. Toriello conducted an independent orthopedic examination of the plaintiff on March 10, 2014. Also at the Schwartz defendants’ request, Dr. Lechtenberg conducted an independent neurological examination of the plaintiff on March 14, 2014. Lastly, at the Swartz defendants’ request, Dr. Coyne performed an independent radiological review of the magnetic resonance images (“MRI”) films of the plaintiff’s lumbar spine taken on December 1, 2010, July 29, 2011, August 8, 2011, and November 26, 2011. Dr. Coyne also performed an independent radiological review of the MRI studies of the plaintiff’s cervical spine taken on July 22, 2011 and November 26, 2011. In addition, Dr. Coyne independently reviewed the MRI films of the plaintiff’s left knee taken on December 17, 2007, January 14, 2008 and April 9, 2008, and of the plaintiff’s right knee taken on February 25, 2008 and October 17, 2011. The defendant Akinson cross-moves for summary judgment on the same basis as the Swartz defendants, and relies on the same evidence submitted in the Swartz defendants’ motion for summary judgment.

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, *prima facie*, that the plaintiff did not sustain an injury within the meaning of Section 5102 (d) of the Insurance Law (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, 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 orthopedist, Dr. Toriello, and examining neurologist, Dr. Lechtenberg, each state in their medical reports that an examination of the plaintiff reveals full range of motion in her spine, wrists, and knees; that there are no pre-existing conditions affecting her recovery; that the strains she sustained to her spine as a result of the subject collision have resolved; and that she is capable of returning to her normal daily living activities without restrictions. In addition, Dr. Coyne, the defendants' examining radiologist, states in his sworn medical report that the plaintiff's MRI examinations of her spine and knees are normal for her age, and that there is no evidence of any osseous or soft tissue abnormality or other trauma causally related to the subject accident. Further, Dr. Coyne states that the degenerative changes that are seen in the MRI films of the plaintiff's cervical spine are normal for patients of the plaintiff's age, and are chronic and preexistent to the subject accident.

Therefore, the defendants have shifted the burden to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). 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]).

The plaintiff opposes the instant motions, arguing that the evidence submitted in opposition demonstrates 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. In opposition to the motion, the plaintiff submits her own affidavit, a certified copy of the police accident report, photographs of defendant Atkinson’s vehicle, and uncertified copies of the plaintiff’s medical records pertaining to the injuries at issue. In addition, the plaintiff submits the sworn medical reports of Dr. P. Warwick Green, Dr. David Fisher, and Dr. Steven Pinsky, and Dr. Salvatore Corso.

In opposition, the plaintiff has failed to raise a triable issue of fact to refute the defendants’ *prima facie* showing that she did not sustain a serious injury as a result of the accident (*see Gaddy v Eyster*, *supra*; *Licari v Elliott*, *supra*; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). The plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see Licari v Elliott*, *supra*; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the 90/180 category of the Insurance Law (*see Jack v Acapulco Car Serv., Inc.*, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). Significantly, no admissible proof has been offered by the plaintiff to establish that her alleged ailment goes beyond temporary discomfort. The subjective complaints of pain and impaired joint function expressed by the plaintiff during her deposition are insufficient to raise a triable issue of fact (*see Sheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Rovelo v Volcy*, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011], *Young v Russell*, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; *Sham v B&P Chimney Cleaning & Repair, Co., Inc.*, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]). Additionally, the plaintiff’s self-serving affidavit fails to establish that she sustained a serious injury as a result of the subject accident (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]).

Moreover, although a plaintiff may rely upon his or her own examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her *prima facie* case (see *Dietrich v Puff Cab Corp.*, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), in this instance, neither the Swartz defendants nor the Atkinson defendant submitted any of the uncertified medical reports that the plaintiff relied upon to attempt to raise a triable issue of fact as to whether she sustained an injury within the serious injury threshold requirement of Section 5102 (d) of the Insurance Law (see *Khan v Finchler*, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). More importantly, the medical reports are without probative value, since they are unaffirmed and, therefore, inadmissible (see *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). As a result, the numerous unsworn medical reports submitted by the plaintiff in opposition are not sufficient to defeat the defendants' motions for summary judgment (see *Shamsodeen v Kibong*, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; *Elfiky v Harris*, 301 AD2d 624, 754 NYS2d 59 [2d Dept 2003]).

Although the plaintiff is not required to proffer proof of a quantitative assessment contemporaneous with the accident (see *Perl v Meher*, *supra*; *Ortiz v Salahuddin*, 102 AD3d 617, 959 NYS2d 64 [1st Dept 2013]), she is required to offer proof in admissible form demonstrating that she sustained some form of impairment contemporaneous with the accident (see *Ostroll v Nargizian*, 97 AD3d 1076, 949 NYS2d 283 [3d Dept 2012]). The plaintiff has failed to submit any admissible evidence based upon a contemporaneous examination to demonstrate that she sustained significant range of motion limitation in the cervical and lumbar regions of her spine, or in her right knee (see *Joseph v A & H Livery*, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]; *Quagliarello v Paladino*, 40 AD3d 836, 835 NYS2d 724 [2d Dept 2007]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Significantly, the sworn medical reports of Dr. Pinsky, Dr. Green, and Dr. Corso, who each state that the plaintiff has reached maximum medical improvement, that she has entered a phase of "chronicity," and that the injuries she sustained to her spine as a result of the accident are permanent, are based only on recent examinations. Thus, their findings and opinions are insufficient to raise a triable issue of fact as to whether the plaintiff's alleged injuries existed for a sufficient period of time to constitute a serious injury under the limitations of use categories of the Insurance Law, since none of the doctors can offer an opinion as to the extent or duration of any alleged limitations (see *Estrella v Geico Ins. Co.*, 102 AD3d 730, 959 NYS2d 210, [2d Dept 2013]; *Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

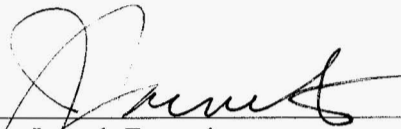
Further, despite the fact Dr. Fisher, the plaintiff's radiologist, states in his medical report that a review of the MRI examinations of the plaintiff's right knee taken before and after the accident reveal findings consistent with an exacerbation of a pre-existing condition, the plaintiff has failed to raise a triable issue of fact as to whether she sustained an exacerbation of a previously asymptomatic pre-existing condition to her right knee, since she did not seek any medical treatment for her right knee until approximately one year after the subject accident occurred (see *Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; *McIntosh v O'Brien*, 69 AD3d 585, 893 NYS2d 154 [2d Dept 2010]). In addition, although Dr. Green, an independent orthopedist, in his medical report concluded that "the right

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knee complaints represent an exacerbation of a pre-existing condition,” he failed to conduct any range of motion testing on the plaintiff’s right knee, and, thus, cannot opine as to causation (*see Perl v Meher, supra; Licari v Elliott, 57 NY2d 230, 455 NYS2d 570 [1982]*).

Finally, the plaintiff failed to submit any competent medical evidence demonstrating that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily living activities for not less than 90 days of the first 180 days subsequent to the accident (*see Valera v Singh, supra; Bamundo v Fiero, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; McLoud v Reyes, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]*). Accordingly the motion and cross-motion seeking to dismiss the complaint are granted.

Dated: May 27, 2015

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION