Karademir v Mirando-Jelinek
2015 NY Slip Op 32000(U)
September 29, 2015
Supreme Court, Suffolk County
Docket Number: 13-13114
Judge: John H. Rouse
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SHORT FORM ORDER

INDEX No. 13-13114
CAL. No. 14-01586MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 10-16-14 (#001)
MOTION DATE 1-28-15 (#002)
ADJ. DATE 3-11-15
Mot. Seq. # 001 - MG
002 - MD; CASEDISP

ENES KARADEMIR and SUKRAN KARADEMIR,

Plaintiffs,

- against -

D.A. MIRANDO-JELINEK and KEITH JELINEK,

Defendants.

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 19 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 20 - 30 ; Replying Affidavits and supporting papers 31 - 32 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendants D.A. Mirando-Jelinek and Keith Jelinek and the motion (#002) by plaintiffs Enes Karademir and Sukran Karademir hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants D.A. Mirando-Jelinek and Keith Jelinek seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by plaintiffs Enes Karademir and Sukran Karademir seeking summary judgment in their favor on the issue of liability is denied, as moot.

Plaintiffs Enes Karademir and Sukran Karademir commenced this action to recover damages for injuries allegedly sustained by Enes Karademir as a result of a motor vehicle accident that occurred on the Southern State Parkway, near the Bethpage State Parkway exit, in the Town of Oyster Bay on August 2, 2012. It is alleged that the accident occurred when the vehicle operated by plaintiff was struck in the

rear by the vehicle owned by defendants D.A. Mirando-Jelinek and Keith Jelinek and operated by defendant D.A. Mirando-Jelinek while it was stopped in the right lane of the westbound Southern State Parkway. By his bill of particulars, Enes Karademir alleges that he sustained various personal injuries as a result of the subject collision, including disc bulges at levels L2 through L5 and level C4/5, and disc herniations at levels C3 through C7.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by Enes Karademir fail to meet the serious injury threshold requirement of § 5102(d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, Enes Karademir's deposition transcript, and the sworn medical report of Dr. Gary Kelman. At defendants' request, Dr. Kelman conducted an independent orthopedic examination of Enes Karademir on June 9, 2014.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance Law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992])). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants, by submitting Enes Karademir's deposition transcript and competent medical evidence, established a prima face case that he did not sustain an injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject collision (*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]). Defendants' examining orthopedist, Dr. Kelman, states in his medical report that an examination of Enes Karademir reveals he has full range of motion in the cervical and lumbar regions of his spine, that there is no evidence of paraspinal muscle spasm or weakness upon palpation of the paraspinal muscles, and that the straight leg raising test and the foraminal compression test are negative. Dr. Kelman opines that the sprains sustained by Enes Karademir to his spine as a result of the subject accident have resolved. Dr. Kelman further states that Enes Karademir does not have any objective evidence of an orthopedic disability or permanency causally related to the subject accident, and that he is capable of performing his normal daily living activities and maintaining full employment without restriction.

Defendants, having made a prima facie showing that Enes Karademir did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiffs to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained by Enes Karademir (*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]).

Plaintiffs oppose the motion on the grounds that defendants failed to make a prima facie case that Enes Karademir did not sustain a serious injury, and that the evidence submitted in opposition demonstrates that Enes Karademir 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, plaintiffs submit a certified copy of the police accident report, unsworn copies of Enes Karademir's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Roger Kasendorf and Dr. Raju Mantena.

In opposition to defendants' prima facie showing, plaintiffs have failed to raise a triable issue of fact as to whether Enes Karademir sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). 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 casually 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 mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Mejia v Rose***, 35 AD3d 407, 407-408, 825 NYS2d 722 [2d Dept 2006]; *see* ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]). The medical evidence proffered by plaintiffs was insufficient to establish that Enes Karademir sustained a serious injury or to defeat defendants' prima facie showing (*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]; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). Significantly, no admissible proof has been offered by plaintiffs to establish that Enes Karademir alleged ailment goes beyond temporary discomfort. The subjective complaints of pain and impaired joint function expressed by Enes Karademir during his 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]).

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, the uncertified medical reports that plaintiffs relied upon to attempt to raise a triable issue of fact as to whether Enes Karademir sustained an injury within the serious injury threshold requirement of § 5102(d) of the Insurance Law were not submitted by

defendants in support of their motion for summary judgment (*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]).

While plaintiffs have submitted the sworn medical reports of Dr. Kasendorf and Dr. Mantena to establish that Enes Karademir sustained some form of impairment to his lumbar spine contemporaneous with the accident (*see* ***Ostroll v Nargizian***, 97 AD3d 1076, 949 NYS2d 283 [3d Dept 2012]), they have failed to submit any admissible evidence based upon a recent examination to show that Enes Karademir continues to have significant ranges of motion limitations in his spine as a result of the subject accident (*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]; ***Nesci v Romanelli***, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]). Recent examinations of a plaintiff are necessary to demonstrate that the plaintiff is alleging an injury that has an extended duration element as defined in Insurance Law § 5102(d) (*see e.g.* ***Medina-Santiago v Nojovits***, 5 AD3d 253, 773 NYS2d 294 [1st Dept 2004]). In particular, the one medical report for Enes Karademir, dated January 28, 2015, that plaintiffs submit, which may be construed as a recent examination, is without probative value, since it is unsigned, unaffirmed, leaves the Court to speculate as to who wrote it, and contradicts the prior sworn medical report of Dr. Kasendorf, who opines that Enes Karademir has full range of motion in his cervical spine (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]).

Lastly, plaintiffs failed to produce any objective medical evidence to substantiate the existence of an injury which limited Enes Karademir's 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, defendants' motion for summary judgment dismissing the complaint is granted.

Having determined that Enes Karademir failed to sustain an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law, plaintiffs' motion for summary judgment in their favor on the issue of liability is denied as moot.

Dated: 9/29/15

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION