Alam v DelValle
2015 NY Slip Op 32248(U)
November 9, 2015
Supreme Court, Suffolk County
Docket Number: 13-20164
Judge: John H. Rouse

SHORT FORM ORDER

INDEX No. 13-20164
CAL. No. 15-00035MV

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 3-3-15
ADJ. DATE 4-7-15
Mot. Seq. # 001 - MG; CASEDISP

SHARMIN ALAM,	:	MALLILO & GROSSMAN
	:	Attorney for Plaintiff
Plaintiff,	:	163-09 Northern Boulevard
	:	Flushing, New York 11358
-against-	:	
	:	RUSSO, APOZNANSKI & TAMBASCO
CHRISTOPHER DELVALLE,	:	Attorney for Defendant
	:	115 Broad Hollow Road, Suite 300
Defendant.	:	Melville, New York 11747

Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment in his favor is granted.

Plaintiff Sharmin Alam commenced this action to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on Statesmen Street in the Town of Babylon on March 28, 2013. The accident allegedly happened when plaintiff's vehicle, which was stopped for a stop sign at the intersection of Statesman Street and Sunrise Highway South Service Road, was struck in the rear by a vehicle driven by defendant Christopher. By her bills of particulars, plaintiff alleges she suffered various injuries and conditions due to the accident, including disc herniations at levels L1-L2, L3-L4, and L5-S1; disc bulges at levels T9-T10, L2-L3, and L4-L5; lumbar radiculopathy; internal derangement of the left and right shoulders; and sprains and strains in the cervical and lumbar regions.

Defendant now moves for summary judgment dismissing the complaint, arguing plaintiff is precluded under Insurance Law § 5014 from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant alleges the report of its medical expert establishes a prima facie case that plaintiff did not suffer a spinal injury within the "limitation of use" categories, and that there is no evidence substantiating the allegation she suffered

injury within the 90/180 category of Insurance Law § 5102 (d). Defendant's submissions in support of the motion include copies of the pleadings and the bills of particulars; medical records and reports of Dr. Craig Shalmi; the transcript of plaintiff's deposition testimony; and the affirmed report of Dr. Richard Weiss. At defendant's request, Dr. Weiss, a orthopedic surgeon, conducted an examination of plaintiff on September 11, 2014.

In opposition to the motion, plaintiff submit affirmations of Dr. Nunzio Saulle and Dr. Robert Diamond, as well as her own affidavit. Plaintiff contends that Dr. Weiss's report is insufficient to establish a prima facie case of entitlement to summary judgment. Alternatively, she argues that the medical proof included with the opposition papers raises a triable issue as to whether she suffered a spinal injury within the "limitation of use" categories of Insurance Law § 5102 (d). She also contends her affidavit, together with Dr. Saulle's affirmation, demonstrates an issue exists as to whether she suffered injury within the 90/180 category.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., 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 also may 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]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant's submissions are sufficient to meet his initial burden of establishing a prima facie case that plaintiff did not sustain a serious physical injury as a result of the subject accident (*see* ***Carfi v Forget***, 101 AD3d 1616, 956 NYS2d 721 [4th Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Ranford v Tim's Tree & Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Here, the affirmed report of Dr. Weiss states that plaintiff informed him she suffered pain in her neck, shoulders, back, right wrist and right hip after the accident. It states, in relevant part, that palpation of plaintiff's spine revealed no muscle spasms and no paraspinal muscle tenderness; that plaintiff exhibited normal muscle strength, reflexes and sensation in her upper and lower extremities; and that there was no evidence of muscle atrophy. Moreover, Dr. Weiss's report states that range of motion testing revealed normal joint function in plaintiff's cervical and lumbosacral regions, as well as in her shoulders and hips, and that diagnostic testing to assess for cervical radiculopathy, acute lumbar disc herniation, and rotator cuff tear were negative. Dr. Weiss diagnoses plaintiff as having suffered spinal sprains and strains, right leg sprain and shoulder sprains, and concludes there is no objective evidence that she suffers from any orthopedic disability.

Further, plaintiff's deposition testimony shows that, while she needed assistance to perform certain tasks at home, like helping her son shower, her injuries did not prevent her from performing "substantially all" of the material acts constituting her daily activities for at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Morgan v Beh***, 256 AD2d 752, 681 NYS2d 394 [3d Dept 1998]; *see also* ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). The Court notes that plaintiff testified that she was unemployed at that time of the accident, but resumed working, part-time, as a cashier for a 7-Eleven store in September 2013.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). 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]). A plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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; ***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***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff's submissions in opposition to the motion failed to raise a triable issue of fact. Initially, the Court notes there is no evidence in the record that plaintiff sought treatment for the alleged injuries to her shoulders. Plaintiff testified that she treated with two different physical therapy offices during the weeks after the subject accident, and then sought treatment at Perry Physical Medicine and Rehabilitation. In an affirmation dated March 31, 2015, plaintiff's treating physiatrist, Dr. Nunzio Saulle, a former employee of Perry Physical Medicine and Rehabilitation, states that he initially examined plaintiff on April 22, 2013; that he saw her for follow-up examinations on May 20, June 17, July 22, September 9, October 14, October 28, and December 30, 2013, and on February 10 and March 24, 2014; and that she received physical therapy treatments "at [his] office from April 23, 2013 through March 17, 2014." Dr. Saulle states, in part, that at the examination conducted on April 22, 2013, plaintiff exhibited 60 degrees of rotation in her cervical spine (80 degrees normal), and 80 degrees of flexion (90 degrees normal) and 30 degrees of lateral flexion (40 degrees normal) in her lumbar spine; no other in measurements of plaintiff's spinal function at that time are provided. He states that at a re-examination conducted in February 2015, plaintiff exhibited 65 degrees of flexion (90 degrees normal), 30 degrees of right lateral bending (40 degrees normal), and 35 degrees of left lateral bending (40 degrees normal). Dr. Saulle states plaintiff was "discharged" from physical therapy in March 2014, "as she reached maximum benefit and the condition was chronic." He further states plaintiff was seen by Dr. Shalmi, a pain management physician, for nerve pain in her leg, and underwent a lumbar epidural spinal injection procedure on April 7, 2014. He opines that plaintiff suffered herniations and bulges in her lumbar spine as a result of the March 2013 accident, and that such injuries "impair [her] from carrying out her normal daily activities, including standing for long periods, sitting, bending and lifting," and "have left her with a partial permanent disability in her lumbar spine."

The affirmation of Dr. Diamond states, in relevant part, that the MRI examination of plaintiff's lumbar spine performed in April 2013 revealed disc herniations at levels L1-L2, L3-L4 and L5-S1 and disc bulges at levels L2-L3 and L4-L5, as well as osteophytes and disc hydration loss at levels T9-T10, L3-L4 and L5-S1. It also states plaintiff suffers from lumbar scoliosis and kyphosis, yet it does not indicate there was any evidence of trauma or vertebral fractures. The Court notes the MRI report prepared in connection with such MRI examination was not included in the opposition papers.

Contrary to the assertions of plaintiff's counsel, Dr. Saulle's affirmation is insufficient to raise a triable issue of fact. Here, Dr. Saulle relied on unsworn medical reports, including reports prepared by Dr. Shalmi and an unsworn MRI report concerning plaintiff's lumbar spine, in reaching his conclusions that plaintiff suffers from permanent restrictions in her lumbar spine due to the accident (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]). Further, Dr. Saulle does not explain the substantial reduction in lumbar range of motion from April 2013, when plaintiff allegedly exhibited 80 degrees of flexion, to February 2015, when she allegedly exhibited 65 degrees of flexion (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***Carrillo v DiPaola***, 56 AD3d 712, 869 NYS2d 135 [2d Dept 2008]). Although he asserts the alleged injuries to her lumbar spine "impair" her from performing daily activities due to the herniations and bulges in her lumbar region, Dr. Saulle does not state that such injuries prevented plaintiff from performing substantially all of her normal activities for at least 90 of the 180 days immediately following

the accident (*see* ***Pryce v Nelson***, 124 AD2d 859, 2 NYS3d 214 [2d Dept 2015]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Additionally, Dr. Saulle's vague, conclusory statement that plaintiff was "discharged" from physical therapy in April 2014 because she reached her "maximum benefit" fails to satisfy plaintiff's burden of presenting a reasonable explanation for ceasing medical treatment shortly after the accident (*see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***Sibrizzi v Davis***, 7 AD3d 691, 776 NYS2d 843 [2d Dept 2004]). The Court notes such statement contradicts plaintiff's affidavit, in which she states she stopped physical therapy in September 2013,"because my no fault benefits were terminated on September 5, 2013 because I had reached the maximum benefit." Moreover, it contradicts plaintiff's deposition testimony that she stopped physical therapy treatment "not exactly a year" after the accident and sought treatment from Dr. Shalmi, because she was advised to seek care from a pain management specialist, and that she stopped treating with Dr. Shalmi after just one epidural injection, "because the pain became worse" after the procedure (*see* ***Gonzalez v A.V. Managing, Inc.***, 37 AD3d 175, 829 NYS2d 70 [1st Dept 2007]). And, while concluding plaintiff suffered from disc injuries due to the accident and that such injuries caused significant restrictions in lumbar joint function, Dr. Saulle does not address Dr. Diamond's findings that plaintiff suffers from lumbar scoliosis and kyphosis. Thus, Dr. Saulle's conclusion that plaintiff suffers significant restrictions in lumbar joint function due to disc injuries suffered in the subject accident is speculative and without probative value (*see* ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77; ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2d Dept 2009]).

Dr. Diamond's affirmation also is insufficient to defeat summary judgment. The mere existence of a herniated or bulging disc is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from the disc injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). Further, Dr. Diamond's report does not address the issue of whether the alleged disc herniations and bulges are causally related to the subject accident (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67). Finally, plaintiff's affidavit is insufficient to raise a triable issue of fact (*see* ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133; ***Lauretta v County of Suffolk***, 273 AD2d 204, 708 NYS2d 468 [2d Dept 2000]).

According, defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: NOVEMBER 9, 2015

JOHN H. ROUSE J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION