Beaucicaut v Zawada
2016 NY Slip Op 30340(U)
February 26, 2016
Supreme Court, Suffolk County
Docket Number: 17734/12
Judge: Paul J. Baisley

[* 1]

Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 17734/12
CALENDAR NO.: 201401741MV
MOTION DATE: 6/22/15
MOTION SEQ. NO.: 002 MOT D

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JEAN MAX BEAUCICAUT and JACQUELINE BEAUCICAUT,

Plaintiffs,

-against-

WALTER ZAWADA and MR. GLASS OF NORTHPORT, INC.,

Defendants.

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PLAINTIFFS' ATTORNEY:
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Upon the following papers numbered 1 to 28 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-28 ; Replying Affidavits and supporting papers 29-30 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) of defendants for summary judgment dismissing the complaint is granted to the extent set forth herein, and is otherwise denied.

Plaintiffs Jean Max Beaucicaut and Jacqueline Beaucicaut commenced this action to recover damages for personal injuries and property damages allegedly suffered as a result of a motor vehicle accident that occurred on Gibbs Pond Road in the Town of Smithtown on October 17, 2011. The accident allegedly happened when a vehicle driven by Jean Max Beaucicaut, in which Jacqueline Beaucicaut was riding as a passenger, was struck in the rear by a vehicle owned by defendant Mr. Glass of Northport, Inc. and driven by defendant Walter Zawada. By their bill of particulars, plaintiffs allege that Jean Max Beaucicaut sustained various injuries due to the collision, including bulging discs at levels L4-L5 and L5-S1, and cervical and lumbar sprains and strains. They also allege Jacqueline Beaucicaut sustained various injuries, including a herniated disc at level C3-C4, multiple bulging discs in her cervical spine, and sprains and strains in her right shoulder and cervical spine.

Defendants now move for summary judgment dismissing the complaint on the ground Insurance Law §5014 precludes plaintiffs from recovering for non-economic loss, as they did not suffer "serious injury" within the meaning of Insurance Law §5102 (d). More particularly, defendants assert plaintiffs' own medical records and deposition testimony demonstrate they did not suffer a serious injury as a result of the accident. They also assert plaintiffs' cessation of medical treatment just three months after the subject accident is fatal to their claim that they suffered injuries within the "limitation of use" category of Insurance Law §5102 (d). Defendants'

submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcripts of plaintiffs' deposition testimony, copies of the records of St. Catherine of Siena Hospital concerning plaintiffs' treatment in the emergency department on the day of the accident, and the sworn medical reports of Dr. Isaac Cohen. At defendants' request, Dr. Cohen, an orthopedic surgeon, conducted examinations of plaintiffs on May 29, 2014, and reviewed medical records related to the injuries alleged in this action.

Plaintiffs oppose the motion, arguing defendants failed to make a *prima facie* showing of entitlement to judgment in their favor. Alternatively, plaintiffs contend that medical evidence submitted in opposition raises triable issues as to whether they suffered injuries within the "limitation of use" categories or the 90/180 category. In opposition, plaintiffs submit affirmations and medical reports of Dr. Jean-Marie Francois; sworn medical reports of Dr. Paul Lerner; the sworn magnetic resonance imaging (MRI) reports of Dr. Harold Augenstein and Dr. Lise Corrente; and their own affidavits.

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]).

Defendants' submissions are sufficient to make a *prima facie* case that plaintiffs did not sustain serious physical injury as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Master v Boiakhtchion*, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [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]). The affirmed report of Dr. Cohen states that Jean Max Beaucicaut presented at the May 2014 examination complaining of back discomfort. The report states, in relevant part, that an examination of Jean Max Beaucicaut's cervical and lumbar regions revealed no evidence of spasm or trigger points on palpation; that he had normal motor strength, reflexes and sensation in his upper and lower extremities; and that there was no radiculopathy or muscle atrophy. Moreover, Dr. Cohen's report states that range of motion testing revealed normal joint function in Jean Max Beaucicaut's cervical and lumbar regions, and that the two disc bulges revealed during the MRI examination of the lumbar spine were degenerative in nature and preexisted the subject accident. Dr. Cohen opines that Jean Max Beaucicaut suffered only soft tissue injuries in the accident, that such injuries are resolved, and that his examination revealed no evidence of any functional disability.

Similarly, Dr. Cohen's affirmed report concerning Jacqueline Beaucicaut states that she presented at her examination with complaints of intermittent lower back pain. It states that range of motion testing revealed normal movement in the cervical and lumbosacral regions of Jacqueline Beaucicaut's spine, and that no trigger points or spasms were detected on palpation of such areas. It also states that an examination of her right shoulder showed normal joint function, and that orthopedic tests to assess impingement of the rotator cuff were negative. Dr. Cohen concludes that Jacqueline Beaucicaut suffered soft tissue injuries in her cervical spine and right shoulder due to the accident, and that such injuries have resolved. Further, Dr. Cohen's report states that while an MRI examination performed after the accident revealed a large disc herniation at level C3-C4, plaintiff did not report any complaints involving her cervical spine, and that his examination revealed no evidence of any functional disability in her neck or upper extremities.

Further, the deposition testimony demonstrates *prima facie* that neither Jean Max nor Jacqueline Beaucicaut has a 90/180 claim (*see Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; *Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180). Here, Jean Max Beaucicaut testified that he was unemployed at the time of the accident, but began a new job as a nursing assistant a few weeks after such accident. Jacqueline Beaucicaut, who also is employed as a nursing assistant, testified that she missed two days of work immediately after the accident, as well as between five and ten days intermittently, due to pain. In addition, the deposition testimony established that both plaintiffs stopped receiving medical treatment for their alleged spinal injuries approximately three months after the subject accident (*see Pommells v Perez*, 4 NY3d 556, 574, 797 NYS2d 380 [2005]).

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]). To prove significant physical limitation, 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]).

Contrary to the assertion by plaintiffs' counsel, the affirmed medical reports of Dr. Lerner are insufficient to defeat summary judgment. Significantly, Dr. Lerner, a neurologist, examined plaintiffs on only one occasion, 3½ years after the subject accident (*see Morris v Edmond*, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]). As to Jean Max Beaucicaut, the range of motion testing performed by Dr. Lerner in April 2015 revealed normal range of motion in the cervical joint function and only mild to moderate restrictions in lumbar joint function (*see McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; *Trotter v Hart*, 285 AD2d 772, 728 NYS2d 561 [3d Dept 2001]; *Decker v Stang*, 243 AD2d 1033, 663 NYS2d 448 [3d Dept 1997]; *Waldman v Dong Kook Chang*, 175 AD2d 204, 572 NYS2d 79 [2d Dept 1991]). Dr. Lerner diagnosed Jean Max Beaucicaut as suffering from a lumbar sprain, not a serious injury under the No-Fault Law (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; *Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]). Further, his report regarding Jean Max Beaucicaut lacks probative value, as he did not actually review the images produced during the MRI examination of plaintiff' lumbar spine, and he improperly relied on unsworn reports of other physicians in forming his diagnosis (*see Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; *Luna v Mann*, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]; *Fiorillo v Arriaza*, 52 AD3d 465, 859 NYS2d 699 [2d Dept 2008]). In addition, Dr. Lerner failed to address Dr. Cohen's finding that the MRI study of Jean Max Beaucicaut's lumbar spine revealed degenerative disc disease that predated the accident (*see Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; *Barry v Future Cab Corp.*, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Khan v Finchler*, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]).

As to Jacqueline Beaucicaut, Dr. Lerner's report states that range of motion testing revealed normal function in her lumbar spine and only mild restrictions in cervical joint function, with the exception of a finding of 60 degrees out of 80 degrees of left cervical rotation. Dr. Lerner's report concerning Jacqueline Beaucicaut sets forth a diagnosis of cervical sprain, and states she suffers from only a "moderate degree of impairment" due to the accident (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; *Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197). Moreover, it does not provide any range of motion findings or a qualitative assessment of

Jacqueline Beaucicaut's right shoulder (*see Jean v Labin-Natochenny*, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; *Wallace v Adam Rental Transp., Inc.*, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]; *Fiorillo v Arriaza*, 52 AD3d 465, 859 NYS2d 699). Additionally, as with Jean Max Beaucicaut, Dr. Lerner did not review the films from the MRI examination of Jacqueline Beaucicaut's cervical spine, and he relied on unsworn medical reports of other physicians in forming his opinion (*see Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651; *Luna v Mann*, 58 AD3d 699, 872 NYS2d 467; *Fiorillo v Arriaza*, 52 AD3d 465, 859 NYS2d 699).

The affirmations and reports of Dr. Francois, an internist who treated plaintiffs during the three months immediately after the accident, fail to raise a triable issue of fact. Dr. Francois' affirmations and reports do not contain recent findings of limitations in Jean Max Beaucicaut's spine or Jacqueline Beaucicaut's spine or right shoulder (*see Tinyanoff v Kuna*, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]; *Lively v Fernandez*, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623, 909 NYS2d 103). And though the reports prepared by Dr. Francois, dated November 29, 2011, indicate that range of motion testing of Jean Max Beaucicaut's lumbar spine performed within a week of the accident showed 40 degrees flexion and 30 degrees extension, and that range of motion testing of Jacqueline Beaucicaut's cervical spine performed at that same time showed 50 degrees of flexion and 40 degrees of extension, the reports do not compare those finding to the normal ranges of motion for such regions (*see Quintana v Area Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; *Mack v Valfort*, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]; *Morris v Edmond*, 48 AD3d 432, 850 NYS2d 641) or explain the medical treatment rendered to plaintiffs (*see Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]).

Moreover, as to Jacqueline Beaucicaut, Dr. Francois's affirmation is insufficient to explain the cessation of treatment just months after the accident (*see Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387). While Dr. Francois states that plaintiff stopped treatment because her No-Fault benefits were terminated and she did not have private insurance, Jacqueline Beaucicaut testified at her examination before trial that she had health insurance benefits through her employer at the time of the accident and that she paid for her treatments at Dr. Francois's facility, Freeport Medical, P.C. (*cf. Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 701 NYS2d 403 [1st Dept 2000]). Similarly, Jacqueline Beaucicaut's affidavit, which states she "did not have private insurance," fails to raise an issue as her cessation of treatment. Rather, such allegation, which directly contradicts her deposition testimony, is rejected as an attempt to raise a feigned issue of fact (*see Blochl v RT Long Is. Franchise, LLC*, 70 AD2d 993, 895 NYS2d 511 [2d Dept 2010]; *Shapiro v Munoz*, 28 AD3d 638, 813 NYS2d 755 [2d Dept 2006]; *Martin v Savage*, 299 AD2d 903, 750 NYS2d 684 [4th Dept 2002]; *cf. Francovig v Senekis Cab Corp.*, 41 AD3d 643, 838 NYS2d 635 [2d Dept 2007]).

The sworn MRI reports concerning Jean Max Beaucicaut's lumbar spine and Jacqueline Beaucicaut's cervical spine also are 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 Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d

245 [2d Dept 2010]). Also the MRI reports do not address the issue of whether the disc bulges in Jean Max Beaucicaut's lumbar region and the herniated disc in Jacqueline Beaucicaut's cervical region are causally related to the subject accident (*see Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]). Finally, plaintiffs failed to offer competent evidence that they sustained nonpermanent injuries that left them unable to perform their normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149).

Accordingly, defendants' motion for summary judgment in their favor based on plaintiffs' failure to meet the serious injury threshold is granted, and the first and second causes of action are dismissed. However, as defendants failed to address plaintiffs' claim for property damage, the third cause of action is severed and continued.

Dated: February 26, 2016

PAUL J. BAISLEY, JR.
J.S.C.