Horne v Beatrice
2017 NY Slip Op 30083(U)
January 12, 2017
Supreme Court, Suffolk County
Docket Number: 14-18370
Judge: Joseph A. Santorelli

SHORT FORM ORDER

INDEX No. 14-18370
CAL. No. 15-02169MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-25-16
ADJ. DATE 7-28-16
Mot. Seq. # 002 - MD

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CIBEL HORNE,

Plaintiff,

- against -

CARMINE A. BEATRICE,

Defendant.

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Upon the following papers numbered 1 to 69 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1- 63; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 64- 67 ; Replying Affidavits and supporting papers 68-69 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order granting summary judgment in her favor on the issue of serious injury is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff due to a motor vehicle accident which occurred on December 19, 2013. By order of the undersigned dated November 18, 2015, a motion by the plaintiff's for partial summary judgment in her favor on the issue of liability was granted. The plaintiff now moves for summary judgment in her favor on the issue of serious injury, arguing her injuries fall within the "limitation of use" categories and the 90/180 category of the No Fault Law. In support of the motion, the plaintiff submits copies of the pleadings, the transcript of her deposition testimony, her own affidavit, the affirmation of Dr. Neil Smith, the affirmed reports of Dr. David Benatar and Dr. Kumar Reddy, and certain medical records and magnetic resonance imaging (MRI) reports.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make 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, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To recover for non-economic loss resulting from an automobile accident under Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. Serious injury is defined by Insurance Law § 5102 (d) to include, as pertinent to the instant case, "permanent consequential limitation of use of a body organ or member," a "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 constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

A plaintiff moving for summary judgment on the issue of serious injury must establish, prima facie, that he or she sustained a serious injury within the meaning of Insurance Law § 5102 (d), and that such injury was causally related to the accident (***Nicholson v Bader***, 105 AD3d 719, 962 NYS2d 350 [2d Dept 2013]; ***Kapeleris v Riordan***, 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]). To establish a prima facie case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (***Broderick v Spaeth***, 241 AD2d 898, 660 NYS2d 232 [3d Dept], *lv denied*, 91 NY2d 805, 668 NYS2d 560 [1998]; ***Gaddy v Eyler***, 167 AD2d 67, 570 NYS2d 853, *aff'd*, 79 NY2d 955, 582 NYS2d 990 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]).

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, 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; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing him from performing substantially all of his material activities during 90 out of the first 180 days, plaintiff must show that "substantially all" of his usual activities were curtailed (***Gaddy*** v ***Eyler*** 167 AD2d 67, 570 NYS 2d 853). The "substantially all" standard requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]).

The affirmation of Dr. Smith states that the plaintiff presented to his office on December 20, 2013 with complaints of pain in her lower back, neck, left knee, and left shoulder. It states that the plaintiff had a pre-existing injury to her left shoulder, but that her pain increased after the subject accident. The Court notes the plaintiff testified at her deposition that she received treatment from Dr. Smith for an injury to her left shoulder that she suffered in 2011, and that she was scheduled to undergo an arthoscopic procedure on such shoulder prior to the accident. Dr. Smith's affirmation also states that "during her initial visits, there were several positive orthopedic findings," so he recommended that the plaintiff remain out of work from January 2, 2014 to April 1, 2014. Absent from the affirmation, however, is any indication that Dr. Smith performed any range of motion tests to determine the limitations in movement, if any, in her spine, left knee and left shoulder.

The plaintiff also submits two sworn reports from Dr. David Benatar, who conducted independent orthopedic examinations of her on May 20, 2014 and August 5, 2014. In his report dated May 20, 2014, Dr. Benatar states that he conducted range of motion tests using a goniometer and details the results of his findings. According to such report, the plaintiff's cervical flexion was "near full," and she was "nontender in the cervical paraspinals and trapezii." It states that the plaintiff was tender and spasmodic in the lumbar paraspinals, but that there was no evidence of motor or sensory deficits in the upper or lower extremities, and no objective evidence supporting a diagnosis of myelopathy. It also states there is "obviously a preexisting condition" in the plaintiff's left shoulder. Dr. Benatar further states in the May 2014 report that the plaintiff had a preexisting knee condition, and that such condition was exacerbated by the accident. Dr. Benatar states that the plaintiff suffered a "cervical sprain/strain, lumbar sprain/strain, left knee contusion/sprain with aggravation of degenerative condition, and left shoulder sprain/strain aggravating a preexisting condition" due to the subject accident. In his report dated August 5, 2014, Dr. Benatar states that an examination conducted that same day showed normal range of motion in the cervical and lumbar regions of the plaintiff's spine. Dr. Benetar states that the plaintiff's left knee contusion is resolved, and that the left shoulder sprain, which he opines is unrelated to the subject accident, requires surgery. He further states that there is "MRI evidence of lumbar disc pathology."

Three reports of Dr. Kumar Reddy, who performed independent orthopedic examinations of the plaintiff on February 9, 2015, June 8, 2015, and November 16, 2015, also are offered in support of the

motion. Dr. Reddy states that he examined the plaintiff's spine, knees and her shoulder. He opines that plaintiff's cervical spine sprain is resolving, that both knee sprains have resolved, and that a bulging lumbar disc revealed in an MRI test has resolved. Dr. Reddy states that the plaintiff's prognosis is fair and that "there is evidence of a mild partial disability."

In addition, the plaintiff submits MRI reports and her own affidavit. However, as the MRI reports are unsworn, they are not in admissible form (***Rush v Kwan Chiu***, 79 AD3d 1004, 914 NYS2d 234 [2d Dept 2010]; ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2d Dept 2009]). Even if considered, the reports are insufficient to establish the plaintiff suffered a serious injury, as the mere existence of a herniated or bulging disc, unaccompanied by objective evidence of the extent or degree of any resulting physical limitations and duration, is not evidence of a serious injury (***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS 2d 651 [2d Dept 2010]; ***Bravo v Rehman***, 28 AD3d 694, 814 NYS2d 225 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]).

The plaintiff's submissions fail to establish a prima facie case that she sustained a serious injury to her left knee, left shoulder or spine within the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). The affirmation of Dr. Smith is insufficient, as it is devoid of facts describing the "positive orthopedic findings" that he made during her examination after the subject accident. Furthermore, his reports dated September 24, 2013 and December 20, 2013 are not in admissible form, and, in any event, fail to establish any significant limitations in the plaintiff's joint function in the months following the accident. Likewise, the unsworn reports prepared by Dr. Smith for the various examinations he conducted during the period from February 28, 2014 through August 21, 2014 are not in admissible form. Even if they were properly sworn, such reports demonstrate that the plaintiff has normal range of motion in her lumbar spine and her left knee. Also there are no range of motion findings concerning the plaintiff's cervical spine establishing the allegations in her amended bill of particulars that she suffered a significant restriction to her cervical sprain as a result of the accident.

Moreover, as the plaintiff's alleged pain and injury to her left shoulder concededly were related to a preexisting condition, she has the burden of establishing that such condition was exacerbated by the subject accident rather than the result of the prior work-related accident (*see* ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]). The affirmation of Dr. Smith fails to address this issue. It is noted that Dr. Smith's unsworn report dated March 24, 2014 indicates that the plaintiff has normal range of motion in her left shoulder. Further, Dr. Reddy's vague statement that there is evidence of a "mild partial disability" is insufficient to establish that the plaintiff suffered a serious injury (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655). Finally, the plaintiff's submissions fail to establish, prima facie, that the nonpermanent injury that allegedly kept her out of work for three months following the accident was medically determined (***Serrano v Rachel's Car Serv., Inc.***, 142 AD3d 596, 36 NYS3d 514 [2d Dept 2016]). A showing that

the plaintiff missed more than 90 days of work is not determinative (***Amamedi v Archibala***, 70 AD3d 449, 895 NYS2d 42 [1st Dept 2010], *lv denied* 15 NY3d 713, 912 NYS2d 577 [2010]; ***Ortiz v Ash Leasing, Inc.***, 63 AD3d 556, 883 NYS2d 180 [1st Dept 2009]). Accordingly, the plaintiff's motion for summary judgment in her favor on the issue of serious injury is denied.

Dated: JAN 1 2 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION