Urbancik v Teitelbaum
2017 NY Slip Op 30232(U)
January 10, 2017
Supreme Court, Suffolk County
Docket Number: 14-8882
Judge: Joseph Farneti

[* 1]

PUBLISH

SHORT FORM ORDER

INDEX No. 14-8882

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-9-16 (001)
MOTION DATE 7-14-16 (002)
ADJ. DATE 10-6-16
Mot. Seq. # 001 - MD
002 - XMG; CASEDISP

----------X

LEANE N. URBANCIK,

Plaintiff,

- against -

NEAL P. TEITELBAUM,

Defendant.

----------X

STEIN & STEIN, P.C.
Attorney for Plaintiff
195 East Main Street
Smithtown, New York 11787

LAW OFFICES OF DENIS J. KENNEDY
Attorney for Defendant
1325 Franklin Avenue, Suite 340
Garden City, New York 11530

Upon the following papers numbered 1 to 57 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 28; Answering Affidavits and supporting papers 29 - 54; Replying Affidavits and supporting papers 55 - 57; Other ___; it is,

ORDERED that the motion by plaintiff Leane N. Urbancik for an Order granting partial summary judgment in her favor on the issue of liability is denied as moot; and it is further

ORDERED that the cross motion by defendant Neal P. Teitelbaum for an Order granting summary judgment in his favor dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Leane N. Urbancik as a result of a motor vehicle accident that occurred on October 26, 2011, on the Cross Island Expressway, about 600 feet north of Northern Boulevard, Queens, New York. The accident allegedly happened when a vehicle owned and operated by defendant Neal P. Teitelbaum failed to stop and struck plaintiff's stopping vehicle in the rear. By her verified complaint, as amplified by her verified bill of particulars, plaintiff alleges that, as a result of the accident, she suffered serious injuries, including

herniated and bulging discs of the cervical and lumbar spine. Defendant now moves for summary judgment dismissing the complaint, alleging that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support, defendant submits, among other things, transcripts of the parties' deposition testimony and the sworn medical report of orthopedic surgeon Dr. David J. Weissberg. At defendant's request, Dr. Weissberg conducted an examination of plaintiff and reviewed medical records related to the injuries alleged in this action.

Plaintiff opposes defendant's motion, arguing that, as a result of the accident, she sustained a "serious injury" as defined by the statute because she suffers from, among other things, bulging and herniated discs in her cervical and lumbar spine. Plaintiff further alleges that she suffers from deficits in range of motion in her cervical spine, which permanently and significantly limit its use. In opposition, plaintiff submits several documents, including her own affidavit, an affidavit of Dr. Michael Cole, her treating chiropractor, and her medical records relating to the subject accident. In addition, plaintiff moves for partial summary judgment on the issue of liability, arguing that defendant's negligence was the sole legal and proximate cause of the collision. In support, plaintiff submits several documents, including transcripts of the parties' deposition testimony. In reply, defendant submits an affirmation of his attorney.

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 seeking 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]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). 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***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute 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* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380, 384 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). In addition, a plaintiff who terminates therapeutic measures following an accident, while claiming "serious injury," must offer some reasonable explanation for having done so to prevail on his or her claim (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]; ***Pommells v Perez***, *supra*; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]).

Defendant's submissions establish a *prima facie* case that the alleged injuries to plaintiff's cervical and lumbar spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Defendant has presented competent medical evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation" or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). In his affirmed report, Dr. Weissberg states, in relevant part, that during his examination, plaintiff exhibited normal joint function during range of motion testing of her cervical and thoracolumbar spine, that no spasm or tenderness was detected on palpation of the spine, and that the reflexes and sensation in her upper and lower extremities were normal and intact. Although Dr. Weissberg noted mild to moderate limitation in flexion of plaintiff's cervical spine during his examination, this limitation was not significant (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). Dr. Weissberg diagnoses plaintiff as having suffered sprains of the cervical and thoracolumbar spine and concludes that these conditions have completely resolved. Further, through plaintiff's own deposition testimony that she was confined to bed and home for only a few days after the accident and that she was absent intermittently from her college classes afterwards,

defendant established, *prima facie*, that plaintiff did not suffer injury within the "90/180-days" category of the statute (*see* ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Finally, plaintiff's deposition testimony demonstrates that there was a 3-year gap in treatment for her injuries, from mid-2012 until April 2015, without reasonable explanation, although she testified that she has private health insurance (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, *supra*; ***Pommells v Perez***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***David v Caceres***, *supra*).

Defendant having met his initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Initially, the Court notes that the majority of the various medical records and reports submitted by plaintiff were not considered in the determination of this motion because, although affirmed as "true and accurate copies" of plaintiff's medical records by her treating physicians (*see* CPLR 4518 [c]), they are unsworn and not affirmed, and therefore, not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; ***McLoud v Reyes***, *supra*; ***Washington v Mendoza***, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]). Although the Court considered the sworn report of Dr. Cole, such report is insufficient to raise a triable issue of fact as to whether plaintiff suffers from a "permanent consequential" or "significant limitation" in the use of her cervical and lumbar spine. In his report, Dr. Cole concludes that plaintiff suffers from disc herniations and bulges in her cervical and lumbar spine as a result of the subject accident, and that she exhibited loss of range of motion in these areas during a recent examination (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, *supra*). However, Dr. Cole states that he reviewed plaintiff's radiological reports, namely from magnetic resonance imaging (MRI) and computed tomography (CT) imaging performed on plaintiff shortly after the accident. As these reports are not in admissible form, Dr. Cole's reliance upon them in rendering his opinion that the alleged injuries shown on the imaging films were caused by the accident and that these injuries have caused plaintiff's range of motion restrictions lacks probative value (*see* ***Vasquez v John Doe # 1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]). Further, as Dr. Cole did not begin rendering treatment to plaintiff until April 2015, about three and a half years after the accident, his report is insufficient to demonstrate the duration of the claimed range of motion limitations in plaintiff's cervical and lumbar spine, and that such limitations causally related to the subject accident (*see* ***Pryce v Nelson***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*).

In addition, plaintiff's affidavit fails to give an adequate explanation for her 3-year gap in treatment, as her contention that she had reached maximum therapeutic benefit from physical therapy is not supported by a healthcare provider's determination that continued treatment would be merely palliative in nature (*see* ***Pommells v Perez***, *supra*, at 577; ***Jean-Baptiste v Tobias***, 88 AD3d 962, 931 NYS2d 645 [2d Dept 2011]; ***Park v He Jung Lee***, 84 AD3d 904, 922 NYS2d 564 [2d Dept 2011]). Moreover, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether she sustained nonpermanent injuries that left her unable to perform substantially all her 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***, *supra*; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). As plaintiff's submissions are insufficient to demonstrate that these alleged limitations are causally related to the subject accident and fail to offer a reasonable explanation for her gap in treatment, she fails to rebut defendant's *prima facie* showing that she did not suffer a "serious injury" within the meaning of the statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Pryce v Nelson***, *supra*). Finally, as defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted, plaintiff's cross motion is denied, as moot.

In light of the foregoing, defendant's motion for summary judgment is granted and plaintiff's cross motion for summary judgment is denied.

Dated: January 10, 2017

GRANTED
JAN 10 2017
JUDITH A. PASCALE
Clerk of Suffolk County

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION