

Delp v Guerra
2017 NY Slip Op 30735(U)
April 4, 2017
Supreme Court, Suffolk County
Docket Number: 14-2209
Judge: Joseph C. Pastorella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 14-2209CAL. No. 16-00971MV

PY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-8-16 (002)
MOTION DATE 9-14-16 (003)
ADJ. DATE 11-2-16
Mot. Seq. # 002 - MG; CASEDISP
003 - MD

-----X
JOHN DELP AND LYNN DELP,

Plaintiffs,

- against -

DANILO GUERRA,

Defendant.
-----X

CELLINO & BARNES P.C.
Attorney for Plaintiffs
600 Old Country Road, Suite 500
Garden City, New York 11530

RUSSO & TAMBASCO
Attorney for Defendant
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers numbered 1 to 52 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 22; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 23 - 42; 43 - 48; Replying Affidavits and supporting papers 49 - 52; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendant for summary judgment in his favor on the issue of liability is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when their vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on Great Neck Road in Copiague, New York, on June 27, 2012. At the time of the accident, plaintiff Lynn Delp was a passenger in a vehicle operated by plaintiff John Delp. By the bill of particulars, plaintiffs allege that, as a result of the subject accident, John Delp sustained various serious injuries and conditions, including herniated discs at levels L4-L5 and L5-S1; bulging discs at levels C3-C4 and C5-C6; cervical, thoracic, lumbar and right shoulder sprain/strain; and bilateral carpal tunnel syndrome. Lynn Delp allegedly sustained various injuries and conditions, including herniated discs at levels C4-C5 and L4-L5; bulging discs at levels C3-C4, C5-C6, and L5-S1; and right lumbar radiculopathy.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a “serious injury” as defined in Insurance Law §5102 (d).

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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295). 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 a specific percentage of the loss of range of motion must be ascribed, 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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955; *Akhtar v Santos*, 57 AD3d 593). The defendant may satisfy this burden by submitting the plaintiff’s deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672; *Faroze v Kamran*, 22 AD3d 458). The failure to make such 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, 853; *Boone v New York City Tr. Auth.*, 263 AD2d 463).

Here, defendant made a prima facie showing that John Delp did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of moving defendant’s

examining physician (see *Bailey v Islam*, 99 AD3d 633; *Sierra v Gonzalez First Limo*, 71 AD3d 864; *Staff v Yshua*, 59 AD3d 614). On April 28, 2015, approximately two years and 10 months after the subject accident, moving defendant's examining orthopedist, Dr. Howard Levin, examined John Delp and performed certain orthopedic and neurological tests, including Waddell's sign, the straight leg raising test, apprehension test, Tinel's test, Phalen's test, and Finkelstein's test. Dr. Levin found that all the test results were negative or normal, and that there was no spasm or tenderness in John Delp's cervical, thoracic and lumbar regions. Dr. Levin also performed range of motion testing on John Delp's cervical, thoracic and lumbar spin, shoulders and wrists, using a goniometer to measure his joint movement. Dr. Levin found that John Delp exhibited normal joint function in his cervical, thoracic and lumbar regions, shoulders and wrists. Dr. Levin opined that John Delp had no orthopedic disability at the time of the examination and that he is capable of performing all the tasks of daily living and maintaining full employment (see *Willis v New York City Tr. Auth.*, 14 AD3d 696).

Further, at his deposition, John Delp testified that at the scene of the accident, he had a pain in his back and chest. He testified that following the accident, he was not confined to bed or home. When asked, "[d]id [he] lose any time from work because of the accident," he answered "a day here and there." He testified that three days after the subject accident, he went to a chiropractor and received treatment for his neck and back for about a year. He also testified that there is no activity that he is unable to perform because of the accident. John Delp's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (see *Burns v McCabe*, 17 AD3d 1111; *Curry v Velez*, 243 AD2d 442).

Thus, defendant met his initial burden of establishing that John Delp did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (see *Gonzalez v Green*, 24 AD3d 939).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see *Gaddy v Eyler*, *supra*). 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; *Mejia v DeRose*, 35 AD3d 407; *Laruffa v Yui Ming Lau*, 32 AD3d 996; *Cerisier v Thibiu*, 29 AD3d 507). 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*, *supra*; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Rovelo v Volcy*, 83 AD3d 1034). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, *supra*; *Cebon v Tuncoglu*, *supra*). 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; see *Vasquez v John Doe #1*, 73 AD3d 1033; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712).

Plaintiffs oppose the branch of the motion relating to John Delp, arguing defendant's expert report is insufficient to meet his burden on the motion. Plaintiffs also argue that the medical reports prepared by John Delp's treating physician and chiropractor raise a triable issue as to whether John Delp suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiffs submit, *inter alia*, the sworn medical reports of Dr. Nadine Beach, a chiropractor, the numerous medical reports of Beach Chiropractic, three sworn MRI reports performed on John Delp's lumbar and cervical regions and brain of Dr. Harold Tice, a radiologist, three sworn medical reports of Dr. David Rabinovici, a neurologist, and the sworn medical report of Dr. Keith Williams, a chiropractor.

Two MRI reports, dated August 12, 2012, of Dr. Tice indicate that John Delp had bulging and herniated discs in his cervical and lumbar regions. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see Pierson v Edwards*, 77 AD3d 642). The MRI report, dated August 15, 2012, of Dr. Tice indicates that there is fluid signal intensity focus adjacent to the left temporomandibular joint. However, Dr. Tice failed to proffer an opinion as to the cause of the disc and brain pathology noted in his reports (*see Schecker v Brown*, 91 AD3d 751; *Sorto v Morales*, 55 AD3d 718; *Collins v Stone*, 8 AD3d 321).

Three sworn reports, dated July 30, 2012, October 8, 2012 and January 21, 2013, of Dr. Rabinovici are insufficient to defeat summary judgment. Here, Dr. Rabinovici's initial report sets forth John Delp's complaints and the findings obtained during his neurological examination on July 30, 2012. However, Dr. Rabinovici offered no range of motion testing results in his reports (*see Barrett v Jeannot*, 18 AD3d 679).

The sworn reports of Dr. Beach are also insufficient to defeat summary judgment. Here, Dr. Beach's July 2, 2012 report set forth John Delp's initial complaints and the findings, including the limitations in his lumbar spine joint function obtained during his initial examination at Beach Chiropractic on July 2, 2012. Although Dr. Beach failed to state how long he treated John Delp, the last day of the service provided by Beach Chiropractic was April 10, 2013, according to copies of health insurance claim forms filed by Beach Chiropractic. In his March 15, 2014 report, Dr. Beach stated that on March 15, 2014, he performed range of motion testing on John Delp's lumbar spine and compared the findings to the initial range of motion testing results performed on July 2, 2012. However, the Court finds that the findings in the March 15, 2014 report were not legible. In any event, even assuming that the findings were legible, Dr. Beach's reports failed to adequately explain a gap in treatment from April 2013 through March 2014 and, thus, are insufficient to raise a triable issue of fact as to whether John Delp sustained a serious injury (*see Pommells v Perez*, *supra*; *Valdez v Benjamin*, 101 AD3d 622; *Osgood v Martes*, 39 AD3d 516; *Li v Woo Sung Yun*, 27 AD3d 624).

The sworn report, dated October 3, 2016, of Dr. Williams is insufficient to defeat summary judgment. Dr. Williams's report set forth John Delp's recent complaints and the findings, including the limitations in his cervical and thoraco-lumbar spine joint function, obtained during an examination performed on October 3, 2016. However, Dr. Williams's report failed to adequately explain a gap in treatment and, thus, is insufficient to raise a triable issue of fact as to whether John Delp sustained a serious injury.

In addition, plaintiffs failed to offer competent evidence that John Delp sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950; *Rivera v Bushwick Ridgewood Props., Inc.*, *supra*).

Likewise, defendant made a prima facie showing that Lynn Delp did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of moving defendant's examining physician (*see Bailey v Islam*, *supra*; *Sierra v Gonzalez First Limo*, *supra*; *Staff v Yshua*, *supra*). On April 28, 2015, Dr. Levin examined Lynn Delp and performed certain orthopedic and neurological tests, including Waddell's sign, the straight leg raising test, apprehension test, Tinel's test, Phalen's test, and Finkelstein's test. Dr. Levin found that all the test results were negative or normal, and that there was no spasm or tenderness in Lynn Delp's cervical, thoracic and lumbar regions. Dr. Levin also performed range of motion testing on Lynn Delp's cervical, thoracic and lumbar spin, shoulders and wrists, using a goniometer to measure her joint movement. Dr. Levin found that Lynn Delp exhibited normal joint function in her cervical, thoracic and lumbar regions, shoulders and wrists. Dr. Levin opined that Lynn Delp had no orthopedic disability at the time of the examination and that she is capable of performing all the tasks of daily living and maintaining full employment (*see Willis v New York City Tr. Auth.*, *supra*).

Further, at her deposition, Lynn Delp testified that following the accident, she was not confined to bed or home. At the time of the accident, she was a school teacher. When asked, "[d]id [she] lose any time from work," she answered "[i]t was summer vacation." She returned to school in September. She testified that the day after the subject accident, she went to a chiropractor and received treatment for about a year. She also testified that there is no activity that she is unable to perform because of the accident. Lynn Delp's deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, *supra*; *Curry v Velez*, *supra*).

Thus, defendant met his initial burden of establishing that Lynn Delp did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, *supra*).

Plaintiffs oppose the motion, arguing defendant's expert report is insufficient to meet his burden on the motion as to Lynn Delp's claim. Plaintiffs also argue that the medical reports prepared by Lynn Delp's treating physician and chiropractor raise a triable issue as to whether Lynn Delp suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiffs submit, *inter alia*, the sworn medical reports of Dr. Beach, the numerous medical reports of Beach Chiropractic, two sworn MRI reports performed on Lynn Delp's lumbar and cervical regions of Dr. Tice, two sworn medical reports of Dr. Rabinovici, a sworn affirmation of Dr. Patrick Prepetit, a physician, and the sworn medical report of Dr. Williams.

Two MRI reports, dated August 12, 2012, of Dr. Tice indicate that Lynn Delp had bulging and herniated discs in her cervical and lumbar region. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (see *Pierson v Edwards*, *supra*). Moreover, Dr. Tice failed to proffer an opinion as to the cause of the disc pathology noted in his reports (see *Scheker v Brown*, *supra*; *Sorto v Morales*, *supra*; *Collins v Stone*, *supra*).

Two sworn reports, dated July 30, 2012 and August 13, 2012, of Dr. Rabinovici are insufficient to defeat summary judgment. Here, Dr. Rabinovici's July 30, 2012 report sets forth Lynn Delp's complaints and the findings obtained, during his neurological examination on July 30, 2012. However, Dr. Rabinovici offered no range of motion testing results in either of his reports (see *Barrett v Jeannot*, *supra*). The sworn affirmation of Dr. Prepetit is insufficient to defeat summary judgment.¹ Here, in his affirmation and attached charts with the affirmation, Dr. Prepetit failed to demonstrate that he performed any range of motion testing on Lynn Delp's cervical or lumbar regions (see *id.*).

Further, the sworn reports of Dr. Beach are insufficient to defeat summary judgment. Here, Dr. Beach's June 29, 2012 report set forth Lynn Delp's initial complaints and the findings, including the limitations in her cervical and lumbar spine joint function obtained during her initial examination at Beach Chiropractic on June 29, 2012. However, the Court finds that the findings were not legible. Although Dr. Beach failed to state how long he treated Lynn Delp, the last day of the service provided by Beach Chiropractic was January 25, 2013, according to copies of health insurance claim forms filed by Beach Chiropractic. In his March 13, 2014 report, Dr. Beach stated that on March 13, 2014, he performed range of motion testing on Lynn Delp's cervical and lumbar spins and compared the findings to the initial range of motion testing results performed on June 29, 2012. Dr. Beach found that Lynn Delp had range of motion restriction in her cervical and lumbar regions in both reports. However, Dr. Beach's reports failed to adequately explain a gap in treatment from January 2013 through March 2014 and, thus, are insufficient to raise a triable issue of fact as to whether Lynn Delp sustained a serious injury (see *Pommells v Perez*, *supra*; *Valdez v Benjamin*, *supra*; *Osgood v Martes*, *supra*; *Li v Woo Sung Yun*, *supra*).

The sworn report, dated October 3, 2016, of Dr. Williams is insufficient to defeat summary judgment. Dr. Williams's report set forth Lynn Delp's recent complaints and the findings, including the limitations in her cervical and thoraco-lumbar spine joint function obtained, during an examination performed on October 3, 2016. However, Dr. Williams's report also failed to adequately explain a gap in treatment and, thus, is insufficient to raise a triable issue of fact as to whether Lynn Delp sustained a serious injury. Moreover, the unaffirmed medical reports of Spears Acupuncture, submitted by plaintiffs, are insufficient to raise a triable issue of fact, as they are not in admissible form.

In addition, plaintiffs failed to offer competent evidence that Lynn Delp sustained nonpermanent injuries that left her unable to perform her normal daily activities for at least 90 of the 180 days

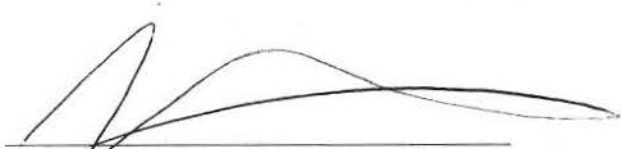
¹ No date is provided on the copy of the affirmation provided to the court.

Delp v Guerra
Index No. 14-2209
Page 7

immediately following the accident (*see John v Linden, supra; Il Chung Lim v Chrabaszcz, supra; Rivera v Bushwick Ridgewood Props., Inc., supra*).

Thus, the motion by defendant for summary judgment based on plaintiffs' failure to meet the serious injury threshold is granted, and the complaint is dismissed. Accordingly, defendant's motion for summary judgment in his favor on the issue of liability is denied, as moot.

Dated: April 4, 2017



HON. JOSEPH C. PASTORESSA, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION