Consalvo v Tarantola
2017 NY Slip Op 31006(U)
March 22, 2017
Supreme Court, Suffolk County
Docket Number: 15-2950
Judge: William G. Ford

[* 1]

SHORT FORM ORDER

INDEX No. 15-2950
CAL. No. 16-00684MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 9-16-16
ADJ. DATE 10-20-16
Mot. Seq. # 002 MG;CASEDISP

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JAYMEE L. CONSALVO,

Plaintiff,

- against -

ANTHONY S. TARANTOLA and SAMANTHA N. TARANTOLA,

Defendants.

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Attorney for Plaintiff:
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 20 - 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 by defendants for an order granting summary judgment in their favor is **GRANTED.**

Plaintiff Jaymee Consalvo commenced this action to recover damages for personal injuries she allegedly suffered as a result of a motor vehicle accident that occurred in the Town of Brookhaven on January 9, 2014. The accident allegedly happened when a vehicle driven by defendant Samantha Tarantola and owned by defendant Anthony Tarantola collided with the rear of plaintiff's vehicle as it was stopped at a stop sign. By her bill of particulars, plaintiff alleges she suffered various injuries and conditions due to the collision, including a disc herniation at level L5-S1, disc bulges at levels L3-L4 and L4-L5, lumbar sprain, and lumbar radiculopathy.

Defendants now move for summary judgment dismissing the complaint on the ground plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d). More

specifically, defendants argue that their expert's sworn medical report establishes a prima facie case that plaintiff did not suffer injury within the "limitation of use" categories, and that plaintiff's own deposition testimony demonstrates she did not sustain injury within the 90/180 category. They also assert that plaintiff cannot establish her claim of significant limitation of use in spinal function, as she suffered from multilevel degenerative disc disease in her lumbar region at the time of the accident. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars; a transcript of plaintiff's deposition testimony; certain medical records prepared by plaintiff's physicians in 2007 and 2010 in connection with treatment for lumbar disc herniations and bulges; and the sworn medical report of Dr. Richard Lechtenberg. At defendants' request, Dr. Lechtenberg, a neurologist, conducted a neurologic examination of plaintiff in February 2016 and reviewed various medical records related to her alleged injuries.

Plaintiff opposes the motion, arguing that Dr. Lechtenberg's report is insufficient to meet defendants' burden of proof, as he failed to address the finding of a disc bulge at level L5-S1 indenting the thecal sac herniation contained in a magnetic resonance imaging (MRI) report concerning plaintiff's lumbar spine prepared by Dr. Hamid Alam in April 2014 or the finding of radiculopathy contained in a electromyopathy (EMG)/nerve conduction velocity (NCV) report concerning plaintiff's lumbar paraspinal muscles and lower extremities prepared by Dr David Besser in May 2014. In opposition, plaintiff submits an affirmed MRI report of Dr. Alam and copies of certain medical records and reports obtained from the medical office of her treating neurologist.

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 unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see* ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***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 establish a prima facie case that plaintiff did not sustain a serious physical injury as a result of the subject accident (*see* ***Santucci v Sousa***, 131 AD3d 1036, 16 NYS3d 469 [2d Dept 2015]; ***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]). Dr. Lechtenberg's report states that plaintiff presented at the February 2016 examination with various complaints, including persistent lower back pain and discomfort when walking, bending, sitting and lifting. It states, in relevant part, that range of motion testing of plaintiff's lumbar region revealed 60 degrees of forward flexion (60 degrees normal), 25 degrees of extension (25 degrees normal), and 25 degrees of lateral rotation (25 degrees normal). The report also states that plaintiff walked with a normal gait, that her sensation was intact, and that the straight leg raise test was normal. Dr. Lechtenberg concludes that plaintiff suffered a sprain in her lumbar spine as a result of the subject accident, that the sprain has resolved, and that she has no permanent neurologic impairment or disability due to the accident. He further asserts "[t]here were no objective, clinical, neurologic deficits" observed during the examination correlating with the finding of a disc bulge at level L5-S1. Further, MRI reports concerning plaintiff's lumbar spine prepared in 2007 and 2010 included with the moving papers show plaintiff suffered from pre-existing degenerative disc disease in that region (*see* ***Puerto v Omholt***, 17 AD3d 650, 794 NYS2d 117 [2d Dept 2005]).

Moreover, plaintiff's deposition testimony that she did not miss any work, as she was unemployed at the time of the accident, and that she was not confined to her bed or home for any period of time due to her alleged injuries establishes a prima facie case that she did not sustain injury within the 90/180 category of Insurance Law § 5012 (d) (*see* ***Canelo v Genolg Tr., Inc.***, 82 AD3d 584, 919 NYS2d 27 [1st Dept 2011]; ***Houston v Hofmann***, 75 AD3d 1046, 906 NYS2d 190 [3d Dept 2010]; *see also* ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]). It is noted that plaintiff also testified she was treated for back pain and had been diagnosed as suffering from disc bulges and spinal stenosis years before the subject motor

vehicle accident.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). Plaintiff failed to meet this burden, as he did not present any evidence substantiating his claim that he suffered a serious injury in the subject accident. 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]).

Plaintiff failed to meet this burden, as she did not present any admissible evidence substantiating her claim that she suffered a serious injury in the subject accident. Here, the unsworn medical reports prepared by various physicians who treated plaintiff in 2014, which were obtained from the medical office of South Shore Neurologic and were submitted with a "medical record certification" signed by Colleen LaRocca of such office, are without probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]). Contrary to the assertion by plaintiff's counsel, the mere listing in a sworn report or affidavit of the medical reports and records reviewed by a defendant's medical expert in connection with his or her examination of the plaintiff does not relieve the plaintiff of the requirement of submitting medical reports and records prepared by his or her treating medical providers in admissible form, or providing an excuse for failing to do so, when opposing a motion for summary judgment (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *cf.* ***Azam v New York City Health & Hosps. Corp.***, 98 AD3d 595, 949 NYS2d 722 [2d Dept 2012]; ***Zarate v McDonald***, 31 AD3d 632, 819 NYS2d 288 [2d Dept 2006]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]). In any event, such records are insufficient to defeat summary judgment, as they merely state that plaintiff presented for treatment of radicular pain and was diagnosed as suffering from chronic radiculopathy, spinal stenosis and partial epilepsy. Absent from such medical records, which were prepared during the period from May 2014 to January 2015, are objective findings of range of motion restrictions in plaintiff's lumbar region or conclusions as to the cause of plaintiff's radicular pain (*see* ***Pryce v***

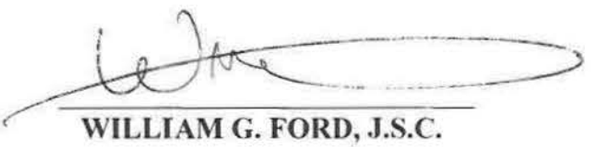
Nelson, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). While the Court of Appeals has held that contemporaneous quantitative range of motion measurements are not a prerequisite to recovery under the "limitation of use" categories, it also recognized "[a] contemporaneous doctor's report is important to proof of causation" (***Perl v Meher***, 18 NY3d 208, 218, 936 NYS2d 655; *see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]; *cf.* ***Pantojas v Lajara Auto. Corp.***, 117 AD3d 577, 986 NYS2d 87 [1st Dept 2014]).

The MRI report prepared by Dr. Hamid Alam also fails to raise a triable issue of fact. 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 AD3d 726 [2d Dept 2010]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]). Moreover, the MRI report fails to address the issue of whether the alleged disc injuries in the lumbar region are causally related to the subject accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689).

In addition, plaintiff's submissions in opposition to the motion fail to address defendants' evidence that the herniated and bulging discs in her lumbar spine are due to degenerative disc disease (*see* ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Lagois v Public Adm'r of Suffolk County***, 303 AD2d 644, 760 NYS2d 52 [2d Dept 2003]). Finally, plaintiff's self-serving affidavit, which states that she continues to suffer lower back pain as a result of the accident and that such pain is "entirely different" from the back pain she experienced in the past, is insufficient to raise a triable issue as to whether she sustained a serious injury as a result of the accident (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]).

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

Dated: March 22, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION