Hernandez v Vargas
2017 NY Slip Op 31139(U)
May 24, 2017
Supreme Court, Suffolk County
Docket Number: 13-30955
Judge: Daniel Martin

SHORT FORM ORDER

INDEX No. 13-30955
CAL. No. 16-01306MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 12-22-16
ADJ. DATE 3-14-17
Mot. Seq. # 003 - MG; CASEDISP

SANTIAGO HERNANDEZ,

Plaintiff,

- against -

BRAHYAN C. VARGAS and ROOSEVELTH VARGAS,

Defendants.

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers 16 - 17; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when his vehicle collided with a vehicle owned by defendant Roosevelth Vargas and operated by defendant Brahyan Vargas. The accident allegedly occurred in front of the premises located at 126 Hilltop Drive in Brentwood, New York, on August 25, 2012, at approximately 11:00 a.m. By the bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained various injuries and conditions including herniated discs at levels C3-C4, C4-C5, C5-C6, L4-L5, T9-T10, and T11-T12, bulging discs at levels T3-T4, L2-L3, L3-L4, and L5-S1, cervical and lumbar radiculopathy, and right shoulder impingement and partial rotator cuff tear.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff 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, 727 NYS2d 378 [2001]). 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, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). 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, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). 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, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of moving defendants' examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On February 8, 2016, approximately three years and five months after the subject accident, moving defendants' examining orthopedist, Dr. Gary Kelman, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test, the straight leg raising test, O'Brien's test, Tinel's sign, and Phalen's test. Dr. Kelman found that

all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical, thoracic and lumbar regions. Dr. Kelman also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, shoulders, wrists and ankles, using a goniometer to measure his joint movement. Dr. Kelman found that plaintiff exhibited normal joint function in his cervical, thoracic and lumbar regions, shoulders, wrists and ankles. Dr. Kelman opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that on the night of the subject accident, he went to an emergency room and was discharged on the same day. He testified that following the accident, he was confined to bed and home for a week, that he missed a week from work, and that he returned to work with the limited duties for the first week. A week after the accident, he saw a chiropractor and received physical therapy and chiropractic treatment for approximately a year. Within six months of the accident, he saw Dr. Durant, a shoulder specialist, who treated him five times. He also testified that there is no activity that he is unable to perform because of the accident. Plaintiff'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, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants met their initial burden of establishing that plaintiff 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, 805 NYS2d 450 [3d Dept 2005]).

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, 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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***, *supra*; ***Cebron 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, 797 NYS2d 380 [2005]; *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]).

Plaintiff opposes the motion, arguing moving defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians, Dr. Scott Roteman and Dr. Durant, raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn medical report, dated June 12, 2013, of Dr. Roteman, the numerous unsworn medical reports of Eastern Island Medial Care, two unsworn MRI reports performed on plaintiff's right shoulder and right ankle of Dr. Mark Decker, a radiologist, an unsworn MRI report performed on plaintiff's right ankle of Dr. Meir Zombek, a radiologist, two unsworn medical reports, dated November 30, 2012, of Dr. Roteman, the sworn medical reports, dated November 7, 2012 and November 28, 2012 of Dr. Durant.

The sworn medical report, dated June 12, 2013, of Dr. Roteman is insufficient to defeat summary judgment. Here, Dr. Roteman's report set forth plaintiff's complaints and the findings, including the limitations in his cervical, thoracic and lumbar regions and right shoulder joint function measured during range of motion testing performed on June 12, 2013. Although Dr. Roteman found that plaintiff had range of motion restriction in his cervical and lumbar regions and right shoulder, as he did not examine plaintiff until approximately nine months after the accident, such findings are insufficient to raise an issue of fact as to whether such restrictions are causally related to the accident (*see* ***Linton v Gonzales***, 110 AD3d 534, 974 NYS2d 350 [1st Dept 2013]; ***Rosa v Mejia***, 95 AD3d 402, 943 NYS2d 470 [1st Dept 2012]). Moreover, Dr. Roteman failed to state how he measured the joint function in plaintiff's spine and right shoulder. The Court can only assume that Dr. Roteman's tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]). Moreover, two unsworn medical reports, dated November 30, 2012, of Dr. Roteman, unsworn medical reports of Eastern Island Medial Care, two unsworn MRI reports of Dr. Decker, and an unsworn MRI report of Dr. Zombek, submitted by plaintiff, are insufficient to raise a triable issue of fact, as they are not in admissible form.

The two sworn medical reports of Dr. Durant are also insufficient to defeat summary judgment. On November 7, 2012, approximately two months after the subject accident, Dr. Durant performed range of motion testing on plaintiff's lumbar region and shoulders. Although Dr. Durant recorded range of motion measurements, expressed in numerical degrees, namely 160 degrees of flexion in the right shoulder and 50 degrees of flexion in the lumbar region, he failed to compare these findings to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Tinyanoff v Kuna***, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]). Moreover, Dr. Durant failed to state how he measured the joint function in plaintiff's spine and right shoulder. On November 28, 2012, Dr. Durant performed range of motion testing on plaintiff's right shoulder. He failed to compare his findings of flexion and abduction to the normal range of motion and failed to state how he measured the joint function in the right shoulder. Plaintiff failed to provide any other sworn medical evidence concerning his condition contemporaneous to the accident (*see* ***Perl v Meher***, *supra*; ***Camilo v Villa Livery Corp.***, 118 AD3d 586, 987 NYS2d 164 [1st Dept 2014]).

Finally, plaintiff failed to offer competent evidence that he 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, 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.***, *supra*).

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

Dated: MAY 24, 2017

A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**