Braun v Smith
2017 NY Slip Op 32681(U)
October 13, 2017
Supreme Court, Suffolk County
Docket Number: 14-24802
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 14-24802
CAL. No. 16-01714MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-19-17 (002)
MOTION DATE 3-10-17 (003)
ADJ. DATE 3-31-17
Mot. Seq. # 002 - MotD
003 - MD

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SYLVIA BRAUN,

Plaintiff,

- against -

MORGAN SMITH and FEDELE MONTELEONE,

Defendants.

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GOIDEL & SIEGEL, LLP
Attorney for Plaintiff
56 West 45th Street 3rd Floor
New York, New York 10036

LAW OFFICE OF FRANK J. LAURINO
Attorney for Defendant Smith
999 Stewart Avenue
Bethpage, New York 11747

MARTYN, TOHER MARTYN & ROSSI
Attorney for Defendant Monteleone
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Fedele Monteleone, dated December 13, 2016, and by the plaintiff, dated January 27, 2017, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated March 24, 2017, and by the defendant Morgan Smith, dated January 5, 2107 and March 2, 2017, and supporting papers; (4) Reply Affirmation by the defendant Fedele Monteleone, dated March 28, 2017 and April 18, 2017, and by the plaintiff, dated march 27, 2017, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#002) by defendant Fedele Monteleone for summary judgment dismissing the complaint and the motion (#003) by plaintiff Sylvia Braun for summary judgment in her favor on the issue of negligence hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Fedele Monteleone for, inter alia, summary judgment dismissing the complaint on the ground that plaintiff's injuries fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d) is decided as follows; and it is further

ORDERED that the motion by plaintiff Sylvia Braun, incorrectly denominated as a cross motion, for summary judgment in her favor on the issue of negligence is denied, as moot.

Plaintiff Sylvia Braun commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Middle Country Road and Randall Road in the Town of Brookhaven on July 3, 2012. It is alleged that the accident occurred when the vehicle operated and owned by defendant Morgan Smith struck the rear of the vehicle operated by plaintiff while she was attempting to make a left turn onto Randall Road. As a result of the impact between the Braun and Smith vehicles, the Braun vehicle was propelled forward and struck by the vehicle owned and operated by defendant Fedele Monteleone. At the time of the accident, plaintiff and defendant Smith were traveling eastbound on Middle Country Road and defendant Monteleone was traveling westbound on Midddle Country Road. By her bill of particulars, plaintiff alleges that she sustained various personal injuries, including bilateral shoulder injury radiculopathy in the left upper extremity and right lower extremity, and trochanteric bursitis.

Defendant Monteleone moves for summary judgment on the basis that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Section 5102 (d) of the Insurance Law as a result of the subject accident. In the alternative, defendant also asserts that he is not liable for the subject accident occurrence. In support of the motion, defendant Monteleone submits copies of the pleadings, the parties' deposition transcripts, photographs of the parties' vehicles following the accident, an uncertified copy of a witness statement by defendant Smith, an affidavit from nonparty witness John Davis, and a certified copy of the police accident report. In addition, defendant Monteleone submits the affirmed medical report of Dr. Teresa Habacker. At defendant Monteleone's request, Dr. Habacker conducted an independent orthopedic examination of plaintiff on December 21, 2015.

Plaintiff opposes the motion on the grounds that defendant Monteleone failed to meet his prima facie burden showing that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In addition, plaintiff asserts that there are material triable issues of fact as to defendant Monteleone's liability in the subject accident's happening. In opposition, plaintiff submits the affirmation of Dr. Nabil Farakh, the affirmation of Dr. Kioomars Moosazadeh, and uncertified copies of her medical records concerning the injuries at issue. Defendant Smith supports the branch of defendant Monteleone's motion for summary judgment on the grounds that plaintiff injuries do not meet the serious injury threshold requirement of Section 5102(d) of the Insurance Law. Defendant Smith

opposes the branch of defendant Monteleone's motion for dismissal on the grounds that he is not liable for the subject accident's occurrence, arguing that there are triable issues of fact regarding defendant Monteleone's contributory negligence regarding the accident's happening.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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 under 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.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d

706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant Monteleone, by submitting plaintiff's deposition transcript and competent medical evidence, established a prima face case that plaintiff did not sustain an injury within the meaning of § 5102 (d) of the Insurance Law as a result of the subject collision (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Habacker, states in her medical report that plaintiff has full range of motion in her spine, shoulders, hips, and knees; that although there was some evidence of tenderness upon palpation of the paraspinal muscles there was no evidence of muscle spasm or atrophy; and that there was no evidence of erythema, deformity or edema in her shoulders, hips, or knees. Dr. Habacker states that plaintiff has normal muscle strength, that she has normal ambulation and good muscle tone, and that she does have antalgia. Dr. Habacker further states that plaintiff's prognosis is good, that she does not have an orthopedic disability, and that she is capable of performing her normal daily activities of living without restrictions, including performing her regular duties at work.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that plaintiff suffered injuries under the "90/180" category under Insurance Law § 5102 (d) (*see* ***Dutka v Odierno***, 145 AD3d 661, 43 NYS3d 409 [2d Dept 2016]; ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]). Plaintiff testified at an examination before trial that following the accident she missed approximately four weeks from her part-time employment with Good Shepherd Hospice as a community field nurse, but that she returned to work in the same capacity and performing the same duties as she did prior to the subject accident.

Thus, defendant Monteleone shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the motion, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury within the limitations of use or 90/180 categories of the Insurance Law as a result of the subject accident (*see* ***John v Linden***, *supra*; ***Inzalaco v Consalvo***, 115 AD3d 807, 982 NYS2d 165 [2d Dept 2014]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was causally related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by the plaintiff was insufficient to establish a serious injury or to defeat the Gotham Area defendants' prima facie showing. While plaintiff has submitted the medical reports of Dr. Nabil Farakh, who conducted a contemporaneous examination of plaintiff, which showed that plaintiff sustained significant range of motion limitations in her spine, shoulders, right knee and right hip, and Dr. Kioomars Moosazadeh, who conducted a recent examination of plaintiff, and found that such limitations to her spine, shoulder, right knee, and right hip still were present, neither doctor's findings raises a triable issue of fact as to whether she sustained a serious injury (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Mack v Valfort***, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). Dr. Farakah's only treated plaintiff approximately three times and the last treatment occurred on September 24, 2012. Yet, she concludes that plaintiff's injuries are permanent and causally related to the subject accident, despite plaintiff testifying that she injured her right hip "from overuse from kickboxing" approximately five or six years prior to the subject accident and received injections to that hip. Dr. Moosazadeh's conclusion that plaintiff's injuries have resulted in objective range of motion limitations that are significant and permanent is speculative, since he only examined plaintiff once on March 19, 2017, and he failed to set forth plaintiff's treating history, or to support his assessment with objective medical evidence (*compare* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2014]; ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; ***Gould v Ombrellino***, 57 AD3d 608, 869 NYS2d 567 [2d Dept 2008]). Consequently, neither Dr. Farakh nor Dr. Moosazadeh are able to substantiate the extent or degree of the limitation to plaintiff's spine, shoulders, right knee, and right hip caused by the alleged injuries and the duration thereof (see ***Caliendo v Ellington***, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011])

Finally, plaintiff failed to submit competent medical evidence demonstrating that the injuries she sustained prevented her from performing substantially all of their usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept

2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Accordingly, the branch of defendant Monteleone's motion for summary judgment dismissing plaintiff's complaint on the grounds that she failed to sustain an injury within the meaning of Section 5102 (d) of the Insurance Law is granted.

Having determined that plaintiff's injuries failed to meet the serious injury threshold requirement of Insurance Law § 5102 (d), the branch of defendant Monteleone's motion for summary judgment on the issue of negligence and plaintiff's motion for summary judgment in her favor on the issue of negligence are denied, as moot.

Dated: October 13, 2017

PETER H. MAYER, J.S.C.