Bassi v Greco
2017 NY Slip Op 32682(U)
October 3, 2017
Supreme Court, Suffolk County
Docket Number: 13-28273
Judge: Arthur G. Pitts
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SHORT FORM ORDER

COPY

INDEX No. 13-28273
CAL. No. 16-01662MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-9-17
ADJ. DATE 4-13-17
Mot. Seq. # 005 - MG; CASEDISP

BALJINDER BASSI and HARNINDER BASSI,

Plaintiffs,

- against -

ANTHONY GRECO and JOSEPH C. GRECO, SR.,

Defendants.

JOHN A. MULLAN, ESQ.
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Upon the following papers numbered 1 to 26 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 20-24 ; Replying Affidavits and supporting papers 25-26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Anthony Greco and Joseph Greco, Sr. for summary judgment dismissing the complaint is granted.

Plaintiff Baljinder Bassi commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Park Avenue and Main Street in the Town of Huntington on October 11, 2012. It is alleged that the accident occurred when the vehicle operated by defendant Anthony Greco and owned by defendant Joseph Greco, Sr. struck the rear of the vehicle owned and operated by plaintiff while it was stopped at a red traffic light on northbound Park Avenue. By his bill of particulars, plaintiff alleges that he sustained various personal injuries, including herniated disc at level C5-C6, cervical radiculopathy, and aggravation of pre-existing cervical and right shoulder conditions. Plaintiff's wife, Harninder Bassi, also instituted a derivative cause of action for loss of consortium.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not meet the serious injuries threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, the parties' deposition transcripts, uncertified copies of plaintiff's medical records, a copy of the certified field report of the motor vehicle accident, the sworn medical reports of Dr. Andrew Bazos, Dr. Gary Kelman, and Dr. Mark Zuckerman, and the affidavit of Dr. Ana Barbir. Dr. Kelman conducted an independent orthopedic examination of plaintiff on April 27, 2014. Dr. Zuckerman conducted an independent neurological examination of plaintiff on April 27, 2015. On February 19, 2013 and April 19, 2013,

Dr. Bazos performed an orthopedic causality review of plaintiff's injuries and clinical assessment for the cervical fusion surgery that plaintiff underwent on January 30, 2013. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition, plaintiff submits uncertified copies of his own medical records regarding the injuries at issue, and the affidavit of Dr. Franco Cerabona.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

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."

In order to recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***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]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Dufel v Green***, *supra*). 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]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Angeramni***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

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 defendant has met this burden, 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***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). 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, defendants established their prima facie entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(a) as a result of the subject accident by submitting the affirmed medical reports of their examining physicians and a copy of plaintiff's deposition transcript (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Young Hwan Park v Orellana***, 49 AD3d 721, 854 NYS2d 447 [2d Dept 2008]; ***Cooper v LI Constr., Inc.***, 45 AD3d 623, 845 NYS2d 454 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Kelman, and examining neurologist, Dr. Zuckerman, based upon physical examinations of plaintiff and reviews of his medical records and magnetic resonance imaging ("MRI") films of the cervical spine and right shoulder, found that the limitations observed in plaintiff's cervical spine were due to a pre-existing history of cervical spondylosis with noted degenerative changes and a prior sports-related injury to his right shoulder, and that such limitations were not causally related to the subject accident (*see* ***McArthur v Act Limo, Inc.***, 93 Ad3d 567, 940 NYS2d 616 [1st Dept 2012]). Additionally, Dr. Kelman and Dr. Zuckerman each state that plaintiff's loss of range of motion in his cervical spine is subsequent to the cervical spine surgery he underwent on January 30, 2013, which was performed not as a result of any injuries he sustained in the subject accident, but due to chronic and pre-existing degenerative changes in the cervical region of his spine (*see* ***Marcellus v Forvarp***, 101 AD3d 482, 956 NYS2d 13 [1st Dept 2012]). The reports of Dr. Kelman and Dr. Zuckerman further opine that the cervical spine sprain/strain and right shoulder strain/sprain plaintiff sustained as a result of the subject accident have resolved, and that he does not have an orthopedic or neurologic disability causally related to the subject accident.

Also, the affirmed causality review reports by Dr. Bazos submitted by defendants in support of the motion demonstrated that plaintiff's cervical spine injuries and subsequent cervical fusion surgery were not established as being causally related to the subject accident (*see* ***Santos v Manga***, 152 AD3d 416, 58 NYS3d 354 [1st Dept 2017]; ***Alvarez v NYLL Mgt. Ltd.***, 120 AD3d 1043, 993 NYS2d 1 [1st Dept 2014]). Indeed, Dr. Bazos states that an examination of plaintiff's operative report and other documentation, including the MRI films of his cervical spine, indicates that there was longstanding, chronic, and pre-existent degenerative changes in plaintiff's cervical region "as opposed to acute traumatic injury," and that the documentation does not evince a causal relationship between the need for cervical surgery and the subject motor vehicle accident.

Furthermore, plaintiff's deposition testimony establishes that he did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified that following the accident he did not miss any time from his employment as an engineer, that his work schedule did not change following the subject accident, and that he does not have any currently scheduled medical treatments for the injuries he sustained in the subject accident.

Therefore, defendants shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he 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, the evidence submitted by plaintiff failed to raise a triable issue of fact as to whether he sustained an injury to the cervical region of his spine within the limitations of use categories of the Insurance Law (*see* ***Perl v Meher***, 74 AD3d 930, 902 NYS2d 632 [2d Dept 2010]; ***Krerimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). 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 casually 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]). Of significance, plaintiff has failed to submit any evidence establishing that he sustained significant range of motion limitations in the cervical region of his spine based upon either a contemporaneous or recent examination (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 26 NYS3d 188 [2d Dept 2016]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]). Thus, plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]).

Moreover, plaintiff's submission of the report of his spinal surgeon, Dr. Franco Cerabona, which states that plaintiff sustained a traumatic disc herniation with neurological compression that required surgical intervention, that he has significant limitations to his cervical spine, that there is a likelihood he will develop "adjacent segment degeneration," and that such limitations are permanent, is without probative value, since the report is in inadmissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]). Thus, plaintiff's failure to submit Dr. Cerabona's report in admissible form requires that it be excluded from consideration (*see* ***Sanchez v Romano***, 292 AD2d 202, 739 NYS2d 368 [1st Dept 2002]; ***Ramos v Dekhtyar***, 301 AD2d 428, 753 NYS2d 489 [1st Dept 2003]).

In any event, even if the Court were to consider the report of Dr. Cerabona, it fails to raise a triable issue of fact on the question of serious injury (*see* ***Rodriguez v Grant***, 71 AD3d 659, 896 NYS2d 243 [2d Dept 2010]; ***O'Shea v Johnson***, 49 AD3d 614, 853 NYS2d 608 [2d Dept 2008]; ***Doran v Sequino***, 17 AD3d 626, 795 NYS2d 245 [2d Dept 2005]), since it fails to demonstrate that plaintiff's cervical fusion surgery was not successful and that any lingering symptoms are nothing more than minor or slight impairments (*see* ***Licari v Elliot***, *supra*; ***Baker v Thorpe***, 43 AD3d 535, 840 NYS2d 834 [3d Dept 2007]; ***Palmer v Moulton***, 16 AD3d 933, 792 NYS2d 653 [3d Dept 2005]). In fact, Dr. Cerabona states in his report that during his final treatment of plaintiff on July 1, 2013, plaintiff's weakness in his right upper extremity basically was resolved, that he "cleared" him to return to playing soccer, and that there was good position of the implants with good bone growth.

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: Riverhead, New York
October 3, 2017

ARTHUR G. PITTS, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION