O'Neill v Buckland
2017 NY Slip Op 32804(U)
September 25, 2017
Supreme Court, Suffolk County
Docket Number: 15-603054
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 15-603054
CAL. No. 16-02163MV

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-7-17
ADJ. DATE 4-14-17
Mot. Seq. # 001 - MG; CASEDISP

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LAURA O'NEILL and JOHN O'NEILL,

Plaintiffs,

- against -

JAMES R. BUCKLAND,

Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated December 15, 2016, and supporting papers; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated April 14, 2017, and supporting papers; (4) Reply Affirmation by the defendant, dated April 26, 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 by defendant James Buckland for summary judgment dismissing the complaint is granted.

Plaintiff Laura O'Neill commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on the Southern State Parkway, near its Straight Path Road exit (Exit 36), in the Town of Babylon on November 26, 2012. It is alleged that the accident occurred when the vehicle operated and owned by defendant James Buckland struck the rear of the vehicle operated and owned by plaintiff while it was stopped in the left lane of the westbound Southern State Parkway. By her bill of particulars, plaintiff alleges to have sustained various personal injuries, including disc bulges at level L3 through S1, a disc protrusion at level L4-L5, and myofascial

syndrome of the lumbar and thoracic spine. Plaintiff's husband, John O'Neill, instituted a derivative cause of action for loss of consortium.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff failed to meet the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Teresa Schully-Habacker. Dr. Schully-Habacker conducted an independent orthopedic examination of plaintiff on June 16, 2016. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden establishing 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 opposition to the motion, plaintiff submits the affidavit of Tina Elderbaum and unsworn copies of her medical reports pertaining to the injuries at issue.

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 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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."

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***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant established, prima facie, through the submission of the affirmed medical report of his examining physician, and plaintiff's deposition transcript, that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Gaddy v Eyler***, *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]). Defendant's examining orthopedist, Dr. Schully-Hacker, states in her medical report that plaintiff has full range of motion in her spine, that there was no evidence of spasm upon palpation of the paraspinal muscles, that her normal muscle tone was normal, that the straight leg raising test was negative, bilaterally, that there was no evidence of erythema or edema in her upper or lower extremities, and that her muscle strength was 5/5. Dr. Schully-Habacker opines that the sprains/strains that plaintiff sustained to her spine as a result of the subject accident have resolved, that her prognosis is good, and that she does not have any disability causally related to the subject accident.

Furthermore, plaintiff's deposition testimony establishes that she 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 at an examination before trial that following the subject accident the only days she missed from her employment as a speech language pathologist with the Massapequa School District occurred when she had to have tests performed, school recesses, and for issues unrelated to the subject accident, and that she was never confined to her bed or her home as a result of the injuries she sustained in the subject accident.

Therefore, the burden shifted 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]). 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, plaintiff submitted the sworn affidavit of Tina Elderbaum, her physical therapist, along with her unsworn physical therapy reports, which purports to demonstrate that she exhibited significant range of motion limitations in her spine contemporaneous with the subject accident, and that, based upon a recent examination, plaintiff continues to have such limitations. Since a physical therapist "cannot by definition diagnose or make prognoses and is incompetent to determine the permanency or duration of a physical limitation" (***Delaney v Lewis***, 256 AD2d 895, 897, 682 NYS2d 270 [3d Dept 1998]; *see* ***Howard v Espinosa***, 70 AD3d 1091, 898 NYS2d 267 [3d Dept 2010]; ***Brandt-Miller v McArdle***, 21 AD3d 1152, 801 NYS2d 834 [3d Dept 2005]; ***Tornatore v Haggerty***, 307 AD2d 522, 763 NYS2d 344 [3d Dept 2003]), Ms. Elderbaum's affidavit failed to raise a triable issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Thus, plaintiff has failed to submit competent medical evidence on the issue of whether she sustained a serious injury under the Insurance Law (*see* ***Henchy v VAS Espress Corp.***, 115 AD3d 478, 981 NYS2d 418 [1st Dept 2014]; ***Brush v Levy***, 303 AD2d 536, 756 NYS2d 456 [2d Dept 2003]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her 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, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: September 25, 2017

PETER H. MAYER, J.S.C.