

<b>Williams v County of Suffolk</b>
2017 NY Slip Op 33500(U)
August 24, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 15-611269
Judge: Thomas F. Whelan
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SHORT FORM ORDER

ORIGINAL

INDEX No. 15-611269  
CAL. No. 16-02252MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 5-24-17  
ADJ. DATE 7-7-17  
Mot. Seq. #001 - MG; CASEDISP

ERIC D. WILLIAMS,

Plaintiff,

- against -

COUNTY OF SUFFOLK, SUFFOLK COUNTY  
TRANSIT BUS and WES EDAN an employee  
of SUFFOLK COUNTY TRANSIT BUS,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers by defendants, uploaded April 12, 2017; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers by plaintiff, uploaded June 30, 2017; Replying Affidavits and supporting papers by defendants, uploaded July 12, 2017; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant County of Suffolk for summary judgment in its favor is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Eric Williams as a result of falling on a public bus on November 17, 2014 on County Road 58 in Riverhead, New York. The bus was owned by defendant County of Suffolk, sued herein as County of Suffolk, Suffolk County Transit Bus, and Wes Edan. Plaintiff alleges that, as a result of the incident, he suffered serious injuries including disc herniations, a partial tear of the proximal patellar tendon in his right knee, hypothesia, radiculopathy, and myofascitis.

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Defendant seeks an order granting summary judgment dismissing plaintiff's complaint on the grounds that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings; the transcripts of plaintiff's 50-h and deposition testimony; the medical reports of Dr. Noah Finkel, Dr. Raymond Shebairo, and Dr. Peter Chiu; the correspondence of chiropractor Christopher Ferrante; and various medical records. In opposition, plaintiff argues that issues of fact remain as to whether he suffered a significant limitation in the joint function of his cervical spine, lumbar spine, and right knee. Plaintiff submits, in opposition, a bill of particulars, various medical records, and the medical report of Dr. Daniel Korman.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

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 seeking 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, prima facie, 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]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see Brite v Miller*, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see Gaddy v Eyler*, *supra*; *Zuckerman v City of New York*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*).

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A plaintiff claiming injury within the “permanent consequential limitation” or “significant limitation” of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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.*, *supra*; *McEachin v City of New York*, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a “serious injury” within the meaning of the statute (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Likewise, the mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; *Simanovskiy v Barbaro*, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; *Little v Locoh*, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; *Larson v Delgado*, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the “90/180-days” category of “serious injury” must prove the injury is “medically determined,” meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*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]; *Beltran v Powow Limo, Inc.*, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a “great extent rather than some slight curtailment” (*see Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming “serious injury,” must offer some reasonable explanation for having done so to prevail on his or her claim (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 976 NYS2d 1 [2013]; *Pommells v Perez*, *supra*; *David v Caceres*, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]).

Defendant’s submissions established a prima facie case that the alleged injuries to plaintiff’s cervical spine, lumbar spine, and right knee do not constitute “serious injuries” within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). Through plaintiff’s own deposition testimony that he missed only five days of work, defendant established, prima facie, that plaintiff did not suffer injury within the “90/180-days” category of the statute (*see Pryce v Nelson*, *supra*; *Strenk v Rodas*, *supra*; *Beltran v Powow Limo, Inc.*,

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*supra*). Additionally, defendant has presented competent evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see Perl v Meher, supra; Schilling v Labrador, supra; Rovelo v Volcy, supra*).

Although the affirmed medical report of Dr. Finkel states, in relevant part, that plaintiff exhibited normal joint function of his cervical and lumbar spine, it fails to set forth the objective tests utilized to measure the joint function, such as through the use of a goniometer or inclinometer (*see Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]; *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 [2d Dept 2001]; *Junco v Ranzi*, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]; *see also Bayk v Martini*, 142 AD3d 484, 35 NYS3d 923 [2d Dept 2016]; *Schilling v Labrador, supra; Durand v Urick*, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]). Dr. Shebairo's report also fails to set forth the objective tests utilized to measure the joint function of plaintiff's spine and knee (*see Bayk v Martini, supra; Schilling v Labrador, supra; Durand v Urick, supra*). The purported medical report of Christopher Ferrante, a chiropractor, is not in admissible form, as it is not sworn to before a notary (*see Paul-Austin v McPherson*, 91 AD3d 924, 937 NYS2d 627 [2d Dept 2012]; *Vejselovski v McErlean*, 87 AD3d 1062, 929 NYS2d 760 [2d Dept 2011]; *Casco v Cocchiola*, 62 AD3d 640, 878 NYS2d 409 [2d Dept 2009]; *Rabolt v Park, supra; Sanchez v Romano*, 292 AD2d 202, 739 NYS2d 368 [1st Dept 2002]). Similarly, the purported medical report of Dr. Petraco is not in admissible form as it is not sworn to or affirmed (*see CPLR 2106; Pagano v Kingsbury, supra*).

However, the affirmed medical report of Dr. Chiu is sufficient to establish defendants's prima facie entitlement to summary judgment. Dr. Chiu's report states, in relevant part, that during his examination, plaintiff exhibited normal joint function in his cervical spine, lumbar spine, and right knee. Dr. Chiu also stated that no spasm or muscle atrophy was detected, but plaintiff exhibited mild tenderness upon palpation of his cervical and lumbar spine. Dr. Chiu diagnosed plaintiff as having suffered sprains to his cervical spine, lumbar spine, and right knee, and concludes that such sprains have resolved (*see Brite v Miller, supra; Damas v Valdes, supra; Pagano v Kingsbury, supra*). In addition, plaintiff's testimony demonstrates that he ceased treatment for his injuries approximately nine months after the subject accident without reasonable explanation (*see Pommells v Perez, supra; Beltran v Powow Limo, Inc., supra*).

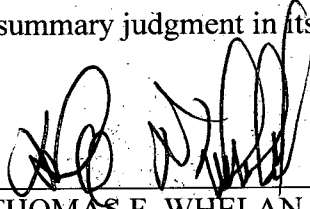
Defendant having met his initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra; Pagano v Kingsbury, supra*). Plaintiff failed to raise an issue of fact as to whether his injuries constitute "serious injuries." Although Dr. Korman found that plaintiff exhibited significant range of motion restrictions in his cervical and lumbar spine, his report fails to provide an explanation for plaintiff's gap in treatment from the cessation of treatment in August 2015 to his reexamination in June 2017 (*see Ramkumar v Grand Style Transp. Enters. Inc., supra; Pommells v Perez, supra; Strok v Chez*, 57 AD3d 887, 869 NYS2d 345 [2d Dept 2008]; *Sapienza v Ruggiero*, 57 AD3d 643, 869 NYS2d 192 [2d Dept 2008]; *Wei-San Hsu v Briscoe Protective Systems, Inc.*, 43 AD3d 916, 842 NYS2d 455 [2d Dept 2007]; *Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]). As plaintiff's submissions fail to offer a reasonable explanation for his cessation of treatment, he fails to

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rebut defendant's prima facie showing that he did not suffer a "serious injury" within the meaning of the statute (see Insurance Law § 5102 [d]; *Perl v Meher, supra*; *Pommells v Perez, supra*; *Pryce v Nelson, supra*).

Accordingly, defendant County of Suffolk's motion for summary judgment in its favor is granted.

Dated: 8/24/17

  
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THOMAS F. WHELAN, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION