

Jones-Marcus v Costa
2017 NY Slip Op 33513(U)
August 23, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 15-612428
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

ORIGINAL

INDEX No. 15-612428
CAL. No. 16-01987MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

E-FILE

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-8-17
ADJ. DATE 5-11-17
Mot. Seq. # 001 - MG; CASEDISP

-----X

JUSTINE JONES-MARCUS,

Plaintiff,

- against -

CHRIS E. COSTA,

Defendant.

-----X

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Upon the following papers read on these e-filed motion for summary judgment; Notice of Motions/Order to Show Cause and supporting papers dated December 8, 2016; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers dated May 3, 2017; Replying Affidavits and supporting papers dated May 4, 2017; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle was rear-ended by a vehicle owned and operated by defendant. The accident allegedly occurred on August 28, 2015, at approximately between 5:00 p.m. and 5:30 p.m., on Jerusalem Avenue in Wantagh, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated discs at levels C3-C4, C4-C5 and C5-C6, bulging discs in the cervical and lumbar regions, cervical sprain, and lumbosacral strain.

Defendant moves 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

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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, defendant 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 defendant's 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 August 9, 2016, approximately one year after the subject accident, defendant's examining neurologist, Dr. Richard Lechtenberg, examined plaintiff and performed certain orthopedic and neurological tests. Dr. Lechtenberg found that all the test results were negative or normal. Dr. Lechtenberg also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, shoulders, knees, ankles, elbows, wrists, and hip using a goniometer to measure her joint movement. Dr. Lechtenberg found that plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions, shoulders, knees, ankles, elbows, wrists, and hip. Dr. Lechtenberg 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]). On October 3, 2016, moving defendant's examining orthopedist, Dr. Edward Toriello, examined plaintiff and performed certain orthopedic and neurological tests. Dr. Toriello found that all the test results were negative or normal. Dr. Toriello also performed range of

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motion testing on plaintiff's cervical, thoracic and lumbar regions, shoulders, elbows, wrists, knees and ankles, using a goniometer to measure her joint movement. Dr. Toriello found that plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions, shoulders, elbows, wrists, knees and ankles. Dr. Toriello provided ranges or spectrums of degrees up to 15 degrees for the normal standards of comparison for lumbar flexion (*compare Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see Lee v M & M Auto Coach, Ltd.*, 2011 NY Slip Op 30667[U], 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see Sainnoval v Sallick*, 78 AD3d 922, 911 NYS2d 429 [2d Dept 2010]; *see also Lee v M & M Auto Coach, Ltd., supra*). In view of the foregoing, Dr. Toriello's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). It is to be noted that, although the affirmed report of Dr. Toriello is deficient, the affirmed report of Dr. Lechtenberg is sufficient to establish a prima facie case that plaintiff did not sustain a serious injury.

Further, at her deposition, plaintiff testified that following the accident, she was confined to her home for one or two weeks and stopped her babysitting job for two or three weeks. She testified that one and a half days following the accident, she went to an emergency room and was discharged on the same day. Within a week after the accident, she first saw a chiropractor and has received physical therapy and chiropractic treatment for over nine months. She also saw several health care providers, including a primary care physician, a neurologist and an acupuncturist. After she saw Dr. Sabini, a physical medicine doctor, who diagnosed a vestibular imbalance, she received vestibular therapy for several months. She also testified that following the accident, she has to do laundry or cleaning in small batches. Plaintiff's deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her 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, defendant met his 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 she was not prevented from performing substantially all of her 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 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

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extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv., supra; Mejia v DeRose, supra; Laruffa v Yui Ming Lau, supra; Cerisier v Thibiu, supra*). 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 defendant’s expert reports are insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by her treating physician, Dr. Timothy Mosomillo, raise a triable issue as to whether she suffered injury within the “significant limitation of use” category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn affidavit of Dr. Mosomillo, the sworn MRI reports of Dr. Steven Winter, and the sworn MRI report of Dr. Harold Tice.

The sworn report of Dr. Mosomillo is insufficient to defeat summary judgment. Here, Dr. Mosomillo’s report set forth plaintiff’s complaints and the findings, including the limitations in her cervical and lumbar regions and right shoulder joint function. Although Dr. Mosomillo found that plaintiff had range of motion restriction in her cervical and lumbar regions and right shoulder, as he did not state when said range of motion testing was performed, 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]*). Dr. Mosomillo just stated in his report that plaintiff presented to his office “following an MVA.” Plaintiff failed to provide any medical evidence concerning her condition contemporaneous to the accident (*see Perl v Meher, supra; Camilo v Villa Livery Corp., 118 AD3d 586, 987 NYS2d 164 [1st Dept 2014]*).

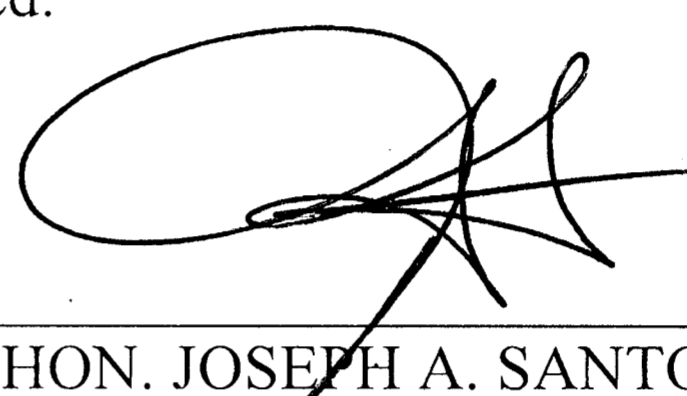
Two MRI reports, dated October 13, 2015, of Dr. Winter indicates that plaintiff had herniated discs and bulging discs in her cervical and lumbar regions. The MRI report, dated October 13, 2015, of Dr. Tice indicates that plaintiff had a herniated disc and a bulging disc in her thoracic region. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see Pierson v Edwards, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]*). However, Dr. Winter and Dr. Tice failed to proffer an opinion as to the cause of the disc pathology noted in their reports (*see Scheker v Brown, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; Sorto v Morales, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; Collins v Stone, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]*).

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Finally, plaintiff failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform her 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, defendant's motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed.

Dated: AUG 23 2017



HON. JOSEPH A. SANTORELLI
J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION