

Palazzolo v Johnson
2017 NY Slip Op 33523(U)
August 17, 2017
Supreme Court, Nassau County
Docket Number: Index No. 605492/2015
Judge: Leonard D. Steinman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

0

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
JENNIFER PALAZZOLO,

Plaintiff,

-against-

**KATHRYN A. JOHNSON and
RICHARD G. JOHNSON,**

Defendants.
-----X

**IAS PART 21
Index No. 605492/2015
Mot. Seq. No. 001**

DECISION AND ORDER

The following papers were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits.....	1
Plaintiff's Affirmation in Opposition & Exhibits	2
Defendants' Reply Affirmation.....	3

Defendants seek an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. In support of the application, defendants contend that plaintiff has failed to sustain injuries sufficient to satisfy the no-fault threshold set forth in Insurance Law Article 51. Plaintiff opposes the application.

In this action, commenced in August 2016, plaintiff seeks to recover for injuries sustained as a result of a car accident that occurred on June 24, 2013 on Hempstead Turnpike near its intersection with Franklin Avenue in East Meadow, New York. At the time of the accident plaintiff was the driver of one of the vehicles involved in the collision.

Plaintiff alleges that as a result of the accident she sustained injuries to her neck and back. Specifically, she alleges that sustained "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; and 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 90 days during the 180 days immediately following the occurrence of the injury or impairment." (See Verified Bill of Particulars ¶6, Defendants' Exhibit "C")

Plaintiff testified that as a result of the accident she missed "approximately a few days of work" and admitted at her deposition that any reduction or modification to her work schedule following the accident was not pursuant to a medical provider's orders. The Bill of Particulars reflects that plaintiff was in bed for three days and in the house for three days. Plaintiff testified that at the time of the accident she was beginning a nursing program and, at the time of her deposition, was a nurse on a medical/surgical unit. She works three days each week from 7:00 a.m. to 7:30 p.m. for three weeks each month; one week each month she works four days.

Plaintiff testified that following her initial post-accident emergency room visit she sought treatment from Dr. Luis Alejo at Cardiology and Internal Medicine Associates. She then began a physical therapy regiment which she followed initially twice weekly and later decreased to one weekly visit. The physical therapy continued until January 10, 2014. She was also treated by a chiropractor through September 2, 2016. Plaintiff had two MRI's taken one, on August 16, 2013 of her cervical spine and the other on August 19, 2013 of her lumbar spine. She further testified that she underwent nerve conduction studies and steroid injections on October 3, 2013 and October 17, 2013 from Dr. Aristide Burducea.

On a motion for summary judgment, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that he/she is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). To obtain summary judgment, the moving party must establish his/her claim or defense by tendering proof, in admissible form, sufficient to warrant the court to direct judgment in the movant's favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation. CPLR §3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092 (1985). Where the movant fails to meet its initial burden, the motion for

summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a “serious injury” as enumerated in Insurance Law § 5102(d). To satisfy the burden, a defendant’s medical expert(s) must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff’s range of motion, must compare any findings to those ranges of motion considered normal for the particular body part under evaluation. *Black v. Robinson*, 305 A.D.2d 438 (2d Dept. 2003); *Minlionica v. Shahabi*, 296 A.D.2d 569 (2d Dept. 2002). The burden then shifts to a plaintiff to set forth sufficient evidence demonstrating that he/she sustained a serious injury within the meaning of the statute. *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 (1992).

Serious injury is defined as:

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. Insurance Law §5102(d).

In support of the application, defendants provide the affirmed medical examination report of Leon Sultan, a Board Certified Orthopedic Surgeon, who examined plaintiff on October 6, 2016. The report reflects that an examination of plaintiff's cervical spine revealed "[h]ead and neck extension is to 30° (normal 25°-35°), flexion is to 45° (normal 40°-50°), rotation to the right and left is to 50°(normal 40°-60°), tilting to the right and left is 25° (normal 20°-30°)." The examination report reflects, with regard to her thoracolumbar examination, that "the spinal column is normally aligned, the pelvis is not titled, lordotic curvature is maintained." His range of motion testing revealed "[f]orward flexion is to 75°-85° (normal 60°-90°), extension is to 15° (normal 10°-15°), trunk rotation to the right and left is to 60°-65° (normal 45°-70°), trunk tilting to the right and left is to 20° (normal 20°-25°)." The report reflects that all of Dr. Sultan's range of motion readings were based on a combination of the AMA Guidelines 5Th Edition, N.Y.S. Guidelines and McBride's Guide to Permanent Disability. Dr. Sultan concluded that the "objective findings are not consistent with and proportional to the subjective complaints."

Defendants also provided the affirmed report of Dr. Marc J. Katzman, a Board-Certified Radiologist. In his report, Dr. Katzman states that the MRI of the cervical spine taken on August 16, 2013 reveals: "normal cervical lordosis" and "minimal chronic multilevel degenerative disc disease of the cervical spine without evidence of recent post-traumatic injury. The disc bulges at C3-4, C5-6 and C6-7 are by definition degenerative and non-traumatic. All aforementioned degenerative changes of the cervical spine are clearly chronic, pre-existing, and unrelated to the accident of 6/24/13. There is no recent-appearing traumatic disc herniation, extrusion, or annular tear. There is no evidence of post-traumatic injury to the cervical spine on the basis of this MRI exam."

With regard to his review of the MRI report of the lumbar spine performed on August 19, 2013, Dr. Katzman's report states that the MRI "reveals mild to moderate chronic multilevel degenerative disc disease of the lumbar spine without evidence of recent post-traumatic injury. The disc bulge at L1-2 is by definition degenerative and non-traumatic. The disc herniations at L2-3, L3-4 and L4-5 appear chronic, degenerative, and pre-existing due to underlying degenerative disc dehydration as well as secondary degenerative changes in facet joints. All aforementioned degenerative changes of the lumbar spine are clearly

chronic, pre-existing, and unrelated to the accident of 6/24/2013. There is no recent-appearing traumatic disc herniation or extrusion. There is no evidence of recent post-traumatic injury to the lumbar spine on the basis of this MRI examination.”

Dr. Katzman also reviewed the MRI report of plaintiff’s lumbar spine from September 20, 2014, which he states “reveals no interval change from prior exam dated 8/19/2013. There is stable mild to moderate chronic multilevel degenerative disc disease of the lumbar spine...there is no evidence of post-traumatic injury that is causally related to the accident on 6/24/2013.”

Defendants have demonstrated *prima facie* that plaintiff did not sustain a sufficient injury under the 90/180 category. “When construing the statutory definition of a 90/180-day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his or her usual activities to a great extent, rather than some slight curtailment.” *Thompson v. Abbasi*, 15 A.D.3d 95 (1st Dept. 2005). Plaintiff was out of work for only a few days and there is no testimony that she was unable to perform substantially all of her daily activities. As discussed above, she took off three days from work and returned to work without any restrictions. In fact, plaintiff testified that any reduction in her work schedule was due to scheduling and that there are no activities that she was unable to perform as a result of her alleged injuries.

In opposition, the plaintiff fails to offer any evidence that she was “medically” determined by any physician at any point in her treatment not to be able to participate in her “usual” and day-to-day activities. Therefore, in the absence of any objective medical evidence to suggest a “serious injury” impairing plaintiff’s customary and daily activities to a “great” extent for 90 days during the first 180 days after the subject accident, plaintiff’s injuries do not satisfy the 90/180 category of Insurance Law §5102(d). *Cf Elshaarawy v. U-Haul Co. of Miss.*, 72 A.D.3d 878 (2d Dept. 2010).

The court has reviewed all of the submissions and there is no evidence in the record of a permanent loss of use of body organ member or function. For that reason, the following analysis is limited to the two remaining categories: permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system;

Under the no-fault statute the law requires that the plaintiff's limitations be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyer*, 79 N.Y.2d 955 (1992). To prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Ultimately, a minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute. *Grossman v. Wright*, 268 A.D.2d 79, 83 (2d Dept. 2000). Based upon the medical reports of Drs. Katzman and Sultan, this court finds that the defendants have established their *prima facie* showing of entitlement to judgment as a matter of law. *Greenberg v. Macagnone*, 126 A.D.3d 937 (2d Dept. 2015); *John v Linden*, 124 A.D.3d 598 (2d Dept. 2015); *Jilani v. Palmer*, 83 A.D.3d 786 (2d Dept. 2011).

A *prima facie* showing that plaintiff did not sustain a "serious injury" within the meaning of the statute having been made, the burden shifts to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. *Pommels v. Perez*, 4 N.Y.3d 566 (2005); *Grossman v. Wright*, 268 A.D. 2d 79, 84 (2d Dept. 2000). When examining medical evidence that is offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that subjective claims as to pain or limitations of motion are sustained by verified objective medical findings. *Sukalic v. Ozone*, 136 A.D.3d 1018 (2d Dept. 2016); *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002).

In opposition to the application, plaintiff has set forth evidence establishing an issue of fact as to whether she suffered permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system. Plaintiff has provided the recent medical reports of Dr. Robert Gelman in which he concluded that plaintiff continues to have range of motion restrictions in her cervical and thoraco-lumbar

spines as well as “1. Intervertebral disc disorders with radiculopathy, lumbar region-L1, L2, L3, and L4 (disc herniations, protrusion, and bulges) 2. Radiculopathy, cervical region 3. Cervical sprain/strain 4. Bilateral S.I. joint sprain 5. Muscle spasm of lumbar 6. Muscle spasm of cervical.” His conclusion is supported by objective range of motion testing using a goniometer. Dr. Gelman’s report reflects that he concluded that her injuries are permanent and will require future treatment.

Dr. Gelman further concluded—after reviewing the MRI reports taken following the accident in 2013, the EMG report, and the medical notes of Drs. Burducea, Alejo and Bianchini—that the injuries are related to the June 24, 2013 accident. Specifically, Dr. Gleman notes that “there wasn’t any lumbar degeneration mentioned on the August 19, 2013 MRI. Lumbar degeneration has begun to develop on the September 20, 2014 MRI.”

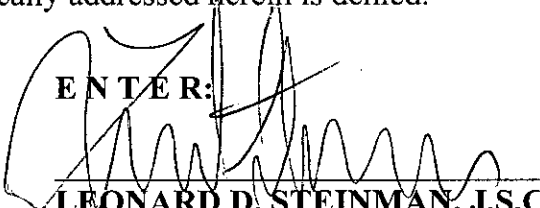
The court notes that the existence of admissible range of motion test results immediately following the accident is “not a prerequisite for recovery.” *Perl v. Meher*, 18 N.Y.3d 208, 218 (2011). To the extent that defendants contend that the application must be granted because a gap in treatment exists, they failed to consider that plaintiff underwent treatment from Dr. George Ruggi, a licensed chiropractor through 2016.

Accordingly, defendants’ motion for summary judgment dismissing the complaint is denied, except as to any injury that plaintiff claims prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately after the accident pursuant to Insurance Law 5102(d) and a permanent loss or use of body organ, member or function.

This constitutes the Decision and Order of the court.

Any relief requested not specifically addressed herein is denied.

Dated: August 17, 2017
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED

AUG 23 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE