Monti v Walsh
2018 NY Slip Op 30821(U)
May 2, 2018
Supreme Court, Suffolk County
Docket Number: 08891/2014
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Andrew Monti,

Plaintiff,

-against-

Michael Walsh,

Defendant.

Michael Walsh,

Defendant/Third Party Plaintiff,

-against-

Geraldine McMillan,

Third Party Defendant,

Clerk of the Court

Index No.: 08891/2014

Motion Sequence No.: 003; MOTD
Motion Date: 1/4/18
Submitted: 2/14/18

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Upon the following papers numbered 1 to 244 read upon the application by defendant for an order granting summary judgment dismissing the complaint: Notice of Motion and supporting papers, 1 to 171; Answering Affidavits and supporting papers, 172 to 237; Replying Affidavits and supporting papers, 238 to 244; it is

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

This action to recover damages for personal injuries alleged sustained by plaintiff as a result of a motor vehicle accident on September 25, 2013 was commenced by the filing of a summons and complaint on April 29, 2014. Issue was joined by the service of an answer dated December 10, 2015. Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff failed to satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d). In support of the motion defendant submits, *inter alia,* an affirmation of counsel, copies of the pleadings, an unsigned copy of plaintiff's deposition transcript, and a copy of the affirmed report of the independent medical examination of Dr. Jimmy Lim. Plaintiff opposes the motion on the grounds that the evidence submitted by plaintiff's treating physician demonstrates that plaintiff was permanently disabled following the accident, that he has sustained a permanent injury with permanent consequential use of a body organ or member, that he has significant limitation of use of a body function or system, with probable continued symptomology and disability for an indefinite period of time. Plaintiff submits his own affidavit, the affidavit of his chiropractor Dr. Robert Buurma and affirmed report, and the affirmed reports of Dr. Wanger, M.D., Dr. Anand, M.D., and Lyonel DeSangan, Physical Therapist, along with the corresponding affirmed treatment records. The unsigned deposition transcript of plaintiff's testimony is admissible, as no party challenged the accuracy of the testimony as transcribed and the transcript was certified as accurate by a notary (*see* ***Martin v City of New York***, 82 AD3d 653 [2011]); ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]) and they have been adopted by the party deponents (***Rodriguez v Ryder Truck, Inc., supra***; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

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, 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 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

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." The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982];*see also* ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

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]). 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 [1992]). A defendant may also establish entitlement to summary judgment using medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). 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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). 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 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

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 plaintiff's deposition testimony, plaintiff's medical records, and the affirmed report of defendant's expert witness Dr. Jimmy Lin, a board certified orthopedic surgeon (*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]). Dr. Lin performed an examination of plaintiff on

June 27, 2017, as a result of which it is the opinion of Dr. Lin that plaintiff exhibited a normal evaluation with no findings of any disabilities or restrictions, with no permanency or residential injuries, and no indication of a serious injury that was permanent or disabling. Further, defendant relied upon plaintiff's own deposition testimony that other than an emergency room visit following the accident on September 25, 2013, he did not seek treatment immediately after the accident but rather waited over a month. Moreover, the medical records relating to plaintiff's treatment indicate that he did not seek medical treatment for several months after the accident and that the treatment he received was from December 11, 2013 through March 9, 2014. Indeed, there is no dispute that plaintiff received no treatment from March 2014 through December 2017. In addition, through plaintiff's own deposition testimony, that he was able to return to work after the accident, continuing full-time at his position where he installs athletic equipment with NCI Vinyl & Canvas, defendant established, prima facie, that plaintiff did not suffer injury within the "90/180-days"category of the statute (*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.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Defendant further presents that plaintiff testified that he did not receive any injections, nor was surgery suggested, that he never told he could not return to work or limit his activity, and he vacationed in Puerto Rico in February 2017 and in Florida in April 2016, and that he belongs to a fitness club.

Having established a prima facie showing that plaintiff did not sustain a serious injury, the burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). 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* ***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]; ***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]). 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***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***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]; *see also* ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). 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]). 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*). 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 also* ***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 by providing the report of Dr. Buurma from the examination performed on December 9, 2017. The report of Dr. Buurma states that plaintiff has limited range of motion on all planes, objective orthopedic testing was positive, and Dr. Buurma opined that plaintiff's injuries were permanent in nature and casually related to the accident on September 25, 2013. Further, the report of Dr. Ronald Wagner regarding plaintiff's MRIs stated the images showed C4/5 disc herniation, C2/3 through C5/6 disc bulges flattening the thecal sac, straightening of the cervical spine, L2/3 through L4/5 annular bulges flattening the thecal sac, Schmorl's node at L2/3, and L5/S1 retrolisthesis. According to the records of neurologist Sima Anand, MD, who performed a needle EMG, plaintiff suffers from C5, C6, L4 and L5 radiculopathy. Dr. Anand's opinion based upon a computerized spinal range of motion exam was that plaintiff has 28% whole body impairment and that these conditions are casually related to the accident on September 25, 2013. Plaintiff avers by way of affidavit that following the accident he returned to work on a light duty basis only for approximately four months and attests that he suffers from chronic neck and back pain and has difficulty sleeping as a result of the injuries he sustained in the accident. Plaintiff further asserts therein that he was unable to financially afford to personally pay for further medical treatment after the date his no fault benefits terminated, as the reason for the lack of any treatment after March of 2014. Plaintiff alleges that he after his physical therapy terminated he has performed exercises at home and takes two Tylenol a day to relieve pain.

Based upon the plaintiff's submissions, the medical evidence, and the affidavit of plaintiff, there are triable issues of fact as to whether plaintiff sustained a serious injury within the "limitation of use" and "90/180" categories of Insurance Law §5102 (d) as a result of the subject accident. The reports of Dr. Buurma and Dr. Lin were the result of examinations of the plaintiff during 2017. Indeed, these two close in time and conflicting reports create a triable issue of fact. Further, plaintiff offered a reasonable explanation as to why he ceased treatment after March of 2014.

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 5/2/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**