Quinn v Moss
2018 NY Slip Op 30971(U)
May 16, 2018
Supreme Court, Suffolk County
Docket Number: 13-27569
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 13-27569
CAL. No. 17-01957MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 3-5-18 (005)
MOTION DATE 3-8-18 (006)
ADJ. DATE 3-14-18
Mot. Seq. # 005 - MD
006 - MG; CASEDISP

---X

MARYGRACE A. QUINN and JAMES QUINN,

Plaintiffs,

- against -

EILEEN M. MOSS and DANIEL R. MOSS,

Defendants.

---X

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Upon the following papers numbered 1 to 41 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 25 ; Notice of Cross Motion and supporting papers__ ; Answering Affidavits and supporting papers 26 - 28; 29 - 34 ; Replying Affidavits and supporting papers 35 - 39; 40 - 41 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff/defendant on the counterclaim, Mary Grace Quinn, for an order granting summary judgment dismissing the counterclaim is denied, as moot; and it is further

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

This is an action to recover damages for injuries sustained by plaintiffs when their vehicle was rear-ended by a vehicle owned by defendant Daniel Moss and operated by defendant Eileen Moss. The accident allegedly occurred on January 10, 2011, on the exit ramp of the northbound Sunken Meadow Parkway to the westbound Pulaski Road, in the Town of Smithtown, New York. At the time of the accident, plaintiff James Quinn was a passenger in a vehicle operated by plaintiff Mary Grace Quinn. By the bill of particulars, plaintiff Mary Grace Quinn alleges that, as a result of the accident, she sustained various serious injuries and conditions, including bulging and herniated discs in the cervical and lumbar regions and sprain/strain in the cervical, thoracic and lumbar regions. Plaintiff James Quinn also alleges that, as a result of the accident, he sustained various serious injuries and conditions, including bulging and herniated discs in the cervical and lumbar regions, sprain/strain in the cervical, thoracic and lumbar regions, and pain in the right shoulder and right leg.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiffs 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 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). 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; ***Cebron v Tuncoglu***, 109 AD3d 631).

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; ***Akhtar v Santos***, 57 AD3d 593). 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; ***Farozes v Kamran***, 22 AD3d 458). 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).

Here, defendants made a prima facie showing that Mary Grace Quinn did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendants' examining physician (*see* ***Bailey v Islam***, 99 AD3d 633; ***Sierra v Gonzalez First Limo***, 71 AD3d 864; ***Staff v Yshua***, 59 AD3d 614). On February 15, 2017, approximately six years after the subject accident, moving defendants' examining orthopedist, Dr. Gary Kelman, examined Mary Grace Quinn and performed certain orthopedic and neurological tests, including the foraminal compression test, the seated straight leg raising test, O'Brien's test, and Lachman's test. Dr. Kelman found that all the test results were negative or normal, and that there were no spam or tenderness in Mary Grace Quinn's cervical, thoracic and lumbar regions, shoulders, hips and knees. Dr. Kelman also performed range of motion testing on Mary Grace Quinn's cervical, thoracic and lumbar regions, shoulders, hips, knees and ankles, using a goniometer to measure her joint movement. Dr. Kelman found that Mary Grace Quinn exhibited normal joint function. Dr. Kelman opined that Mary Grace Quinn had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696).

Further, at her deposition, Mary Grace Quinn testified that at the site of the subject accident, she was taken by ambulance to an emergency room and was discharged on the same day. She testified that at the time of the accident, she was a part-time student and worked part-time as a waitress, and that following the accident she missed two months from work due to pain, although she went back to school "a couple of weeks" after the subject accident. She also testified that there is no activity that she is unable to perform because of the accident, although she had difficulty in running, sitting for a long time, and lifting heavy laundry baskets. Mary Grace Quinn'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; ***Curry v Velez***, 243 AD2d 442).

Thus, defendants met their initial burden of establishing that Mary Grace Quinn 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).

The burden, therefore, shifted to plaintiffs 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; ***Mejia v DeRose***, 35 AD3d 407; ***Laruffa v Yui Ming Lau***, 32 AD3d 996; ***Cerisier v Thibiu***, 29 AD3d 507). 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; ***Rovelo v Volcy***, 83 AD3d 1034). 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; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712).

Mary Grace Quinn opposes the motion, arguing defendants' expert report is insufficient to meet their burden on the motion. Mary Grace Quinn also argues that the medical report prepared by her treating physician, Dr. Sushil Basra, raises a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, Mary Grace Quinn submits, *inter alia*, the unaffirmed medical reports from St. Catherine of Sienna Medical Center, Vitaris Physical Therapy, and Long Island Spine Specialists, including the unsworn medical report of Dr. Basra. The unaffirmed medical reports and uncertified medical records of Dr. Basra, St. Catherine of Sienna Medical Center, Vitaris Physical Therapy, and Long Island Spine Specialists are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813). In any event, even assuming that the medical report of Dr. Basra was admissible, Dr. Basra failed to state how he measured the joint function in Mary Grace Quinn's cervical and lumbar regions at his examination. The Court can only assume that Dr. Basra's tests were visually observed with the input of Mary Grace Quinn. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609; ***Herman v Church***, 276 AD2d 471). Moreover, Dr. Basra failed to compare these findings to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500; ***Lopez v Felton***, 60 AD3d 822; ***Perez v Fugon***, 52 AD3d 668).

Moreover, Mary Grace Quinn 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; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Thus, the branch of defendants' motion for summary judgment based on Mary Grace Quinn's failure to meet the serious injury threshold is granted.

Likewise, defendants made a prima facie showing that James Quinn did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendants' examining physician (*see* ***Bailey v Islam***, *supra*; ***Sierra v Gonzalez First Limo***, *supra*; ***Staff v Yshua***, *supra*). On March 1, 2017, Dr. Kelman examined James Quinn and performed certain orthopedic and neurological tests, including the foraminal compression test, the seated straight leg raising test, O'Brien's test, and Lachman's test. Dr. Kelman found that all the test results were negative or normal, and that there were no spam or tenderness in James Quinn's cervical, thoracic and lumbar regions, shoulders and knees. Dr. Kelman also performed range of motion testing on James Quinn's cervical, thoracic and lumbar regions, shoulders and knees, using a goniometer to measure his joint movement. Dr. Kelman found that James Quinn exhibited normal joint function. Dr. Kelman opined that James Quinn had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, *supra*).

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Further, at his deposition, James Quinn testified that at the site of the subject accident, he was taken by ambulance to an emergency room and was discharged on the same day. He testified that at the time of the accident, he was unemployed. He testified that after the accident, he saw Dr. Basra several times and received a physical therapy at Vitaris for approximately eight weeks, and that he had not received any other treatment. He also testified that there is no activity that he is unable to perform because of the accident, although he had difficulty in lifting heavy material at work. James Quinn's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, *supra*; ***Curry v Velez***, *supra*).

Thus, defendants met their initial burden of establishing that James Quinn 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 he was not prevented from performing substantially all of his 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***, *supra*). James Quinn has not submitted opposition to the motion. Thus, the branch of defendants' motion for summary judgment based on James Quinn's failure to meet the serious injury threshold is granted. Accordingly, Mary Grace Quinn's motion for summary judgment dismissing the counterclaim against her on the issue of liability is denied, as moot.

Dated: May 16, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION