Bhatia v Cummings
2018 NY Slip Op 31285(U)
June 22, 2018
Supreme Court, Suffolk County
Docket Number: 12-15885
Judge: Sanford N. Berland

[* 1]

SHORT FORM ORDER

INDEX No. 12-15885
CAL. No. 17-01392MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 12-5-17
ADJ. DATE 3-20-18
Mot. Seq. # 006 - MG; CASEDISP
007 - MD

----------X

LALIT BHATIA and SEEMA BHATIA,

Plaintiffs,

- against -

WADE CUMMINGS,

Defendant.

----------X

STEVEN D. DOLLINGER & ASSOCIATES
Attorney for Plaintiffs
P.O. Box 369
Huntington Station, New York 11746

RICHARD T. LAU & ASSOCAITES
Attorney for Defendant
300 Jericho Quadrangle, Suite 260
P.O. Box 9040
Jericho, New York 11753

MCCABE, COLLINS, MCGEOUGH, FOWLER, LEVINE & NOGAN, LLP
Attorney for Plaintiff on the Counterclaim L. Bhatia
346 Westbury Avenue
P.O. Box 9000
Carle Place, New York 11514

Upon the following papers numbered 1 to 28 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 23; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 24 - 26; Replying Affidavits and supporting papers 27 - 28; Other sur-reply; (~~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 defendant 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; and it is further

ORDERED that the motion (improperly denominated as a cross motion) by plaintiff/defendant on the counterclaim, Lalit Bhatia, for an order granting summary judgment dismissing the claim of plaintiff Seema Bhatia on the ground that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

This is an action to recover damages for injuries sustained by plaintiffs when their vehicle was rear-ended by a vehicle operated by defendant. The accident allegedly occurred on October 18, 2009 on North Country Road in Sound Beach, New York. At the time of the accident, plaintiff Seema Bhatia was a passenger in a vehicle operated by plaintiff Lalit Bhatia. By the bill of particulars, plaintiff Lalit Bhatia alleges that, as a result of the accident, he sustained various serious injuries and conditions, including "insult to the muscular skeletal" and "insult to the neuroperipheral system" of the cervical and lumbar regions. Plaintiff Seema Bhatia also alleges that, as a result of the accident, she sustained various serious injuries and conditions, including "insult to the muscular skeletal" and "insult to the neuroperipheral system" of the cervical and lumbar regions.

Defendant now moves 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, 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 Lalit Bhatia 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 July 18, 2016, approximately seven years after the subject accident, moving defendant's examining orthopedist, Dr. Gary Kelman, examined Lalit Bhatia and performed certain orthopedic and neurological tests, including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there were no spasms or tenderness in Lalit Bhatia's cervical and lumbar regions. Dr. Kelman also performed range of motion testing on Lalit Bhatia's cervical and lumbar regions, using a goniometer to measure his joint movement. Dr. Kelman found that Lalit Bhatia exhibited normal joint function. Dr. Kelman opined that Lalit Bhatia 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]).

Further, at his deposition, Lalit Bhatia testified that following the accident, he did not miss any time from work, and that he received chiropractic treatment once a week for three months. He testified there is no activity that he is unable to perform because of the accident, although he had difficulty in driving a long distance or sleeping on one side of the bed. Lalit Bhatia'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***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, the moving defendant met his initial burden of establishing that Lalit Bhatia 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***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]). Lalit Bhatia has not opposed to the motion. Thus, the branch of defendant's motion for summary judgment based on Lalit Bhatia's failure to meet the serious injury threshold is granted.

Likewise, defendant made a prima facie showing that Seema Bhatia 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***, *supra*; ***Sierra v Gonzalez First Limo***, *supra*; ***Staff v Yshua***, *supra*). On July 18, 2016, Dr. Kelman examined Seema Bhatia and performed certain orthopedic and neurological tests, including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there were no spam or tenderness in Seema Bhatia's cervical and lumbar regions. Dr. Kelman also performed range of motion testing on Seema Bhatia's cervical and lumbar regions, using a goniometer to measure her joint movement. Dr. Kelman found that Seema Bhatia exhibited normal joint function. Dr. Kelman opined that Seema Bhatia had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***,*supra*).

Further, at her deposition, Seema Bhatia testified that prior to the subject accident, she had received chiropractic treatment for her neck pain from a chiropractor, Dr. Gelman, although she had no recollection as to how long she had been treated by him. She testified that following the accident, she did not miss any time from work, and that she received chiropractic treatment for her neck pain from Dr. Gelman. She also had no recollection as to how long she has been treated by him following the accident. She testified there is no activity that she is unable to perform because of the accident, although she had difficulty in lifting heavy objects or sleeping in any position. Seema Bhatia'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***, *supra*; ***Curry v Velez***, *supra*).

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 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]).

Seema Bhatia opposes the motion, arguing defendant's expert report is insufficient to meet her burden on the motion. Seema Bhatia also argues that the medical report prepared by her treating chiropractor, Dr. Robert Gelman, raises a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d).

In his affidavit, Dr. Gelman stated that he examined Seema Bhatia on October 19, 2009 and subsequently examined her on December 9, 2009. During the consultation, Seema Bhatia complained of pain in her neck. Dr. Gelman administered range of motion testing on Seema Bhatia's cervical region on both dates. Subsequently, Dr. Gelman administered range of motion testing on Seema Bhatia's cervical region on December 11, 2017. Dr. Gelman did not state how long he treated Seema Bhatia. Dr. Gelman's affidavit is insufficient to raise a triable issue of fact since Dr. Gelman failed to state how he measured the joint function in Seema Bhatia's cervical region. The Court can only assume that Dr. Gelman's tests were visually observed with the input of Seema Bhatia. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]; ***Russel v Mount Vernon***, 256

AD2d 454, 682 NYS2d 91 [2d Dept 1998]). Moreover, neither Seema Bhatia nor her treating chiropractor adequately explained the gap in treatment from the time she stopped seeking treatment on a date only several months after the subject accident, until December 11, 2017 (*see* ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept. 2010]; ***Rivera v Bushwick Ridgewood Props.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]; ***Krieger v Diallo***, 62 AD3d 504, 878 NYS2d 361 [1st Dept 2009]).

Finally, Seema Bhatia 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 defendant's motion for summary judgment based on Seema Bhatia's failure to meet the serious injury threshold is granted. Accordingly, Lalit Bhatia's motion for summary judgment dismissing the claim of plaintiff Seema Bhatia on the issue of serious injury is denied, as moot.

Dated: 6/22/2018

A.J.S.C.
HON. SANFORD NEIL BERLAND

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION