Turcios-Rodriguez v Velasquez
2018 NY Slip Op 34308(U)
December 17, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 610266/2016
Judge: Paul J. Baisley, Jr.
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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WALTER TURCIOS-RODRIGUEZ,

Plaintiff,

-against-

JOSE VELASQUEZ,

Defendant.

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INDEX NO.: 610266/2016
CALENDAR NO.: 201702123MV
MOTION DATE: 3/15/18
MOTION SEQ. NO.: 002 MD

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant, dated November 6, 2017 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated March 8, 2018 ; Replying Affidavits and supporting papers by defendant, dated March 13, 2018 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of defendant Jose Velasquez seeking summary judgment dismissing the complaint is denied.

Plaintiff Walter Turcios-Rodriguez commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection between the ramp for the Long Island Expressway's Motor Parkway exit, Exit 55, and Expressway Drive North in the Town of Smithtown on December 12, 2015. By his complaint, plaintiff alleges that the accident occurred when the vehicle operated by defendant Velasquez struck the driver's side of the vehicle operated by plaintiff. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject accident, including disc herniations at level L4-L5 and at levels C3 through C5; disc bulge at level L5-S1; a "left wrist tear of fibrocartilage and ligaments"; and cervical and lumbar radiculopathy.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident do not come within the serious injury threshold requirement of Insurance Law §5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Gary Kelman and Dr. Marc Katzman. At defendant's request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on August 16, 2017. Also at defendant's

request, Dr. Katzman performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's left wrist, lumbar spine, and cervical spine taken on January 28, 2016, March 3, 2016, and February 25, 2016, respectively. Plaintiff opposes the motion on the grounds that defendant failed to make a *prima facie* case that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits the sworn medical reports of Dr. William Jones, Dr. Rashid Altafi, Dr. Daniel Shapiro, Dr. Michele Rubin, and Dr. Syeda Shazia Asad.

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, 798, 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 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *affd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law §5102(d) defines a "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."

To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see*, *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *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]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (*see, Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see, Licari v Elliott*, *supra*). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see, Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff's

examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see, Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see, Caulkins v Vicinanzo*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (*see, Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). 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 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). 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 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has demonstrated, *prima facie*, that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see, Toure v Avis Rent A Car Sys.*, *supra*; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Defendant's orthopedist, Dr. Kelman, tested the ranges of motion in plaintiff's spine and left wrist using a goniometer and set forth his specific measurements as well as compared plaintiff's ranges of motion to the normal ranges (*see, Martin v Portexit Corp.*, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *DeSulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Kelman states in his medical report that an examination of plaintiff reveals he has full range of motion in his spine and left wrist, that there were no muscle spasms or tenderness upon palpation of the paraspinal muscles, that the straight leg raising test was

negative, and that there was no atrophy of intrinsic muscles. Dr. Kelman states that the Tinsel's sign and Phalen's test performed on plaintiff's wrists were negative, that his grip strength was normal, that his sensory responses were intact throughout the upper and lower extremities, and that he does not have a limp or antalgic gait. Dr. Kelman opines that the strains to plaintiff's spine and left wrist that were sustained as a result of the subject accident have resolved, and that there is no clinical evidence of cervical or lumbar radiculopathy. Dr. Kelman further states that plaintiff does not have any evidence of an orthopedic disability as a result of the subject accident.

In addition, defendant's examining radiologist, Dr. Katz, in his medical report states that his review of the MRI films of plaintiff's left wrist does not reveal any evidence of a recent traumatic injury, and that there is evidence of pre-existing mild degenerative changes involving the scaphoid bone. Dr. Katz further states that his review of the MRI films of plaintiff's cervical and lumbar spine reveal mild chronic two-level degenerative disease without any evidence of a recent post-traumatic injury, that the disc herniations observed in plaintiff's spine are chronic, degenerative, and pre-existing due to underlying degenerative disc dehydration and secondary degenerative changes to the facet joints. Finally, Dr. Katz states that there is no evidence of a recent post-traumatic disc herniation, extrusion, or annular tear causally related to the subject accident.

Furthermore, plaintiff's deposition testimony establishes that he did not sustain an injury within the 90/180 category of the Insurance Law (*see, Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; *Rico v Figueroa*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified that at the time of the accident he worked a nine hour shift, six days a week cleaning stores; that following the accident he did not miss any time from his employment; and that his work schedule did not change following the accident although his duties were modified so that he was not required to lift any heavy machinery. Plaintiff further testified that, following the cessation of his treatment in October or November of 2016, he has not sought any medical treatment for the injuries he sustained in the subject accident, and that he does not have any currently scheduled medical treatments for the injuries he sustained in the accident.

Thus, defendant shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use

or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; *Toure v Avis Rent A Car Systems, Inc.*, *supra* at 350; *see also, Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see, Perl v Meher*, *supra*; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the motion, plaintiff has raised a triable issue of fact as to whether he sustained an injury within the meaning of Insurance Law §5102(d) (*see, Stanley v Caddie Serv. Co., Inc.*, 110 AD3d 711, 971 NYS2d 886 [2d Dept 2013]; *David v Caceres*, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]; *Park v Shaikh*, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]), and as to whether such injury was causally related to the subject accident (*see, Windisch v Fasano*, 105 AD3d 1039, 963 NYS2d 401 [2d Dept 2013]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]). Plaintiff has submitted the sworn medical reports of his treating physicians who, based upon contemporaneous and recent examinations of plaintiff, conclude that plaintiff has sustained range of motion limitations in his spine and left wrist, and that the observed range of motion deficits were significant and permanent (*see, Vaughan-Ware v Darcy*, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; *Bykova v Sisters Trans, Inc.*, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; *Kanard v Setter*, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; *Dixon v Fuller*, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). In his affirmation, based upon a contemporaneous examination of plaintiff, his treating orthopedist, Dr. Rashid Altafi, states that plaintiff sustained range of motion limitations to his spine and left wrist, that his straight leg raising test was positive, that plaintiff had sustained a causally related disability to his spine and left wrist, and that his prognosis was guarded (*see,* e.g., *Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]).

In addition, despite Dr. William Jones' having only examined plaintiff on February 7, 2018, two years after the subject accident, his report raises a triable issue of fact as to whether the plaintiff sustained a serious injury to his spine and left wrist as a result of the subject accident (*see, Kline v Mitchell*, 149 AD3d 924, 52 NYS3d 450 [2d Dept 2017]; *Sanchez v Draper*, 123 AD3d 492, 998 NYS2d 185 [1st Dept 2014]; *Bojorquez v Sanchez*, 65 AD3d 1179, 885 NYS2d 362 [2d Dept 2009]). In his narrative report, Dr. Jones sets forth plaintiff's treating history,

including a history of progressively worsening symptoms, and the limitations in ranges of motion in his left wrist and spine, which were expressed as a percentage of normal, and described his qualitative impairments. Dr. Jones' assessment was supported by objective medical evidence, including the affirmed medical reports of plaintiff's prior treating physicians, Dr. Rashid Altafi, Dr. Daniel Shapiro, and Dr. Syeda Shazia Asad, who concluded in their reports that plaintiff had sustained sprains to his left wrist and cervical and lumbar regions as well as disc displacement due to the subject collision, and that his prognosis was guarded (*see,* e.g., *Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2014]; *Estaba v Quow*, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; *Gould v Ombrellino*, 57 AD3d 608, 869 NYS2d 567 [2d Dept 2008]). Further, Dr. Jones states that the degeneration observed in plaintiff's spine was not a contributing factor in plaintiff's symptomology, that the subsequent symptomology displayed by plaintiff is consistent with a trauma-related injury, and that such trauma is directly related to the motor vehicle accident on December 12, 2015.

Additionally, plaintiff submits the affirmed radiological reports of Dr. Michele Rubin, who reviewed the MRI films of plaintiff's spine and left wrist. Although disc bulges and herniations standing alone are not evidence of a serious injury under Insurance Law §5102(d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see, Wadford v Gruz*, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; *Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Dr. Rubin in her report states that the images produced of plaintiff's lumbar spine showed that there is "a posterocentral disc herniation at L4-L5 with ventral canal encroachment," an annular bulge at L5-S1, rupture of several of the lumbar interspinous ligaments, and that there is straightening of the lumbar curvature. Dr. Rubin states that the findings of the MRI of plaintiff's cervical spine indicate "loss of the normal cervical lordosis, enlarged tonsillar pillars, mild developmental stenosis, C3-C4 through C5-C6, and posterocentral disc herniations at C3-C4 and C4-C5, which indent the ventral thecal sac." Dr. Rubin further states that the findings of the MRI of plaintiff's left wrist reveal a partial tear of the triangular fibrocartilage and several small ganglion cysts at the volar aspect of the radioscaphoid joint. As a consequence, the medical reports of plaintiff's experts conflict with those of defendant's experts, who found that plaintiff did not have any significant limitations in his cervical or lumbar regions and that plaintiff suffered from disc degeneration.

Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see, Johnson v Garcia*, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; *LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Ocasio v Zorbas*, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; *Reynolds v Burghezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Finally, "where [a] plaintiff establishes that at least some of his injuries meet the 'no-fault' threshold, it is

unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (*Linton v Nawaz*, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: December 17, 2018

J.S.C.

HON. PAUL J. BAISLEY, JR.