Pena v Hanh Thi Le
2018 NY Slip Op 34310(U)
August 9, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 620191/2016E
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

John Pena,

Plaintiff,

-against-

Hanh Thi Le and Linda Nguyen,

Defendants.

Motion Sequence No.: 002; MD
Motion Date: 1/31/18
Submitted: 5/2/18

Index No.: 620191/2016E

Attorney for Plaintiff:

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Clerk of the Court

Upon the **E-file document list** numbered 23 to 44 read on this application by defendants for an order granting them summary judgment pursuant to CPLR 3212 dismissing the complaint; it is

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

This is an action to recover damages for injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident that occurred on November 24, 2015 on State Highway 27, in the Town of Islip, State of New York. The action was commenced by the filing of a summons and verified complaint on December 13, 2016. Issue was joined on January 19, 2017. Plaintiff served his bill of particulars on April 14, 2017. The bill of particulars alleges that, as a result of the accident, plaintiff sustained various serious injuries and conditions, including an L5-S1 disc herniation, disc bulges at L1-2 through L4-5 and right L5 lumbar radiculopathy.

Defendants now move for summary judgment seeking an order dismissing the complaint on the ground that the objective medical evidence establishes that none of the injuries claimed by plaintiff satisfy the "serious injury" threshold requirements of the No-Fault Law as defined in Insurance Law §5102 (d) and that plaintiff's claim for non-economic loss if barred by §5104 (a) of the Insurance Law. In support of their motion, defendants submit an affirmation of counsel, a copy of the pleadings, verified bill of particulars, transcript of the examination before trial of plaintiff, affirmed report of Dr. Mathew M. Chacko dated August 24, 2017, affirmed report of Dr. Anthony J. Spartaro dated February 25, 2016, affirmed report of Dr. Anthony J. Spartaro dated January 12, 2017, reports of Dr. Jeffrey Perry dated April 27, 2016 and June 29, 2016, and the affirmed report of Dr. Sanjeev Agarwal dated August 15, 2016.

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."

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]). 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 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 [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]; ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]).

Plaintiff's deposition was held on July 31, 2017, at which he testified that he went to the hospital after the subject accident but only spent about two hour there, that he went for physical therapy treatment within a month of the subject accident, he did not receive any injections for pain, he only received physical therapy which he decided to cease in late 2016, and he missed three days from work following the accident.

Dr. Mathew M. Chacko performed a neurological examination of plaintiff on August 24, 2017 which included range of motion testing measured by visual observation and goniometer. Dr. Chacko's affirmed report indicates that plaintiff's history of cervical, thoracic and lumbar strains were resolved, there were no findings consistent with lumbar radiculopathy or myelopathy, there was no objective clinical evidence of any neurological permanency, and plaintiff exhibited normal range of motion, and is capable of performing normal activities of daily living. An orthopedic evaluation of plaintiff was conducted on February 25, 2016 by Dr. Anthony J. Spataro. The affirmed report of Dr. Spataro indicates resolved cervical, thoracic and lumbar spine strains, that plaintiff had normal range of motion of the lumbar spine and all other objective tests were within normal range, plaintiff has no disability, is capable of working and performing all of his normal activities of daily living without any limitations, and further orthopedic treatment is not medically necessary.

The medical records reveal that plaintiff was involved in a subsequent motor vehicle accident on April 17, 2016. Defendants assert that any continued complaints by plaintiff of pain stem from the subsequent accident and not the subject accident. Dr. Spataro conducted a further orthopedic evaluation of plaintiff on January 12, 2017. In the affirmed report of Dr. Spataro dated January 12, 2017, he opines that all objective tests were within normal ranges of motion, there was no evidence of any orthopedic disability, plaintiff is able to perform activities of daily living as well as duties of his occupation without restrictions or limitations and plaintiff has reached pre-accident status.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) through the affirmed independent medical examination report of Dr. Mathew Chacko, the affirmed no fault independent medical examination reports of Dr. Anthony J. Spataro, and plaintiff's deposition testimony (*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]). Both doctors Chacko and Spataro opined that plaintiff had no disability at the time of the examinations (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Based upon the evidence submitted, defendants established that plaintiff did not sustain a permanent loss, or 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* ***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]; ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

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]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see*

Rabolt v Park, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). 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*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming "serious injury," must offer some reasonable explanation for having done so to prevail on his or her claim (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]; ***Pommells v Perez***, *supra*; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]). Furthermore, a plaintiff claiming serious injury who ceases any and all 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 and submits his medical records and the affirmations of Dr. Jeffrey Perry, and Dr. Marc Katzman as well as the plaintiff's deposition testimony in support of his claim that he has sustained serious injuries to his lumbar spine, cervical spine and right knee. The court notes, however, that the plaintiff's verified bill of particulars only mentions the lumbar spine and as such, only the alleged lumbar spine injuries will be addressed herein. The examination conducted by Dr. Perry on December 12, 2015 shortly after the accident revealed significant limitations of range of motion of the lumbar spine. The MRI of plaintiff's lumbar spine also conducted on December 12, 2015 revealed L5-S1 disc herniation impressing the ventral thecal sac with impingement on the traversing S1 nerve roots as well as foraminal narrowing and impingement of the exiting L5 nerve roots, and disc bulges at L1-2 through L4-L5 with associated flattening of the ventral thecal sac with neural foraminal narrowing as well as abutment of the exiting L3 nerve roots and impingement of the L4 nerve roots. Follow-up examinations conducted by Dr. Perry revealed L5 lumbar radiculopathy and range of motion testing of the lumbar spine showed significant limitations. Dr. Perry also noted muscle spasms, tenderness, and taut bands in the lumbar paravertebral muscles and recommended plaintiff for a surgical and orthopedic evaluation. Dr. Perry indicates there was a gap in treatment, as plaintiff had reached maximum medical improvement and physical therapy would have been palliative in nature but that plaintiff would benefit from epidural steroid injections and if not successful, plaintiff then would be a candidate for a one-level lumbar fusion. Dr. Perry opined that plaintiff's injuries were permanent and progressive in nature and have persisted for over two years. The report of Dr. Angel Macagno submitted by plaintiff in opposition was not affirmed and will not be considered herein.

Here, there are conflicting medical opinions regarding the nature, extent, and duration of plaintiff's injuries and limitations and concomitant issues of credibility to be resolved by a jury at trial (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v County***

of Nassau, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Further, there are triable issues of fact regarding whether the injuries at issue were casually related to the subject accident, as plaintiff's medical experts opine that the MRI results from the subject accident and the subsequent accident are identical and defendants' assert that the alleged injuries resulted from the subsequent accident not the subject accident (*see, e.g.,* ***Qurashi v. Hittin,*** 51 AD3d 652, 858 NYS2d 675 [2d Dept. 2008]. Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: 8/9/2018

William B. Rebolini

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

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