Gonzalez v Morgan
2018 NY Slip Op 34406(U)
January 23, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 15-606820
Judge: William G. Ford

SHORT FORM ORDER

INDEX No. 15-606820
CAL. No. 16-0221MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1-19-17
ADJ. DATE 5-4-17
Mot. Seq. # 001 - MG; CASEDISP

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IRIS GONZALEZ,

Plaintiff,

- against -

MICHAEL MORGAN and JENNIFER BLANCO,

Defendants.

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Attorney for Plaintiff:
CANNON & ACOSTA, LLP
1923 New York Avenue
Huntington Station, New York 11476

Attorney for Defendants:
RUSSO & TAMBASCO
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers dated November 21, 2016 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers dated April 18, 2017 ; Replying Affidavits and supporting papers dated May 2, 2017 ; Other __; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the motion by defendants 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 **granted**.

This is an action to recover personal damages for injuries sustained by plaintiff when her vehicle was rear-ended by a vehicle owned by defendant Jennifer Blanco and operated by defendant Michael Morgan. The accident allegedly occurred on December 26, 2014 on Church Street in the Town of Islip, New York. Two days prior to the subject accident, she was involved in an unrelated motor vehicle accident. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including limited range of motion in cervical and lumbar regions, lumbar radiculopathy, knee contusions, and left ankle derangement.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff 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, 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 report of defendants' 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 June 7, 2017, approximately one year and five months after the subject accident, moving defendants' examining orthopedist, Dr. Richard Weiss, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, McMurray test, and Lachman test. Dr. Weiss found that all the test results were negative or normal. Dr. Weiss also performed range of motion testing on the plaintiff's cervical and lumbar regions, knees and left ankle, using a goniometer to measure her joint movement. Dr. Weiss found that the plaintiff exhibited normal joint function in her cervical and lumbar regions, knees and left ankle. Dr. Weiss opined that plaintiff

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 her deposition, plaintiff testified that after the subject accident, she was taken by ambulance to an emergency room and was discharged on the same day. She testified that following the accident, she was confined to her bed only for two days and did not miss any time from work. Within a month of the accident, she saw a chiropractor and received massage therapy and chiropractic treatment for several months. She also testified that there is no activity that she is unable to perform because of the accident, although she had difficulty in heavy lifting or long walking. Plaintiff'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, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

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, 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 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.***, *supra*; ***Mejia v DeRose***, *supra*; ***Laruffa v Yui Ming Lau***, *supra*; ***Cerisier v Thibiu***, *supra*). 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]).

Plaintiff opposes the motion, arguing defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the affidavit prepared by plaintiff's treating chiropractor, Dr. Nicholas Martin, raises a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn affidavit, dated April 19, 2017, of Dr. Martin.

Dr. Martin's affidavit fails to raise a triable issue of fact. Dr. Martin's affidavit set forth plaintiff's complaints and the findings, including significant limitations in her cervical and lumbar spine joint function measured during range of motion testing performed at her initial consultation on January 6, 2015. Dr. Martin opined that plaintiff's injuries were causally related to the subject accident. However, he failed to adequately address the fact that plaintiff was involved in an unrelated motor vehicle accident just two days prior to the subject accident. Dr. Martin has not reviewed any of plaintiff's prior medical records related to the prior accident. Due to his failure to adequately address the prior accident, his conclusions that plaintiff's injuries were the result of the subject accident are speculative (*see* ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857, 891 NYS2d 432 [2009]; ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]).

Finally, plaintiff 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, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*).

Thus, defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is **granted**, and the complaint is dismissed.

Dated: January 23, 2018
Riverhead, New York

WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION