Martinez v McKernan
2018 NY Slip Op 34443(U)
April 2, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 608713/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 608713/2015**

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

PUBLISH

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 08/10/17
Motion Seq 001 MG; CASE DISP

x

DALILA MARTINEZ,

Plaintiff,

-against-

NICHOLAS S. MCKERNAN & STEPHEN M. MCKERNAN,

Defendants.

x

PLAINTIFF'S COUNSEL:
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Upon the following papers numbered read on this Motion for Summary Judgment: Notice of Motion & Affirmation in Support dated May 3, 2017 and supporting papers; Affirmation in Opposition dated July 12, 2017; and Reply Affirmation dated July 17, 2017; it is,

ORDERED that defendant's motion seeking summary judgment pursuant to CPLR 3212 dismissing the Complaint on the basis that plaintiff Dalila Martinez did not sustain a serious injury as defined by Insurance Law § 5102(d) is **granted** as follows; and it is further

ORDERED that plaintiff's complaint is accordingly dismissed as against the defendants; and it is further

ORDERED that counsel for defendants' is hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

This matter arises out of a motor vehicle accident which occurred on August 17, 2012 at the intersection of Middle Country Road (Route 25) and Nicoll's Road (County Road 97). Plaintiff Dalila Martinez was an employee of Suffolk Transportation Company as a Suffolk County SCAT bus operator. On the date and time of her incident, she operated a SCAT bus with the intent of making a left-hand turn as a traffic light controlled intersection when she was rear-ended by a vehicle owned or operated by the defendants.

As a result of that accident, plaintiff commenced this action filing a summons and complaint on August 12, 2015 seeking the recovery of money damages premised on defendants' negligence for her alleged serious personal injuries. Defendants joined issue filing an answer on October 12, 2015. By her verified bill of particulars, plaintiff has alleged that as a result of that

accident she sustained injuries to her cervical, thoracic and lumbar spine, as well as to her left thumb and right elbow.

Before the Court is defendants' motion to dismiss the complaint against them seeking an award of summary judgment and judgment as a matter of law that plaintiff has failed to sustain a "serious injury" within the meaning of Insurance Law § 5102. In support of their application, they have submitted a copy of the pleadings, plaintiff's deposition transcript, and IME reports. Defendants argue plaintiff has failed to demonstrate by competent, admissible objective evidence that her alleged injuries constituted "permanent consequential limitation of use of a body organ or member" or that she sustained 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 a person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury or impartment."

Plaintiff opposes defendants' motion in its entirety arguing that defendants have failed to make out a *prima facie* entitlement to judgment as a matter of law, or arguing in the alternative that a triable issue of fact exists precluding summary judgment.

During discovery in this matter, plaintiff was produced for an examination before trial and was deposed on December 20, 2016. At her deposition, plaintiff testified that she was stopped at a red light at the intersection of Middle Country Road and Nicoll's Road when she was hit in the rear by defendants' vehicle. Her stated intention was to turn left and head westbound on Middle Country road to pick up a passenger in Centereach. Suffolk County police responded to the scene. Requiring no medical attention or physical assistance, immediately following the accident, plaintiff was picked up from the accident scene by her supervisor who returned her to her employer's bus yard in Bay Shore. Her husband picked her up there and she returned with him to her home. Shortly thereafter, plaintiff presented at Southside Hospital's emergency room with complaints of pain in her neck, lower back, right elbow and left thumb. She testified that she was given X-rays and pain medication and a prescription for an MRI of her back, but that she did not discuss the X-ray results with anyone. She then followed up with Eastern Island Medical Care in Brentwood for physical therapy consisting of heat packs, massage, and electrostimulative therapy three times a week, covered by her employer's worker's compensation carrier.

Plaintiff further testified that she had her back examined by MRI at Islandia Radiological Associates on October 10, 2012, but she did not discuss the results with anyone. She also presented at South Shore Orthopedic in West Islip with complaints of pain to her left thumb and right elbow, but sought no further treatment as she lacked health insurance. Plaintiff did not follow up with recommended back injections, nor did she seek dental treatment for jaw pain she attributed to the accident.

The plaintiff additionally stated she believed she was out of work for 30 to 45 days following her accident, although she did not specifically recall which doctor put her out for that timeframe. She testified that she was on limited duty for 15 days following the accident. Plaintiff was not otherwise confined to bed for any period following her accident. She stated she is unable to ski on her annual wintertime basis, but has traveled out of state four times since the accident between 2014 and 2015 to Ecuador three times and once to Florida on vacation. She required no special accommodations to fly by plane on those occasions.

Plaintiff also appeared for an orthopedic independent medical examination conducted by Raymond Shebairo, M.D. on February 24, 2017. In his report, Dr. Shebairo noted that plaintiff could perform normal or incidental movements and actions no difficult and required no physical assistance. He also found plaintiff's range of motion in her cervical, thoracic and lumbar spine normal. Additionally, all orthopedic diagnostic testing came back negative. Thus, despite finding plaintiff's complaints of cervical, thoracic, and lumbar spinal sprain or strain as causally related by her motor vehicle accident, Dr. Shebairo concluded that those complaints were resolved by time of his examination.

Lastly, in support of their motion, defendants have submitted the report of their radiologist Marc Katzman, M.D. dated May 24, 2016, based upon his review of plaintiff's back MRI conducted on October 10, 2012. Dr. Katzmann's report indicates that he found minimal degenerative disc bulges of plaintiff's lumbar spine at L3-L4 and mild facet arthropathy; l4-l5 mild shallow broad-based disc herniation with mild facet arthropathy; L5-S1 mild disc degenerative disc bulge with central annular tearing. The report concludes that plaintiff had preexisting mild chronic degenerative disc disease in her lumbar spine, but found no evidence of recent post-traumatic injury casually related to her accident.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill,*** 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529

NYS2d 797 [2d Dept. 1988]).

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."

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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Having reviewed the motion record, this Court finds that defendants have met their burden entitling them to judgment as a matter of law dismissing plaintiff's complaint for her failure to demonstrate that she sustained a "serious injury" within the contemplation of Insurance Law § 5102. With submission of both the radiological and orthopedic IME reports, defendants have sustained their burden of demonstrating that plaintiff's cervical, thoracic or lumbar sprains/strains were resolved by the time of her orthopedic examination and/or were not causally related as post-traumatic injuries. Plaintiff's range of motion was found within normal range at the time of her examination conducted 4 years after the occurrence (***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Moreover, the orthopedic IME reports conclusions authored by Dr. Shebairo noted degenerative disc bulges and herniations that were chronic and preexisting in nature (*see e.g.* ***Noble v Ackerman***, 252 AD2d 392, 394, 675 NYS2d 86, 89 [1st Dept 1998][holding that the mere existence of a herniated disc does not per se constitute serious injury *per se*]). Further, plaintiff in opposition to the motion submitted no objective medical evidence refuting defendants submissions (*compare* ***Scudera v Mahbubur***, 39 AD3d 620, 622, 833 NYS2d 239, 241 [2d Dept 2007][stating the general proposition that a

herniation together with other objective clinical tests providing a quantitative and or qualitative assessment of the plaintiff's condition resulting from the accident may establish a serious injury]; *with* ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 865, 895 NYS2d 863, 864 [2d Dept 2010][summary judgment proper on plaintiffs' failure to proffer competent medical evidence that they sustained a medically-determined injury of a nonpermanent nature which prevented them, for 90 of the 180 days following the subject accident, from performing their usual and customary activities]).

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]). 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 did not show by objective credible medical evidence that she met the 90/180 threshold determination either. Based on the parties' submission and the motion record, 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]).

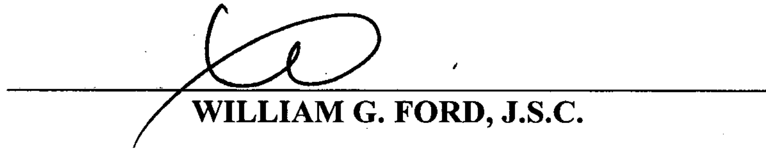
Thus, defendants having met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her 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, 805 NYS2d 450 [3d Dept 2005]).

Here, 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]).

Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is **granted**.

The foregoing constitutes the decision and order of this Court.

Dated: April 2, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** ______ **NON-FINAL DISPOSITION**