Battle v Budget Truck Rental
2019 NY Slip Op 30800(U)
March 22, 2019
Supreme Court, Suffolk County
Docket Number: 15-10973
Judge: Joseph Farneti

[* 1]

ORIGINAL

SHORT FORM ORDER

INDEX No. 15-10973
CAL. No. 18-00472MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 8-6-18 (005)
MOTION DATE 9-27-18 (006)
ADJ. DATE 9-27-18
Mot. Seq. # 005 - MG; CASEDISP
Mot. Seq. # 006 - MD

----------X

JAMES BATTLE and SANTOS GUITY,

Plaintiffs,

- against -

BUDGET TRUCK RENTAL, ANGEL RIVAS, CURTIS HILL, BRIANNA HILL and LINO VALDEZ-BAUTISTA,

Defendants.

----------X

CAVALIER & ASSOCIATES, P.C.
Attorney for Plaintiffs
144-1 Remington Blvd.
Ronkonkoma, New York 11779

BRAND, GLICK & BRAND, P.C.
Attorney for Defendants Budget Truck Rental and Rivas
600 Old Country Road, Suite 440
Garden City, New York 11530

BREEN & CLANCY
Attorney for Defendants Hill
1355 Motor Parkway, Suite 2
Hauppauge, New York 11749-5227

SCHONDEBARE & KORCZ
Attorney for Defendant Valdez-Bautista
1650 Sycamore Avenue, Suite 17
Bohemia, New York 11716

Upon the following papers numbered 1 to 88 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 62; 63 - 88; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other ____; it is,

ORDERED that the motions by defendant Lino Valdez-Bautista and by defendants Budget Truck Rental and Angel Rivas are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Lino Valdez-Bautista for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by defendants Budget Truck Rental and Angel Rivas, improperly denominated as a cross motion, for summary judgment dismissing the complaint is denied as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiffs James Battle and Santos Guity as a result of a motor vehicle accident, which occurred on June 23, 2012, in the Town of Islip, New York. Plaintiffs allege, in relevant part, that James Battle suffered various injuries as a result of the accident, including a supraspinatus tendon and subscapularis tendon tendinosis, cubital tunnel syndrome, and disc bulges to his cervical and lumbar spine. Plaintiffs further allege, in relevant part, that Santos Guity suffered various injuries as a result of the accident, including herniated discs in his cervical region and disc bulges in his cervical, thoracic, and lumbar regions.

Defendant Valdez-Bautista seeks an Order granting summary judgment dismissing plaintiffs' complaint on the ground that they did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Valdez-Bautista submits, in support of the motion, copies of the pleadings, the bills of particulars, the transcripts of plaintiffs' deposition testimony, and the affirmed reports of orthopedic surgeon Craig Ordway, M.D., and radiologist Audrey Eisenstadt, M.D. Defendants Budget Truck Rental and Angel Rivas also move for summary judgment dismissing the complaint on the ground that plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Budget Truck Rental and Angel Rivas incorporate the submissions in Valez-Bautista's motion and submit copies of the pleadings, Orders of this Court dated April 5, 2016 and March 29, 2017, and a consent to change attorney. No papers were submitted in opposition to the motions.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***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]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, *prima facie*, that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating 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]). 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 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.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). 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 also 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]). Further, 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]).

Valdez-Bautista's submissions establish a *prima facie* case that plaintiffs' alleged injuries do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Plaintiffs' alleged 90/180-day injuries were sufficiently refuted, *prima facie*, by their testimony that they were not prevented from performing substantially all of their usual and customary daily activities (*see* ***Licari v Elliott***, *supra*; ***Marrow v Torres***, 140 AD3d 833, 33 NYS3d 416 [2d Dept 2016]; ***Pryce v Nelson***, *supra*). In addition, defendant presented competent evidence that none of plaintiffs' alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Rojas v Linton***, 169 AD3d 849, 92 NYS3d 911 [2d Dept 2019]; ***Skuret v Yoyo Cab Corp.***, 92 NYS3d 730, 2019 NY Slip Op 01116 [2d Dept 2019]; ***Sanchez v L.R.S. Cab Corp.***, 91 NYS3d 708, 2019 NY Slip Op 00921 [2d Dept 2019]; ***Paez v Osborne***, 167 AD3d 766, 87 NYS3d 501 [2d Dept 2018]).

Dr. Ordway's affirmed report states, in relevant part, that during a February 2018 orthopedic examination, Mr. Battle exhibited normal joint function in his cervical, thoracic, and lumbar regions, and that no spasm was detected. Dr. Ordway did not detect any abnormality of the curvature of Mr. Battle's mid and lower back, and opined that normal lordosis was preserved and that no kyphosis or scoliosis was detected. In addition, Mr. Battle tested negative in the straight leg test. Dr. Ordway's report also states that Mr. Battle exhibited normal joint function in his right shoulder, and that no instability, subluxation, atrophy, tenderness, or crepitus was detected. Dr. Ordway found no weakness or atrophy of any flexor or muscle group in Mr. Battle's upper or lower extremities. He also opined that he found no evidence of any impairment existing or an extended period of time in the past. Dr. Ordway explained that he was "puzzled" as to the right cubital tunnel surgery, as he found no documentation of any injury to Mr. Battle's ulnar nerve in his medical records. Dr. Ordway concluded that "[t]here is no finding which would indicate any impairment of function secondary to the [subject accident]."

In her affirmed medical report, Dr. Eisenstadt opined that the magnetic resonance imaging ("MRI") examination of Mr. Battle's right shoulder conducted approximately one month after the accident showed no evidence of acute or recent post-traumatic osseous, tendinous, ligamentous, or labral pathology. She concluded that the rotator cuff musculature was intact and that no rotator cuff tear was seen. Dr. Eisenstadt also opined that the MRI examination of Mr. Battle's cervical spine conducted approximately one month after the accident showed mild straightening of the cervical lordosis, minimal disc bulging at levels C3-4 through C6-7, and disc desiccation at levels C2-3 through C6-7. She explained that disc desiccation is not the result of trauma, but degenerative in nature. Finally, Dr. Eisenstadt opined that the MRI examination of Mr. Battle's lumbar spine conducted approximately one month after the accident showed disc degeneration at L1-2. She concluded that no disc herniations or annular tears were evident.

Dr. Ordway's affirmed medical report states, in relevant part, that during a February 2018 orthopedic examination, Mr. Guity exhibited normal joint function in his cervical, thoracic, and lumbar

spine, and that no spasm was detected in his cervical spine. In addition, Mr. Guity tested negative in the straight leg test. Dr. Ordway's report also states that Mr. Guity exhibited normal joint function in his right shoulder, and that no instability, subluxation, tenderness, or crepitus was detected. Dr. Ordway found no weakness or atrophy of any flexor of extensor muscle group of the upper or lower extremities. Dr. Ordway concluded that there is no evidence of any post-traumatic orthopedic or neurological condition, and that the examination was entirely normal.

Valdez-Bautista having met his initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiffs have failed to raise a triable issue of fact, as no papers in opposition were submitted.

Accordingly, the motion by defendant Lino Valdez-Bautista for summary judgment dismissing the complaint based on plaintiffs' failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted. Therefore, in light of this determination, the motion by defendants Budget Truck Rental and Angel Rivas for summary judgment dismissing the complaint is denied, as moot.

Dated: March 22, 2019

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION