LaFleur v Galis
2019 NY Slip Op 31371(U)
May 7, 2019
Supreme Court, Suffolk County
Docket Number: 16-7334
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 16-7334
CAL. No. 18-00129MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice Supreme Court

MOTION DATE 6-18-18
ADJ. DATE 2-13-19
Mot. Seq. # 001 - MD

ANTHONY LAFLEUR,

Plaintiff,

- against -

DANIELLE GALIS and ROCHELLE SIMON,

Defendants.

FELBERBAUM, HALBRIDGE & WIRTH
Attorney for Plaintiff
357 Veterans Memorial Highway
Commack, New York 11725

KELLY, RODE & KELLY, LLP
Attorney for Defendants
330 Old Country Road, Suite 305
Mineola, New York 11501

Upon the following papers numbered 1 to 35 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-28 ; Replying Affidavits and supporting papers 29-31 ; Other (Sur-Reply) 32-35 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Danielle Galis and Rochelle Simon seeking summary judgment dismissing the complaint is denied.

Plaintiff Anthony LaFleur commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 231 and Tiana Place in the Town of Huntington on April 8, 2014. It is alleged that the accident occurred when the vehicle operated by defendant Danielle Galis and owned by defendant Rochelle Simon made a left turn directly in front of the vehicle owned and operated by plaintiff, striking the front passenger side of the vehicle while it was traveling through the aforementioned intersection. At the time of the accident, plaintiff's vehicle was traveling northbound on Route 231 and defendants' vehicle was traveling westbound on Tiana Place. By his bill of particulars, plaintiff alleges, among other things, that he

sustained various personal injuries as a result of the subject collision, including multilevel herniated and bulging discs of the spine, right knee meniscal tear, and cervical and lumbar radiculopathy.

Defendants now move for summary judgment dismissing the complaint on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, plaintiff's uncertified medical records concerning the injuries at issue, and the sworn medical report of Dr. Craig Ordway and Dr. Jonathan Luchs. At defendants' request, Dr. Ordway conducted an independent orthopedic examination of plaintiff on July 6, 2017. Also at defendants' request, Dr. Luchs performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spine on October 4, 2017. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition shows that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject collision. In support of the motion, plaintiff submits, among other things, his own affidavit, and the sworn medical report of Dr. Nunzio Saulle.

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 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."

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 [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]). Once defendant has met this burden, 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 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). 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 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants demonstrated, prima facie, by submitting competent medical evidence and plaintiff's deposition transcript, that plaintiff did not sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra;* ***Kline v Mitchell***, 148 AD3d 924, 52 NY3d 450 [2d Dept 2017]; ***Green v Canada Dry Bottling Co. of N.Y., L.P.***, 133 AD3d 566, 20 NYS3d 94 [2d Dept 2015]). Defendant's examining orthopedist, Dr. Ordway, states in his medical report that an examination of plaintiff reveals he has full range of motion in his spine and knees, that there is no evidence of muscle spasm upon palpation of the paravertebral musculature, the trapezii or the anterior strap muscles, that there is no evidence of any abnormality of curvature of the spine, and that there is no weakness, atrophy, or limitation of motion in the upper or lower extremities. Dr. Ordway states that the straight leg raising test is negative, that there is no evidence of discomfort or sciatic nerve stretch, and that there is no instability in to the valgus varus testing or anterior-posterior. Dr. Ordway notes that although an examination of plaintiff's lower extremities reveals that plaintiff has a significant wound on his left lower leg with findings of atrophy and changes secondary to surgical intervention, and that he had decreased sensation over the area of skin grafting, but such condition is unrelated to the accident in question and has not been affected by the subject accident. Dr. Ordway opines that the plaintiff's examination was normal for a person of his age and body hiatus and that he is not adversely affected by the subject accident.

In addition, the affirmed medical reports of defendants' reviewing radiologist, Dr. Luchs, states that a review of the MRI films of the cervical and lumbar regions of plaintiff's spine shows that he suffers from hypertonic changes of the joints, which is reflective of prominent and chronic degenerative changes throughout his spine, which predate the subject accident. Dr. Luchs further states that there is no evidence of posttraumatic findings on the MRI films of his lumbar or cervical spine, and that the findings on plaintiff's cervical and lumbar MRI films are not secondary to any of the injuries plaintiff alleges to have sustained in the subject accident.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that he sustained injuries within the 90/180 category under Insurance Law § 5102(d) (*see* ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d

1526, 897 NYS2d 648 [4th Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

In opposition to defendants' prima facie showing, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury as a result of the subject accident (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp.,*** inc., 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Although the mere existence of a bulging or herniated disc, by itself, is not evidence of serious injury, it may constitute a serious injury when coupled with objective medical evidence as to the extent of the alleged physical limitations resulting from that injury and its duration (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]). Plaintiff has submitted the affirmation of Dr. Nunzio Saulle, his treating physician, who provided reports of his examinations of plaintiff. In his reports, Dr. Saulle quantified specific limitations in the range of motion of the plaintiff's cervical spine and lumbar spine after the accident and at a recent examination using a goniometer. Dr. Saulle concluded that, based upon his contemporaneous and recent examinations of plaintiff, the injuries to his spine are permanent and that the observed range of motion deficits were significant (*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]). Dr. Saulle further states that plaintiff's injuries and the range of motion limitations are causally related to the subject accident (*see* ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). In addition, Dr. Saulle states that plaintiff has no prior history other than the gun shot wound to his left leg, which affects his ability to stand for long periods of time, but that plaintiff had no symptoms in his cervical or lumbar regions prior to the happening of the subject accident.

Furthermore, Dr. Saulle provided a reasonable explanation for the cessation of plaintiff's medical treatment (*see* ***Pommells v Perez***, *surpa*; ***David v Caceres***, *supra*). Dr. Saulle explained that despite plaintiff still being symptomatic when he discontinued treatment, he had reached maximum medical improvement and the treatment was no longer helping him– the treatment had become palliative in nature. In addition, plaintiff submits an affidavit claiming that he stopped going for treatment because there was no improvement in his condition. Consequently, the evidence is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Thus, plaintiff has presented medical evidence that conflicts with that of defendants' experts, who found that the injuries sustained by plaintiff were either pre-existing or resolved. "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]). Moreover, "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 [defendants'] 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, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: May 7, 2019

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION