Dalglish v Putyra
2019 NY Slip Op 32697(U)
September 11, 2019
Supreme Court, Suffolk County
Docket Number: 16-2216
Judge: David T. Reilly

SHORT FORM ORDER

COPY

INDEX No. 16-2216
CAL. No. 18-01157MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 09-26-18
ADJ. DATE 01-16-19
Mot. Seq. # 001 - MG; CASEDISP

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CAMPBELL DALGLISH and CATHERINE OBERG,

Plaintiffs,

- against -

SHARON B. PUTYRA,

Defendant.

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Upon the following papers numbered 1 to 31 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 15-29 ; Replying Affidavits and supporting papers 30-31 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sharon Putyra seeking summary judgment dismissing the complaint is granted.

Plaintiff Campbell Dalglish 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 Hounslow Road and Linden Avenue in the Town of Brookhaven on April 30, 2015. It is alleged that the accident occurred when the vehicle owned and operated by defendant Sharon Putyra struck the front driver's side of the vehicle owned and operated by plaintiff when it swerved in front of his vehicle after failing to stop at a stop sign. By his bill of particulars, plaintiffs allege that Campbell Dalglish sustained various personal injuries as a result of the subject collision, including an exacerbation of a preexisting lumbar spine condition, disc bulges at levels L1- L2 and L4 through S1, a disc herniation at level L5-S1, and lumbar levoscoliosis. In addition, Campbell Dalglish's spouse, Catherine Oberg, instituted a derivative cause of action for loss of consortium.

Defendant now moves for summary judgment on the basis that the injuries Campbell Dalglish alleges to have sustained as a result of the subject accident fail to meet the serious injury threshold requirements of Insurance Law § 5102(d). In support of the motion, defendant submits copies of the pleadings, Campbell Dalglish's deposition transcript, uncertified copies of Campbell Dalglish's medical records, and the sworn medical reports of Dr. Gary Kelman and Dr. Melissa Sapan Cohn. At defendant's request, Dr. Kelman conducted an independent orthopedic examination of Campbell Dalglish on May 31, 2017. Also at defendant's request, Dr. Sapan Cohn performed an independent radiological review of the magnetic resonance images ("MRI") films of Campbell Dalglish's lumbar spine taken on November 5, 2015.

Plaintiffs oppose the motion on the grounds that defendant failed to meet her prima facie burden, and that the evidence submitted in opposition demonstrates that Campbell Dalglish sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject collision. Plaintiff further asserts that his outbreak of shingles was causally related to the subject accident. In opposition to the motion, plaintiffs submit Campbell Dalglish's affidavit, the affidavit of Dr. Brett Desing, and uncertified copies of Campbell Dalglish's medical records concerning the injuries at issue.

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, 798, 622 NYS2d 900 [1995]; *see* ***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 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *affd* 64 NY2d 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 [2d Dept 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 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant, through the submission of Campbell Dalglish's deposition transcript and competent medical evidence, established a prima face case that he did not sustain an injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; ***Rodrguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Kelman, used a goniometer to test Campbell Dalglish's ranges of motion in his lumbar spine, hip, and knees, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Kelman states in his medical report that an examination of Campbell Dalglish revealed he has full range of motion in his lumbar spine, knees, and hips, and that the straight leg raising test was negative. Dr. Kelman states that there was no paraspinal tenderness, no muscle spasm upon palpation of the paraspinal muscles, and that there was no atrophy of the intrinsic muscles. He states that there was no tenderness upon palpation of the right or left knee, that there was no effusion or atrophy of the quadriceps, that the anterior drawer sign, McMurray's and Lachman's tests were negative, and that there was no patella-femoral crepitus noted in either the right or left knee. Dr. Kelman further states that Campbell Dalglish was able to arise on heels and toes with good balance, that he does not have a limp or antalgic gait, and that his muscle strength is 5/5. Dr. Kelman opines that the strains Campbell Dalglish sustained to his lumbar region and right thigh as a result of the subject accident have resolved, that he does not have any objective evidence of an orthopedic disability, and that he is able to perform his usual activities of daily living and employment without restrictions.

In addition, the affirmed medical reports of defendant's reviewing radiologist, Dr. Sapan Cohn, states that a review of the MRI films of Campbell Dalglish's lumbar spine show that he suffers from longstanding, chronic, multilevel facet degenerative changes in his spine, which predate the subject accident, and that there is no evidence of posttraumatic findings on the MRI films of his lumbar spine. Further, defendant established, prima facie, that Campbell Dalglish did not sustain a serious injury under the 90/180 category of the Insurance Law by submitting his deposition testimony, which revealed that he did not miss any time from his employment as a professor at the City College of New York in the first 180 days immediately following the subject accident (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]).

Defendant, having made a prima facie showing that Campbell Dalglish did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiffs to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiffs have failed to raise a triable issue of fact as to whether Campbell Dalglish sustained a serious injury within the limitations of use or the 90/180 categories of the Insurance Law as a result of the subject accident (*see* ***Sylvain v Maurer***, 165 AD3d 1203, 85 NYS3d 203 [2d Dept 2018]; ***Romero v Braithwaite***, 154 AD3d 894, 62 NYS3d 170 [2d Dept 2017]; ***Small v City of New York***, 148 AD3d 959, 49 NYS3D 176 [2d Dept 2017]; ***Washington v Pichardo***, 140 AD3d 950, 32 NYS3d 508 [2d Dept 2016]). A plaintiff is required to present non-conclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for non-economic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by plaintiffs was insufficient to establish a serious injury or to defeat defendant's prima facie showing. Inexplicably, the medical evidence submitted by plaintiffs is not in admissable form, and therefore, is without probative value (*see* CPLR 2106; ***Castro v DADS Natl. Enters., Inc.***, 165 AD3d 601, 87 NYS3d 18 [1st Dept 2018]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]; ***DiLernia v Khan***, 62 AD3d 644, 878 NYS2d 405 [2d Dept 2009]; ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]), and plaintiffs have not provided any excuse as to why they failed to meet "the strict requirement of tender in admissible form" (***Merriman v Intergrated Bldg. Controls, Inc.***, 84 AD3d 897, 899, 922 NYS2d 562 [2d Dept 2011]). Moreover, while a plaintiff is entitled to rely upon the unsworn medical reports of his or her doctors that a defendant submits in support of his or her motion (*see* ***Zelman v Mauro***, 81 AD3d 936, 917 NYS2d 581[2d Dept 2011]), in the instant matter, such records were not relied upon by defendant's examining doctor in support of the motion for summary judgment (*see e.g.* ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). More importantly, the records do not contain any objective evidence of a serious injury (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]).

Furthermore, Dr. Desing's medical report fails to raise a triable issue of fact as to whether Campbell Dalglish sustained a serious injury to his lumbar spine, since his examinations were not contemporaneous with the subject accident (*see* ***Capriglione v Rivera***, *supra*; ***Srebnick v Quinn***, 75 AD3d 637, 904 NYS2d

675 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]). Moreover, absent findings from a contemporaneous examination, Dr. Desing cannot substantiate the extent or degree of the limitations in Campbell Dalglish's lumbar region caused by the alleged injury and its duration (*see* ***Wong v Cruz***, 140 AD3d 860, 32 NYS3d 641 [2d Dept 2016]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2D 190 [2d Dept 2013]). In fact, Dr. Desing states in his report that Campbell Dalglish only came under his care in April 2017, approximately two years after the subject accident. Yet, Dr. Desing concludes that Campbell Dalglish suffers from injuries and subsequent sequela, which have resulted in a permanent consequential limitation or use of a body organ or member, that are causally related to the subject accident, and that such injuries have severely curtailed his ability to perform his normal daily activities. Additionally, the reports that were attached to Dr. Desing's affidavit were without probative value, because they were not in admissible form (*see* ***DiLernia v Khan***, 62 AD3d 644, 878 NYS2d 405 [2d Dept 2009]; ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Evans v Mohammad***, 243 AD2d 604, 663 NYS2d 273 [2d Dept 1997]).

Contrary to plaintiffs' assertions, defendant's experts were not required to address whether Campbell Dalglish's outbreak of shingles was a result of the subject accident, since plaintiff failed to allege shingles as one of his injuries in his bill of particulars (*see* ***D'Angelo v Bryk***, 205 AD2d 935, 613 NYS2d 757 [3d Dept 1994]; ***Kenney v Zimmerman***, 185 AD2d 690, 586 NYS2d 80 [4th Dept 1992]). Likewise, Campbell Dalglish's self-serving affidavit fails to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) since there was no objective medical evidence to support it (*see* ***Laguerre v Chavarria***, 41 AD3d 437, 837 NYS2d 716 [2d Dept 2007]; ***Davis v New York City Trans. Auth.***, 294 AD2d 531, 742 NYS2d 658 [2d Dept 2002]).

Finally, plaintiffs failed to produce any objective medical evidence to substantiate the existence of an injury which limited Campbell Dalglish's usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (***see Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]). The subjective complaints of pain and impaired joint function expressed by Campbell Dalglish during his deposition are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rovelo v Volcy***, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011]; ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; ***Sham v B&P Chimney Cleaning & Repair, Co., Inc.***, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing plaintiffs' complaint is granted

Dated: Sept 11, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

X FINAL DISPOSITION **____ NON-FINAL DISPOSITION**