Osias v Kwinter
2019 NY Slip Op 33554(U)
December 4, 2019
Supreme Court, Suffolk County
Docket Number: 16-7631
Judge: Joseph A. Santorelli

SHORT FORM ORDER

INDEX No. 16-7631
CAL. No. 18-02186MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-7-19
ADJ. DATE 7-11-19
Mot. Seq. # 001 - MG; CASEDISP

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MAUBERTE OSIAS,

Plaintiff,

- against -

KIM C. KWINTER,

Defendant.

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-17 ; Replying Affidavits and supporting papers 12-13 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Kim Kwinter seeking summary judgment dismissing the complaint is granted.

Plaintiff Mauberte Osais commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle that occurred at the intersection of Straight Path and Irving Avenue in the Town of Babylon on February 13, 2015. It is alleged that the accident occurred when the vehicle owned and operated by defendant Kim Kwinter struck the rear of the vehicle owned and operated by plaintiff while it was stopped at a red traffic light on northbound Straight Path. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including a disc herniation at level C5-C6, and disc bulges at level L3 through L5.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Matthew Skolnick. Dr. Skolnick, at defendant's request, conducted an independent orthopedic examination of plaintiff on April 13, 2018.

Plaintiff opposes the motion on the grounds that defendant failed to meet her prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories as a result of the subject accident. In opposition to the motion, plaintiff submits her own affidavit, sworn medical reports of Dr. Eliezer Offenbacher and Dr. Nicky Bhatia, and the uncertified copies of her medical reports regarding 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], *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 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***, 57 NY2d 230, 455 NYS2d 570 [1982]). 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]).

Here, defendant, through the submission of plaintiff's deposition transcript and competent medical evidence, established a prima face case that plaintiff did not sustain a serious injury within the meaning of § 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Davis-Hassan v Siad***, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]). Defendant's examining orthopedist, Dr. Skolnick, used a goniometer to test the ranges of motion in plaintiff's spine, shoulders, knees, and hips, and compared his respective findings to the normal range of motion values for each region (*see e.g.* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD2d 614, 874 NYS2d 180 [2d Dept 2009]; ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Skolnick states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine, shoulders, hips, and knees, that there is no tenderness or spasm upon palpitation of the paraspinal muscles, shoulders, knees, or hips, and that the straight leg raising test is negative. He further states that plaintiff is able to walk on her heels and toes with good balance, and that her gait is normal. Dr. Skolnick opines that the strains plaintiff sustained to her spine and left shoulder as a result of the subject accident have resolved. Dr. Skolnick concludes that plaintiff does not have any causally related orthopedic disabilities due to the subject accident, that she does not require any additional physical therapy or treatment, and that she is capable of performing all of her usual daily living activities, including working at her usual occupation, which she is currently engaged in.

Furthermore, plaintiff's deposition testimony establishes that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 ADOk3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that she was registered in college as a full-time student at the time of the accident, that immediately after the accident she drove herself to school and attended her classes for the day, and that she did not miss any time from school as a result of any injuries she sustained in the accident. She testified that she first sought medical treatment for injuries sustained in the accident approximately two weeks after the accident, that she received chiropractic treatment and physical therapy for approximately six months, and that once her no-fault benefits were terminated she ceased treatment. She testified that she injured her neck, back and shoulders in a prior motor vehicle accident in 2009, but that she was not receiving any treatment for those injuries at the time of the subject accident. Plaintiff further testified that she currently attends physical therapy for osteoarthritis in her hips, that she began physical therapy for her hips as a result of a referral from her massage therapist following her complaints of pain, and that she uses her private medical insurance to pay for her physical therapy sessions.

Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff 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]).

Plaintiff has failed to raise a triable issue of fact in opposition to defendant's prima facie showing that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject collision (*see* ***Carpriglione v Rivera***, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]; ***Heumann v JACO Transp., Inc.***, 82 AD3d 1046, 919 NYS2d 198 [2d Dept 2011]; ***Posa v Guerrero***, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]). A plaintiff is required to present nonconclusory 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 noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Notwithstanding the fact that plaintiff submitted the affirmed medical report of Dr. Bhatia, showing that she sustained range of motion limitations in her cervical spine in the subject accident, she failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a contemporaneous examination (*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]). Thus, absent findings from a contemporaneous examination, Dr. Bhatia cannot substantiate the extent or degree of the limitations in plaintiff's cervical 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]). In fact, Dr. Bhatia fails to state any dates for when his examination of plaintiff occurred despite concluding that plaintiff sustained "a structural impairment with functional dynamic derangement of central spinal and/or supporting musculoskeletal structure, resulting in continued pain and disability," which is permanent in nature, as a result of the subject accident.

Additionally, the certified medical records of Physical Infinity Medical, P.C., are inadmissible, since they are unsworn, unaffirmed, and uncertified (*see* ***Grasso v Angerami***, 79 NY2d 813, 588, 580 NYS2d 178 [1991]; ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; ***Joseph v Livery***, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]). The opinions and conclusions in Dr. Pauline Raitses' reports were required to be sworn to or affirmed under the penalties of perjury, and since this was not done, the various opinions and conclusions of this doctor have not been submitted in a form necessary to refute defendant's prima facie showing (*see* ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). More importantly, plaintiff has not offered an "excuse for [her] failure to meet the strict requirement of tender in admissible form" (***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *see* ***Merriman v Integrated Bldg. Controls, Inc.***, 84 AD3d 897, 922 NYS2d 562 [2d Dept 2011]).

Likewise, the affirmation of Dr. Offenbacher, the radiologist who reviewed the MRI studies of the plaintiff's cervical and lumbar regions, which states that plaintiff has disc bulges and disc herniations in her spine, fails to opine as to causation, and, therefore, is insufficient to rebut the defendants' prima facie showing (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]). "The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Stevens v Sampson***, 72 AD3d 793, 794, 898 NYS2d 657 [2d Dept 2010]; *see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Keith v Duval***; 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Moreover, plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her 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 plaintiff during her 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]; ***Sham v B&P Chimney Cleaning & Repair Co., Inc.***, 71 AD3d 978, 979, 900 NYS2d 72 [2d Dept 2010]; ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: DEC 0 4 2019

Hon. Joseph A. Santorelli
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION