

Figueroa v Molina

2019 NY Slip Op 34335(U)

July 15, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 17-602676

Judge: Sanford Neil Berland

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SHORT FORM ORDER

INDEX No. 17-602676
CAL. No. 18-00848MV

E-FILE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 8-28-18
ADJ. DATE 10-16-18
Mot. Seq. # 002 - MG; CASEDISP

-----X
VERONIKA A. FIGUEROA and MARTIN
LAVERGNE,

Plaintiffs,

- against -

JUSTIN S. MOLINA and SEGUNDO L.
MOLINA,

Defendants.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, uploaded July 27, 2018; Answering Affidavits and supporting papers by plaintiffs, uploaded October 9, 2018; and Replying Affidavits and supporting by defendants, uploaded October 11, 2018, it is,

ORDERED that the motion by defendants Justin Molina and Segundo Molina for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Veronika Figueroa and Martin Lavergne, her husband, derivatively, as a result of a motor vehicle accident, which occurred on March 31, 2016, in Bay Shore, New York. Plaintiff alleges, in relevant part, that she suffered various injuries as a result of the accident, including disc herniations to her lumbosacral spine and disc bulges of her cervical spine.

Defendants seek an order granting summary judgment dismissing plaintiffs' complaint on the ground that Veronika Figueroa did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants submit, in support of the motion, copies of the pleadings, the bills of particulars, witness

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disclosures, the affirmed medical reports of orthopedic surgeon Craig Ordway, M.D., and radiologist Scott Coyne, M.D., the medical records of Southside Hospital, the transcript of plaintiff's deposition testimony, and employment records. In opposition, plaintiffs argue that issues of fact remain as to whether Ms. Figueroa sustained serious injuries. Plaintiffs submit, in opposition, the supplemental bill of particulars, the unaffirmed medical reports of Michele Rubin, M.D., the affirmed medical report of Syeda Asad, M.D., the medical records and affidavit of Robert Leahy, D.C., and the transcript of plaintiff's deposition testimony.

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*).

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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 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]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming “serious injury,” must offer some reasonable explanation for having done so to prevail on his or her claim (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 976 NYS2d 1 [2013]; *Pommells v Perez, supra*; *David v Caceres*, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]).

Defendants’ submissions establish a prima facie case that Ms. Figueroa’s 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*). Ms. Figueroa’s alleged 90/180-day injury was sufficiently refuted, prima facie, by her testimony that she missed only one day of work as a result of the accident (*see Ferazzoli v Hamilton*, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; *Pryce v Nelson, supra*; *Strenk v Rodas, supra*; *Beltran v Powow Limo, Inc., supra*). Additionally, defendants presented competent evidence that none of Ms. Figueroa’s alleged injuries fall under the “permanent consequential limitation,” “permanent loss,” or “significant limitation” of use categories of the statute (*see Perl v Meher, supra*; *Schilling v Labrador, supra*; *Rovelo v Volcy, supra*).

Dr. Ordway’s affirmed medical report stated, in relevant part, that during a February 2018 orthopedic examination, Ms. Figueroa exhibited normal joint function in her cervical, thoracic, and

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lumbosacral spine. Dr. Ordway found the examination of plaintiff's spine normal and did not detect spasm in her cervical or lumbosacral spine, or kyphosis or scoliosis in her thoracic spine. In addition, plaintiff tested negative in the straight leg raising test. Dr. Ordway stated that Ms. Figueroa exhibited normal joint function in her shoulders, and that he did not detect instability or crepitus in either shoulder. Dr. Ordway opined that plaintiff had no weakness or atrophy of any flexor or extensor muscle group in her upper or lower extremities. Dr. Ordway concluded that plaintiff's examination was entirely within normal limits and that he found no evidence of impairment of function.

In his affirmed medical report, Dr. Coyne opined that the magnetic resonance imaging ("MRI") examination of Ms. Figueroa's cervical spine performed approximately 2 ½ weeks after the accident showed slight disc dehydration and bulging, reflecting degenerative disc disease at level C6-7. Dr. Coyne found no evidence of disc herniation, central spinal stenosis, spinal cord compression, or displacement. As to the x-ray of plaintiff's cervical spine conducted approximately one month after the accident, Dr. Coyne stated that the curvature was normal and well-preserved, and that he found no evidence of osseous trauma, fracture, dislocation, spinal instability, or prevertebral soft tissue swelling.

Dr. Coyne further opined that the MRI examination of plaintiff's lumbosacral spine conducted approximately 2 ½ weeks after the accident showed no evidence of osseous trauma, fracture, contusion, dislocation, or subluxation. Dr. Coyne found no evidence of focal disc herniation, central spinal stenosis, compression, or displacement of the cauda equina. As to the x-ray of Ms. Figueroa's lumbosacral spine conducted approximately one month after the accident, Dr. Coyne found no evidence of osseous trauma, fracture, subluxation, dislocation, or instability. While curvature was maintained, Dr. Coyne found levoconvex scoliosis, but no evidence of spondylolysis, or osteolytic or osteoblastic lesion.

Dr. Coyne also opined that the MRI examination of plaintiff's thoracic spine conducted approximately nine weeks after the accident showed no evidence of fracture, dislocation, subluxation, marrow edema, or other acute pathology. Dr. Coyne found evidence of slight degenerative change with minimal disc dehydration, but otherwise did not find evidence of disc herniation. As to the x-ray of plaintiff's thoracic spine conducted approximately one month after the accident, Dr. Coyne found no fracture, dislocation, subluxation, or osteolytic or osteoblastic lesion. Dr. Coyne found plaintiff's kyphosis normal and only shallow midthoracic dextroconvex compensatory scoliosis.

Dr. Coyne concluded that plaintiff exhibited chronic and long-standing slight degenerative disc changes in her cervical and thoracic spine that pre-existed the accident. He opined that chronic compensatory scoliosis likely contributed to mild focal degenerative disc changes in plaintiff's cervical, thoracic, and lumbosacral spine. Dr. Coyne determined that radiological examinations demonstrated no evidence of osseous or soft tissue abnormality, trauma, or other pathology causally related to the subject accident.

Defendants having met their initial burden on the motion, the burden shifted to plaintiffs 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 failed to raise an issue of fact as to whether Ms. Figueroa's injuries constitute "serious injuries." Plaintiffs' submissions are insufficient to raise a triable issue of fact as to whether plaintiff sustained non-permanent injuries that left her unable to

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perform substantially all 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 Chrabaszczyk*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Dr. Asad's medical report states, in relevant part, that during an examination approximately one week after the accident, plaintiff exhibited "moderately decreased" limitations in joint function throughout her spine and that he detected mild spasm throughout. He diagnosed plaintiff as having suffered sprains to her cervical, thoracic, and lumbar spine, which he causally related to the subject accident. However, sprains are not "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see Rabolt v Park, supra; Washington v Cross, supra*), and Dr. Asad failed to offer objective quantitative evidence of plaintiff's loss of range of motion by identifying the range of motion values (*see Perl v Meher, supra; Toure v Avis Rent A Car Systems, Inc., supra; McEachin v City of New York, supra*). In addition, Dr. Asad's findings are not based on contemporaneous and recent examinations, and, thus, fail to rebut defendants' prima facie showing that plaintiff did not suffer a "serious injury" within the meaning of the statute (*see Insurance Law § 5102 [d]; Perl v Meher, supra; Pommells v Perez, supra; Zuckerman v City of New York, supra*).

A plaintiff may rely upon his or her examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see Dietrich v Puff Cab Corp.*, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Pagano v Kingsbury, supra*). In this case, defendants did not submit the unsworn medical reports of Dr. Rubin. As a result, her medical reports submitted by plaintiffs in opposition are not sufficient to defeat defendants' motion for summary judgment (*see Shamsodeen v Kibong*, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; *Elfiky v Harris*, 301 AD2d 624, 754 NYS2d 59 [2d Dept 2003]). Assuming, *arguendo*, that the medical reports were in admissible form, Dr. Rubin's radiological findings failed to raise a triable issue of fact. Dr. Rubin opined that the MRI examination of plaintiff's cervical spine conducted approximately 2 ½ weeks after the accident showed annular disc bulges at C6-7, loss of normal lordosis, decreased T1 marrow signal, and mild prominence of nasopharyngeal soft tissues. Dr. Rubin further opined that the MRI examination of plaintiff's lumbosacral spine conducted approximately two-and-a-half weeks after the accident showed lumbar scoliosis and exaggerated lordosis and premature disc desiccation at L5-S1. Dr. Rubin opined that the disc desiccation is indicative of disc injury. However, Dr. Rubin failed to provide additional objective medical evidence showing that the accident resulted in significant physical limitations (*see Pommells v Perez, supra; Hayes v Vasilios, supra; Scheker v Brown, supra*) or that any of these conditions are causally related to the accident (*see Perl v Meher, supra; Schilling v Labrador, supra*).

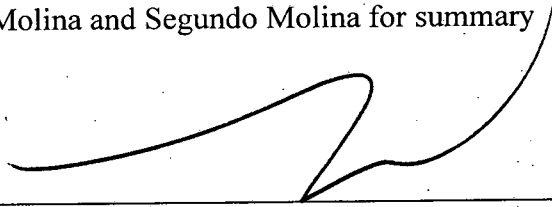
Dr. Leahy's finding of range of motion restrictions in plaintiff's cervical and lumbar spine are based only on an examination performed in August 2018, nearly 2 ½ years after the accident. Therefore, such a report is insufficient to demonstrate the duration of the claimed range of motion limitations, and that such limitations are significant and causally related to the subject accident (*see Pryce v Nelson, supra; Rovelo v Volcy, supra; McLoud v Reyes, supra*).

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Moreover, plaintiffs' submissions failed to address the findings of Dr. Coyne, who concluded that the conditions in plaintiff's cervical and thoracic spine were degenerative in nature and unrelated to the subject accident (see *Perl v Meher, supra; Pommells v Perez, supra; Schilling v Labrador, supra; Gouvea v Lesende*, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]). Therefore, the conclusions of Dr. Asad and Dr. Leahy that plaintiff's injuries and limitations were the result of the subject accident were speculative (see *Casimir v Bailey, supra*).

Accordingly, the motion by defendants Justin Molina and Segundo Molina for summary judgment dismissing the complaint is granted.

Dated: 7/15/2019



A.J.S.C.

HON. STANFORD HILL

FINAL DISPOSITION NON-FINAL DISPOSITION