Padgett v Figueroa
2019 NY Slip Op 34544(U)
April 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 610589/2017E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Richard Padgett,

Plaintiff,

-against-

Carlos M. Figueroa and Julio S. Patzan-Borrayo,

Defendants.

Clerk of the Court

Motion Sequence No.: 001; MD
Motion Date: 9/12/18
Submitted: 1/23/19

Index No.: 610589/2017E

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motions and supporting papers dated August 7, 2018; Answering Affidavits and supporting papers dated January 9, 2019; Replying Affidavits and supporting papers dated January 14, 2019; it is

ORDERED that the motion by defendants for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff when his vehicle collided with a vehicle owned by defendant Carlos Figueroa and operated by defendant Julio Patzan-Borrayo. It is undisputed that the accident occurred on October 22, 2016, at the intersection of Route 112 and Horseblock Road, in Medford, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including herniated discs in the cervical and lumbar regions, cervical and lumbar radiculopathy, and sprains in the spine and shoulders.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of their examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On March 28, 2018, approximately 17 months after the subject accident, moving defendants' examining orthopedist, Dr. Gary Kelman, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test, the

straight leg raising test, the impingement sign, and the O'Brien test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's spine. Dr. Kelman also performed range of motion testing on plaintiff's spine and shoulders, using a goniometer to measure his joint movement, and found that plaintiff exhibited normal joint function. Dr. Kelman opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that following the accident, he did not miss any time from work for approximately three months until January 25, 2017, when he underwent cervical spine surgery. After the surgery, he missed a week from work. Plaintiff testified there is no activity that he is unable to perform because of the accident. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). 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 of the plaintiff 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the affirmations of his treating physicians, Dr. Jordan Sudberg and Dr. John Velez, raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In his affirmation, Dr. Sudberg states that he first examined plaintiff on November 28, 2016, approximately five weeks after the subject accident. During the initial consultation, plaintiff complained of pain in his cervical region and right shoulder. Dr. Sudberg administered range of motion testing on plaintiff's cervical region, using a goniometer to measure his joint movement. Dr. Sudberg found that there were significant range of motion restrictions in plaintiff's cervical region: 30 degrees of flexion (50 degrees normal), 30 degrees of extension (50 degrees normal), 65 degrees of left rotation and 60 degrees of right rotation (85 degrees normal), and 25 degrees of left and right lateral flexion (45 degrees normal).

In his affirmation, Dr. Velez states that he first examined plaintiff on May 24, 2017 and administered range of motion testing on his cervical region. Dr. Velez found that there were significant range of motion restrictions in plaintiff's cervical region. On August 22, 2018, Dr. Velez re-examined plaintiff and administered range of motion testing on his cervical region, using a goniometer to measure his joint movement. Dr. Velez found that there were significant range of motion restriction in plaintiff's cervical region: 40 degrees of flexion (50 degrees normal), 50 degrees of extension (60 degrees normal), and 70 degrees of left and right rotation (80 degrees normal).

Here, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether he sustained a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (*see* ***Perl v Meher***, *supra*; ***Gooden v Joseph***, 137 AD3d 1215, 27 NYS3d 393 [2d Dept 2016]). In addition, plaintiff, with minimal adequacy, explained his treatment gap by testifying that he underwent chiropractic treatment until no-fault insurance benefits were terminated (*see* ***Giap v Hathi Son Pham***, 159 AD3d 484, 71 NYS3d 504 [1st Dept 2018]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: 4/5/2019

HON. WILLIAM B. REBOLINI, J.S.C.

________ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION