Edwards-Mohammed v Brown
2019 NY Slip Op 34548(U)
August 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-600098
Judge: Martha L. Luft

SHORT FORM ORDER

INDEX No. 17-600098
CAL. No. 18-00963MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 10-23-18
ADJ. DATE 1-15-19
Mot. Seq. # 001 - MG; CASEDISP

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ANETA EDWARDS-MOHAMMED and ADRIAN MOHAMMED,

Plaintiffs,

- against -

DONELLA BROWN,

Defendant.

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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 dated September 17, 2018 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated December 11, 208 ; Replying Affidavits and supporting papers dated January 7, 2019 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

This is an action to recover damages for injuries sustained by plaintiff Aneta Edwards-Mohammed ("plaintiff") when her vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on August 28, 2015, at approximately 10:00 a.m., on Convent Road in Syosset, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including anterior inferior labral tear in the left shoulder and a bulging disc at level C3-C4. Plaintiff's husband, Adrian Mohammed, seeks damages for loss of services. Plaintiff also claims that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (d).

Defendant moves 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 "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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant 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 his 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 30, 2018, approximately two years and seven months after the subject accident, defendant's examining orthopedist, Dr. Matthew Skolnick, examined plaintiff and performed certain orthopedic and neurological tests, including the Spurling's test, the O'Brien's test, the Tinel's sign, and the Phalen's test. Dr. Skolnick found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical and lumbar regions. Dr. Skolnick found that there was no tenderness in plaintiff's shoulders. Dr. Skolnick also performed range of motion testing on plaintiff's cervical and lumbar regions, shoulders, and wrists, using a goniometer to measure her joint movement, and found that plaintiff exhibited normal joint function. Dr. Skolnick 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 her deposition, plaintiff testified that following the accident, she was not confined to her bed and home, and that she missed "a few days" from work. She testified that there is no activity that she is unable to perform because of the accident, except for lifting or moving heavy objects. Plaintiff's deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her 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, defendant met his 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 she was not prevented from performing substantially all of her 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]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

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 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, in opposition, argues that the report of defendant's examining physician is insufficient to meet her burden on the motion. She also argues that the affirmation of her treating chiropractor, Dr. Thomas Dow, and the unaffirmed magnetic resonance imaging (MRI) examination reports of her radiologists, Dr. David Payne and Dr. Ron Mark, raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). Plaintiff submits, *inter alia*, the uncertified medical records of Brookhaven Memorial Hospital and the uncertified medical

records of Island Musculoskeletal Care. The uncertified medical records are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Dr. Dow's report set forth plaintiff's complaints and the findings, including significant limitations in her cervical and left shoulder joint function measured during range of motion testing performed at his initial consultation on November 15, 2018, more than three years after the subject accident. However, Dr. Dow failed to provide any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; ***Griffiths v Munoz***, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see* ***Perl v Meher***, *supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see* ***Griffiths v Munoz***, *supra*). Dr. Dow's report, therefore, is insufficient to raise a triable issue of fact.

Further, even assuming that plaintiff was entitled to rely on the unaffirmed MRI reports prepared by Dr. Payne and Dr. Mark, such reports are insufficient to warrant denial of defendant's motion for summary judgment. Said MRI reports revealed a labral tear in plaintiff's left shoulder and a bulging disc at level C3-C4. The mere existence of a herniated or bulging disc or tears in a shoulder, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, plaintiff failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of 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 Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]).

Thus, defendant's motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed.

Dated: 8/5/19

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION