Boine v Arevalo
2019 NY Slip Op 34549(U)
April 3, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-617423
Judge: Joseph A. Santorelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER ORIGINAL

INDEX No. 16-617423
CAL. No. 18-01226MV

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 9-13-18
ADJ. DATE 10-4-18
Mot. Seq. # 001 - MD

----------X

RICHARD BOINE,

Plaintiff,

- against -

LUIS ANTONIO AREVALO and ACT ENTERPRISES, INC.,

Defendants.

----------X

THE HARRISON LAW GROUP, P.C.
Attorney for Plaintiff
445 Broad Hollow Road, Suite 400
Melville, New York 11747

PICCIANO & SCAHILL, P.C.
Attorney for Defendants
1065 Stewart Avenue, Suite 210
Bethpage, New York 11714

Upon the following papers numbered 1 to 23 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14-21 ; Replying Affidavits and supporting papers 22-23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Luis Arevalo and ACT Enterprises, Inc., seeking summary judgment dismissing the complaint is denied.

Plaintiff Richard Boine 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 Joshuas Path and Nostrand Avenue in the Town of Islip on February 14, 2016. It is alleged that the accident occurred when the vehicle owned and operated by plaintiff struck the entire right passenger side of the vehicle owned by defendant ACT Enterprises and operated by defendant Luis Arevalo when it attempted to make a left turn onto Nostrand Avenue across the path of plaintiff's vehicle. At the time of the accident, plaintiff's vehicle was traveling southbound and defendants' vehicle was traveling northbound on Joshuas Path. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject collision, including a tear of the medial and lateral meniscus of the right knee; right knee internal derangement; partial tear of the rotator cuff of the right shoulder; and multilevel disc bulges and herniations of the cervical and lumbar spine. Plaintiff further alleges that he was incapacitated from his employment for approximately one week immediately following the accident, and

then for approximately two months following the right knee surgery he underwent as a result of the injuries he sustained in the subject accident.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, the sworn medical reports of Dr. Mathew Chacko and Dr. David Weissberg. At defendants' request, Dr. Chacko conducted an independent neurological examination of plaintiff on March 8, 2018. Also at defendants' request, Dr. Weissberg conducted an independent orthopedic examination of plaintiff on April 2, 2018. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits his own affidavit, unsworn copies of his medical reports concerning the injuries at issue, and the sworn medical reports of Dr. Harold Tice, Dr. Marc Katzman, and Dr. Christopher Durant.

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], *aff'd* 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*).

Based upon the adduced evidence, defendants established, prima facie, their entitlement to judgment as a matter of law on the ground that the injuries allegedly sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Weissberg, states in his medical report that an examination of plaintiff reveals he has full range of motion in his spine, shoulders, and knees. Dr. Weissberg states that no spasms or tenderness were detected upon palpation of plaintiff's paraspinal muscles. He states the examination of plaintiff showed that there are no motor, sensory or reflex deficiencies, that his muscle strength is 5/5, that he has a nonantalgic gait, and that the impingement and apprehension signs are negative. Dr. Weissberg opines that the strains plaintiff sustained to his spine, right shoulder, and right knee have resolved, and that the ongoing symptoms experienced by plaintiff are due to pre-existing conditions, which were sustained during his past career as a professional mixed martial artist and body builder. Dr. Weissberg further states that plaintiff does not require any additional orthopedic care or treatment presently, and that he is capable of performing all activities of his usual and customary activities and working without restrictions.

Similarly, defendants' examining neurologist, Dr. Chacko, states that an examination of plaintiff reveals he has full range of motion in his spine, that there was no tenderness or spasm upon palpation of the paraspinal muscles, that he walks with a normal gait, and that there was no sign of cerebellar dysfunction. Dr. Chacko states that plaintiff reported pressure in his back and a stretching sensation in his thighs at 60 degrees out of 90 degrees during the straight leg raising test, bilaterally, but that there was no radiating back pain reported or observed. Dr. Chacko opines that the strains plaintiff sustained to his spine have resolved, that plaintiff does not have any focal neurological deficits, and that there is no evidence of cervical, thoracic or lumbar radiculopathy or myelopathy. Dr. Chacko further states that there is no objective evidence that plaintiff has any neurological disabilities or limitations, or that he is unable to perform his normal daily living activities, and that there is no objective evidence consistent with any neurological permanency or residuals casually related to the subject accident.

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of his daily activities were not curtailed for the first 90 out 180 days following the subject accident (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Plaintiff testified at an examination before trial that prior to the accident he works as a mixed martial arts instructor in New Jersey, that following the accident he missed approximately one week from his employment, and that upon his return to work he worked his normal shift, but he was only allowed to teach "beginner bag trainer" class, because he was unable to demonstrate the moves and techniques

required to teach his regular classes. Plaintiff testified that he missed an additional week from his employment after his surgery on his right knee on April 9, 2016, and that when he returned to work after the surgery "his boss allowed him to come into work a little bit later, nothing much," and he only performed managerial work. He testified that he received chiropractic treatment for the injuries he sustained in the accident for approximately six months, that he ceased all treatments for injuries related to the accident after his No-Fault benefits were terminated approximately six month after the accident, and that he did not have private medical insurance. He further testified that he left his employment as a mixed martial arts instructor in July 2016, and that he began working part-time as a custodian for a school district in April 2017, although he accepted the position in July 2016. Lastly, plaintiff testified that he previously had surgery on his right knee when he was in high school after he tore his meniscus while wrestling, and that he injured his right bicep in June 2015 when he executed a punch incorrectly during mixed martial arts training.

Defendants, 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 defendants' 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 to defendants' prima facie showing, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury to his spine, right shoulder, and right knee within the meaning of Insurance Law § 5102 (d) (*see* ***Levin v Khan***, 73 AD3d 991, 904 NYS2d 73 [2d Dept 2010]; ***Nisanov v Kiriyenko***, 66 AD3d 655, 885 NYS2d 633 [2d Dept 2009]; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2d Dept 2008]). Plaintiff primarily relies upon the affirmed medical report of his treating orthopedist, Dr. Christopher Durant, in opposition to the motion. Based upon his contemporaneous and recent examinations of plaintiff, which revealed significant range of motion limitations in plaintiff's

spine, right shoulder, and right knee, and his performance of a right knee arthrosporic surgery on plaintiff on April 9, 2016, Dr. Durant concluded that the injuries sustained by plaintiff to those areas of his body were significant, permanent, and causally related to the subject accident (*see* ***Johnson v Kara***, 72 AD3d 901, 898 NYS2d 525 [2d Dept 2010]; ***Dizdari v Chhon***, 72 AD3d 875, 898 NYS2d 506 [2d Dept 2010]; ***Su Gil Yun v Barber***, 63 AD3d 1140, 883 NYS2d 242 [2d Dept 2009]; ***Modeste v Mercier***, 67 AD3d 871, 888 NYS2d 427 [2d Dept 2009]). Thus, plaintiff has submitted competent medical evidence raising a triable issue of fact as to whether he sustained serious injuries to his spine, right shoulder, and right knee under the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Plaintiff's medical evidence, therefore, conflicts with that of defendants' experts, who found that the injuries sustained by plaintiff were resolved or as a result of his prior sporting activities. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a] plaintiff establishes that at least some of his injuries meet the 'no-fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand [defendants'] motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: APR 0 3 2019

Hon. JOSEPH A. SANTORELLI
J.S.C.