Avelar v McMahon
2019 NY Slip Op 34600(U)
April 2, 2019
Supreme Court, Suffolk County
Docket Number: Index No.17-610107
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 17-610107
CAL. No. 18-00888MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 10-17-18
ADJ. DATE 01-23-19
Mot. Seq. # 002 - MotD

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MELVIN AVELAR and JUANA GARCIA,

Plaintiffs,

- against -

JESSICA N. MCMAHON,

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 6, 2018 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated December 14, 2018 ; Replying Affidavits and supporting papers dated January 15, 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 plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted to the extent of granting summary judgment dismissing the first and fourth causes of action pleaded in the complaint, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs, husband and wife, when their vehicle collided with a vehicle owned and operated by defendant. The accident occurred on December 20, 2016, on an exit road of the Smith Haven Mall, in the vicinity of New Moriches Road in the Town of Smithtown, New York. At the time of the accident, Juana Garcia was a passenger in the vehicle owned and operated by Melvin Avelar. By the bill of particulars, Avelar alleges that, as a result of the accident, he sustained various serious injuries and conditions, including herniated and bulging discs in the cervical and lumbar regions, cervical and lumbar radiculopathy, and sprain and strain in the cervical and lumbar regions, the right shoulder, and the right knee. Garcia alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated and bulging discs in the cervical and lumbar regions, cervical and lumbar radiculopathy, and sprain and strain in the cervical and lumbar regions. Plaintiffs allege four causes of action in their complaint. In the first cause of action Avelar seeks

to recover damages for his personal injuries. In the second cause of action, Garcia seeks to recover damages for her personal injuries. In the third cause of action Avelar seeks to recover damages derivatively for loss of services. In the fourth cause of action Garcia seeks to recover damages derivatively for loss of services.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiffs 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 Avelar did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her 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 15 months after the subject accident, defendant's examining orthopedist, Dr. Gary Kelman, examined Avelar and performed certain orthopedic and neurological tests, including the foraminal compression test, the straight leg raising test, the impingement sign, the O'Brien test, the Lachman's test,

and the Sage sign. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in Avelar's cervical and lumbar regions. Dr. Kelman found that there was no tenderness or effusion in Avelar's shoulders and knees. Dr. Kelman also performed range of motion testing on Avelar's cervical and lumbar regions, shoulders, and knees, using a goniometer to measure his joint movement, and found that Avelar exhibited normal joint function. Dr. Kelman opined that Avelar 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, Avelar testified that following the accident, he missed only two days from work. He testified that there is no activity that he is unable to perform because of the accident, except for performing some chores around the house. Avelar'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, defendant met her initial burden of establishing that Avelar 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 Avelar 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]).

Avelar, in opposition, argues that the report of defendant's examining physician is insufficient to meet her burden on the motion. Avelar also argues that the affirmation of his treating physician, Dr. John Velez, raises a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102(d).

Here, Dr. Velez's report set forth Avelar's complaints and the findings, including significant limitations in his cervical and lumbar joint function measured during range of motion testing performed at his initial consultation on December 29, 2016, nine days after the subject accident. Subsequently, Avelar saw Dr. Velez in follow-up evaluations in the following months: January 2017, April 2017, June 2017, August 2017, September 2017, November 2017, December 2017, and October 2018. On October 30, 2018, Dr. Velez re-examined Avelar and performed range of motion testing on his cervical and lumbar regions. Dr. Velez found a minor range of motion restriction in those regions. With respect to Avelar's cervical region, Dr. Velez indicated that extension was 50 degrees (normal 60 degrees) and left and right rotation were 70 degrees (normal 80 degrees). With respect to Avelar's lumbar region, Dr. Velez indicated that extension was 25 degrees (normal 30 degrees). Avelar's showing of relatively minor limitations in recent examination is insufficient to sustain a serious injury claim (*see* ***Gaddy v Eyler***, *supra*; ***M.P. v New York Tr. Auth.***, 159 AD3d 492, 71 NYS3d 501 [1st Dept 2018]; ***Rose v Tall***, 149 AD3d 554, 52 NYS3d 339 [1st Dept 2017]; ***Cattouse v Smith***, 146 AD3d 670, 672, 45 NYS3d 453 [1st Dept 2017]). Dr. Velez's report, therefore, fails to raise a triable issue of fact.

In his report, Dr. Marc Katzman states that on October 29, 2018, he reviewed the magnetic resonance imaging (MRI) images of Avelar's cervical and lumbar regions obtained during the MRI examinations conducted on January 3, 2017. Dr. Katzman opines that the MRI examinations revealed that Avelar had herniated discs in his cervical and lumbar regions. The mere existence of a herniated or bulging disc or tears in a spine, 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, Avelar failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform substantially all of his 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*). Defendant's motion, therefore, is granted to the extent of granting summary judgment dismissing the first and fourth causes of action on the ground that Avelar's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d).

As to the remaining causes of action, defendant made a prima facie showing that Garcia did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her examining physician (*see* ***Bailey v Islam***, *supra*; ***Sierra v Gonzalez First Limo***, *supra*; ***Staff v Yshua***, *supra*). On March 28, 2018, Dr. Kelman examined Garcia 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 Garcia's cervical and lumbar regions. Dr. Kelman found that there was no tenderness or effusion in Garcia's shoulders. Dr. Kelman also performed range of motion testing on Garcia's cervical and lumbar regions and shoulders, using a goniometer to measure her joint movement, and found that Garcia exhibited normal joint function. Dr. Kelman opined that Garcia had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, *supra*).

Further, at her deposition, Garcia testified she was unemployed at the time of the accident. She testified that following the accident, she was not confined to her house, and that there is no activity that she is unable to perform because of the accident. Garcia'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***, *supra*; ***Curry v Velez***, *supra*).

Thus, defendant met her initial burden of establishing that Garcia 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***, *supra*).

Garcia, in opposition, argues that the report of defendant's examining physician is insufficient to meet her burden on the motion. Garcia also argues that the affirmation of her treating physician, Dr. Velez, raises a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In his affirmation, Dr. Velez states that he first examined Garcia on December 29, 2016. During the initial consultation, Garcia complained of pain in her cervical and lumbar regions and right arm. Dr. Velez administered range of motion testing on Garcia's cervical and lumbar regions, using a goniometer to measure her joint movement. Dr. Velez found that there were significant range of motion restrictions in Garcia's cervical and lumbar regions: 40 degrees of flexion (50 degrees normal) and 35 degrees of extension (50 degrees normal) in the cervical region, and 60 degrees of flexion (90 degrees normal) and 15 degrees of extension (30 degrees normal) in the lumbar region. Subsequently, Garcia saw Dr. Velez in follow-up evaluations in the following months: January 2017, May 2017, June 2017, August 2017, September 2017, October 2017, and October 2018. On October 30, 2018, Dr. Velez re-examined Garcia and performed range of motion testing on her cervical and lumbar regions. Dr. Velez found that Garcia had a significant range of motion restriction in her lumbar region: 20 degrees of extension (30 degrees normal). Dr. Velez explained the gap in his treatment, averring Garcia, though symptomatic, stopped treating in October 2017 because she "had reached maximal medical benefits," and her improvement plateaued (*see* ***Brown v Achy***, 9 AD3d 30, 776 NYS2d 56 [1st Dept 2004]).

Here, Garcia submitted competent medical evidence raising a triable issue of fact as to whether she 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, Garcia, with minimal adequacy, explained her treatment gap between the end of her physical therapy and the re-examination conducted by Dr. Velez (*see* ***Giap v Hathi Son Pham***, 159 AD3d 484, 71 NYS3d 504 [1st Dept 2018]). Thus, to the extent defendant seeks summary judgment dismissing the second and third causes of action, her motion is denied.

Dated: April 2, 2019

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION