Collado v Perez
2019 NY Slip Op 34734(U)
January 23, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-605840
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 16-605840
CAL. No. 18-00642MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice Supreme Court

MOTION DATE 8-23-18 (001)
MOTION DATE 11-5-18 (002)
ADJ. DATE 12-6-18
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

EFRAIN COLLADO,

Plaintiff,

- against -

LAURA P. FRIAS PEREZ,

Defendant.

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Upon the following papers read on these e-filed motion and cross motion for summary judgment: Notice of Motions/Order to Show Cause and supporting papers dated July 20, 2018 ; Notice of Cross-Motion and supporting papers dated October 15, 2018 ; Answering Affidavits and supporting papers dated November 21, 2018 ; Replying Affidavits and supporting papers dated December 5, 2018 ; 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 did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in his favor on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when the vehicle in which he was a front-seat passenger was struck in the rear by a vehicle owned and operated by defendant. The accident allegedly occurred on August 16, 2015, on the Cross Bronx Expressway, in the County of Bronx, New York. By the bill of particulars, plaintiff 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, and radiculopathy in the cervical and lumbar regions.

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 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, 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 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 January 17, 2018, approximately two years and five months after the subject accident, moving defendant's examining orthopedist, Dr. Gary Kelman, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there was no spam or tenderness in plaintiff's cervical and lumbar regions. Dr. Kelman also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure his joint movement. Dr. Kelman 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 was confined to his house only for two days and did not miss any time from work, but he reduced his working hours from eight hours per day to six and worked for five days. He testified that for 15 days to a month after the accident, he performed a light duty assignment and was able to lift something approximately 10 pounds. He further testified that he gradually increased the amount that he lifted. He testified there is no activity that he is unable to perform because of the accident, except for his hobby of racing cars. 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, defendant met her 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]).

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 moving defendant's expert report is insufficient to meet her burden on the motion. Plaintiff also argues that the medical reports prepared by his treating chiropractor, Dr. Robert Buurma, and treating physician, Dr. Sima Anand, raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn report of Dr. Buurma, an affirmation of Dr. Anand, and two affirmed magnetic resonance imaging (MRI) examination reports of Dr. Steven Winter.

Here, the report of Dr. Buurma set forth plaintiff's complaints and the findings, including significant limitations in his cervical and lumbar spine joint function measured during range of motion testing performed at his initial consultation on August 21, 2015, six days after the subject accident. However, Dr. Buurma failed to state how he measured the joint function in plaintiff's cervical and lumbar regions. The Court can only assume that Dr. Buurma's tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]).

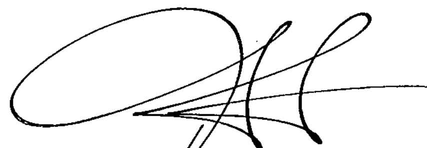
In her affirmation, Dr. Anand states that she examined plaintiff on August 27, 2015, November 6, 2015, and December 7, 2015. On December 7, 2015, Dr. Anand performed range of motion testing on plaintiff's cervical and lumbar regions, using an inclinometer to measure his joint movement, and found significant range of motion restrictions in these regions. However, plaintiff failed to submit any medical evidence of significant restrictions in cervical and lumbar joint function based on a recent examination (*see* ***Santos v Perez***, 107 AD3d 572, 574, 968 NYS2d 43 [1st Dept 2013]; ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Sham v B&P Chimney Cleaning & Repair Co.***, 71 AD3d 978, 900 NYS2d 72 [2d Dept 2010]).

In his reports, Dr. Winter opines that the MRI examinations conducted on September 23, 2015, approximately five weeks after the subject accident, revealed that plaintiff had herniated and bulging discs in his cervical and lumbar regions. The mere existence of a herniated or bulging disc, 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]).

Finally, plaintiff 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*).

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. Finally, plaintiff's untimely cross motion for summary judgment on the issue of liability is denied, as moot.



Dated: JANUARY 23, 2019

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION