

**Ray v Gallego**

2019 NY Slip Op 34738(U)

July 23, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 618220/2016

Judge: Martha L. Luft

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Short Form Order

Index No. 618220/2016

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

P R E S E N T:

Hon. Martha L. Luft

DECISION AND ORDER

Acting Justice Supreme Court

CASEDISP

\_\_\_\_\_  
ELYSE A. RAY, x

Mot. Seq. No.: 001- MG  
Orig. Return Date: 11/28/2017  
Mot. Submit Date: 08/21/2018

Plaintiff,

**PLAINTIFF'S ATTORNEY**

-against-

Dell & Dean, PLLC  
1225 Franklin Avenue, Suite 450  
Garden City, NY 11530

ALEX I. GALLEGO and NATALIE ROSE  
GALLEGO,

**DEFENDANTS' ATTORNEY**

Defendants.

Melissa A. Marano, Esq.  
Russo & Tambasco  
115 Broad Hollow Road, Suite 300  
Melville, NY 11747

\_\_\_\_\_  
x

Upon the e-filed documents numbered 13 through 31, it is

**ORDERED** that the motion by the defendants Alex I. Gallego and Natalie Rose Gallego for an order granting summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Elyse A. Ray as a result of a motor vehicle accident which occurred on May 4, 2015, on Post Avenue, near the intersection with Union Avenue, in Westbury, New York. The accident allegedly happened when a vehicle owned by the defendant Alex I. Gallego and operated by the defendant Natalie Gallego collided with the plaintiff's vehicle as she was attempting to make a left turn. By her complaint, as amplified by her bill of particulars, the plaintiff alleges that, as a result of the accident, she suffered serious injuries, namely a right shoulder tear, and bulging and herniated discs of the cervical and lumbar spine. By order dated January 9, 2019, this Court denied the instant motion as moot, finding that same had been withdrawn by the defendants. However, by order dated January 25, 2019, this Court vacated the January 9 order upon its own motion, finding that such order was issued in error.

The defendants now resubmit their motion for summary judgment dismissing the complaint, alleging that Insurance Law § 5104 precludes the plaintiff from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support, the defendants submit, among other things, transcripts of the plaintiff's deposition testimony, and the affirmed reports of orthopedic surgeon Gary Kelman, M.D., and

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radiologist Steven M. Peyser, M.D. At the defendants' request, Dr. Kelman conducted an examination of the plaintiff and reviewed medical records related to the injuries alleged in this action, and Dr. Peyser conducted an independent review of the images from magnetic resonance imaging (MRI) examinations of the plaintiff's right shoulder. The plaintiff opposes the motion, arguing that, as a result of the accident, she sustained a "serious injury" as defined by the statute because she suffers from, among other things, restrictions of range of motion in her cervical and lumbar spine. The plaintiff further alleges that these restrictions significantly limit the use of these areas. In opposition, the plaintiff submits several documents, including an affirmation of her attorney, the affirmed report of Fred M. Carter II, M.D., her treating orthopedist, and various records related to her medical treatment following the accident.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by 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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see Brite v Miller*, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (*see Gaddy v Eyler, supra; Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Beltran v Powow Limo, Inc., supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute 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 Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 the plaintiff's limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose, and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d

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655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *McEachin v City of New York*, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a “serious injury” within the meaning of the statute (*see Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380, 384 [2005]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). Further, a plaintiff seeking to recover damages under the “90/180” category must prove the injury is “medically determined,” meaning that the condition must be substantiated by a physician, and causally related to the accident (*see Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, *supra*).

Here, the defendants’ submissions establish a prima facie case that the alleged injuries to the plaintiff’s right shoulder, cervical, and lumbar spine do not constitute “serious injuries” within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). The defendants have presented competent medical evidence that none of the plaintiff’s alleged injuries fall under the “permanent consequential limitation” or “significant limitation” of use categories of the statute (*see Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*; *Rovelo v Volcy*, *supra*). The affirmed medical report of Dr. Kelman states, in relevant part, that during his examination, no tenderness or spasm was detected upon palpation of the spine and right shoulder, that the plaintiff exhibited normal joint function during range of motion testing of her spine and right shoulder, and that there were no neurological deficits in her lower extremities (*see Brite v Miller*, *supra*; *Damas v Valdes*, *supra*; *Pagano v Kingsbury*, *supra*). Dr. Kelman diagnoses the plaintiff as having suffered sprains of the right shoulder, the cervical, and the lumbar spine, and he concludes that these conditions have resolved. In addition, by his affirmed report, Dr. Peyser finds that the MRI images of the plaintiff’s right shoulder, which were obtained about eleven months after the subject accident, do not show evidence of acute traumatic injury. Dr. Peyser concludes that the hypertrophic change of the acromioclavicular joint and focal bursal surface tear are evidence of pre-existing degenerative joint disease, which are not causally related to the subject accident, and that these films show no evidence of post-traumatic injury (*see Perl v Meher*, *supra*, at 218-219; *Schilling v Labrador*, *supra*; *Gouvea v Lesende*, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]). Moreover, through the plaintiff’s own deposition testimony that she missed only four to five days from work following the accident, the defendants established, prima facie, that the plaintiff did not suffer injury within the “90/180-days” category of the statute (*see Pryce v Nelson*, *supra*; *Strenk v Rodas*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*).

The defendants having met their initial burden on the motion, the burden shifted to the plaintiff to raise a triable issue of fact (*see Gaddy v Eyler*, *supra*; *Zuckerman v City of New York*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). In opposition, the plaintiff submits various medical records and the affirmed report of Dr. Carter. Initially, the Court notes that the majority of the various medical records submitted by the plaintiff were not considered in the determination of this motion because, although certified as “true and accurate copies” of the plaintiff’s medical records by her treating physicians (*see CPLR 4518 [c]*), they are unsworn and

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unaffirmed, and therefore, not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *McLoud v Reyes*, *supra*; *Washington v Mendoza*, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]). By his affirmed report, Dr. Carter concludes, among other things, that the plaintiff sustained a serious injury to her cervical and lumbar regions of her spine as a result of the subject accident, resulting in significant limitation of its use. Dr. Carter further affirms that he performed range of motion testing of these areas during a recent examination of the plaintiff, and that such examination showed limitations of movement in these regions. However, as Dr. Carter did not begin to treat the plaintiff until May 2016, about one year after the accident, his report fails to provide results of a contemporaneous examination. As Dr. Carter's report fails to demonstrate the duration of the claimed range of motion limitations in the plaintiff's cervical and lumbar spine, it is speculative as to causation of same, and thus it is insufficient to raise a triable issue of fact (*see Perl v Meher*, *supra*, at 217-218; *Sukalic v Ozone*, 136 AD3d 1018, 26 NYS3d 188 [2d Dept 2016]; *Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]). As the plaintiff's submissions fail to present admissible evidence of her alleged limitations in her range of motion in the cervical and lumbar spine, and they are insufficient to demonstrate that these alleged limitations are causally related to the subject accident, she fails to rebut the defendant's prima facie showing that she did not suffer a "serious injury" within the meaning of the statute (*see Insurance Law* § 5102 [d]; *Perl v Meher*, *supra*; *Pommells v Perez*, *supra*; *McLoud v Reyes*, *supra*).

In light of the foregoing, the defendants' motion for summary judgment dismissing the complaint is granted.

ENTER

Date: July 23, 2019  
Riverhead, New York

  
MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION