Tran v Mueller
2019 NY Slip Op 34760(U)
June 7, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 15-611224
Judge: Denise F. Molia

SHORT FORM ORDER

INDEX No. 15-611224
CAL. No. 18-02086MV

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 3-1-19
ADJ. DATE 4-26-19
Mot. Seq. # 002 - MG; CASEDISP

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BINHLAN TRAN,

Plaintiff,

- against -

GLEN MUELLER,

Defendant.

---X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motions/Order to Show Cause and supporting papers dated January 22, 2019 ; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers dated April 16, 2019 ; Replying Affidavits and supporting papers dated April 22, 2019 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for 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.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on November 20, 2012, on Motor Parkway, in Commack, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including "post traumatic trauma" to head, vision difficulty, bulging discs in the cervical region, sprain and strain in the cervical and lumbar regions and hands, lumbar radiculopathy, and numbness to hands.

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.***, *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 reports of his examining physicians (*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 July 17, 2018, approximately five years and eight months after the subject accident, defendant's examining orthopedist, Dr. Stuart Hershon, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test and the Tinel sign. Dr. Hershon found that all the test results were negative or normal, and that there was no tenderness or spasm on plaintiff's cervical and lumbar regions and hands. Dr. Hershon also performed range of motion testing on plaintiff's cervical and lumbar regions, elbows, hands, hips, knees, and ankles, using a goniometer to measure her joint movement. Dr. Hershon found that plaintiff exhibited normal joint function. Dr. Hershon 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]). On August 9, 2018, moving defendant's examining neurologist, Dr. Edward Weiland, examined plaintiff and performed certain orthopedic and neurological tests, including the Funduscopic evaluation, the examination for spontaneous venous pulsation, the Nylen-Barany maneuver, the Adson's test, the Lhermitt's sign, and the Tinel sign. Dr. Weiland found that all the test results were negative or normal. Dr. Weiland found that plaintiff's pupils reacted briskly, and that no apparent pupillary defect was noted. Dr. Weiland also performed range of motion testing on plaintiff's spine and shoulders, using a goniometer to measure her joint movement. Dr. Weiland found that plaintiff exhibited normal joint function. Dr. Weiland opined that plaintiff had no ongoing neurological disability at the time of the examination.

Further, at her deposition, plaintiff testified that following the accident, she missed about a month from work. She testified that there is no activity that she is unable to perform because of the accident, except for sleeping with a pillow. 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]).

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 reports are insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by her treating physicians raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d).

In opposition, plaintiff submits, *inter alia*, the affirmed report of her treating physician, Dr. Sunil Butani, the uncertified medical records of Good Samaritan Hospital Medical Center, the certified medical records of Chris Prentiss Physical Therapy, the unsworn medical report of Dr. Hargovind DeWal, the uncertified medical records of Long Island Spine Specialists, the unaffirmed magnetic resonance imaging (MRI) examination report of Dr. Vinodkumar Velayudhan, and the certified medical records of Branch Orthopedics, including the unsworn medical report of Dr. Anthony Finuoli. The uncertified records and unsworn physician reports submitted by plaintiff 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. Butani's report set forth plaintiff's complaints and the findings, including significant limitations in her cervical and lumbar joint function measured during range of motion testing performed at his initial consultation on February 22, 2019, more than six years after the subject accident. However, Dr. Butani 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. Butani's report, therefore, is insufficient to raise a triable issue of fact.

The Court notes that the unsworn medical report of Dr. Finuoli was not in admissible form and, therefore, was not considered in the determination of the motion. "The certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury" (***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *see* ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Buntin v Rene***, 71 AD3d 938, 896 NYS2d 894 [2d Dept 2010]). In any event, even assuming that Dr. Finuoli's report was affirmed, such report, which found that plaintiff's right hand flexion and extension were 55 degrees and her left hand flexion and extension were 50 degrees, is insufficient because Dr. Finuoli failed to compare these findings to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Lopez v Felton***, 60 AD3d 822, 875 NYS2d 550 [2d Dept 2009]; ***Perez v Fugon***, 52 AD3d 668, 861 NYS2d 86 [2d Dept 2008]).

Likewise, even assuming that plaintiff was entitled to rely on the unaffirmed MRI examination report of Dr. Velayudhan, such report is insufficient to warrant denial of defendant's motion for summary judgment. The MRI report revealed bulging discs in plaintiff's cervical region. 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 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*).

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

Dated: JUNE 7, 2019

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION