

**Gergis v Pena**

2019 NY Slip Op 34763(U)

January 16, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 608795/16

Judge: Vincent J. Martorana

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.

Supreme Court of the State of New York  
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

SAMMY GERGIS,

Plaintiff,

- against-

WILSON J. PENA and JACKSON  
TERMINAL INC.,

Defendants.

ORIG. RETURN DATE: 2/7/18

ADJOURNED DATE: 9/6/18

MOTION SEQ. NO.: 001 - MG

002- MD

PLTF'S/PET'S ATTY:

LAW OFFICES OF JOHN J. GUADAGNO, P.C.

136 East Main Street

East Islip, NY 11730

DEFT'S/RESP'S ATTY:

BAKER, McEVOY, MORRISSEY & MOSKOVITS, PC

1Metrotech Center, 8th Floor

Brooklyn, NY 11201

Upon the following papers read on this motion for summary judgment (001) and motion to dismiss (002): Notice of Motion and supporting papers by defendants dated January 10, 2018, Notice of Cross-Motion and supporting papers by Plaintiff dated October 19, 2018; Affirmation/affidavit in opposition and supporting papers by plaintiff dated October 17, 2018, by Defendant dated October 24, 2018; Affirmation/affidavit in reply and supporting papers by defendants dated October 23, 2018 Other; (and after hearing counsel in support of and opposed to the motion) it is,

**ORDERED** that Defendants' motion (001) seeking summary judgment based upon Plaintiff's failure to meet the threshold injury requirement of Insurance Law §5102 is granted; it is further

**ORDERED** that Plaintiff's motion to strike (002) is denied as moot.

The within action was commenced on June 9, 2016 by filing of a summons and complaint seeking to recover for personal injuries allegedly sustained when a vehicle backed into Plaintiff while he was waiting in a crosswalk. The accident occurred on September 9, 2014. Issue was joined on or about August 9, 2016 by interposition of an answer by counsel on behalf of both defendants. Plaintiff alleges his injuries to include the following: L5/S1 extruded disc herniation with central canal stenosis and mass effect upon both exiting S1 nerve roots; L3/4 and L4/5 disc bulges/tears with central canal stenosis; abdomen contusion; right hip/flank contusion; severe lumbar sprain/strain; severe loss of mobility, use and function of the lumbar spine.

Defendants now move 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 (*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]; *Cebren 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 Eyer*, 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]; *Faroze 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, moving defendants 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 moving defendants' examining physicians and Plaintiff's deposition testimony (*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]). Plaintiff was examined by Dr. Weiland, a board certified neurologist, on August 3, 2017. Dr. Weiland measured lumbar flexion and extension and right and left lateral flexion using a goniometer. Comparing his measurements to normal ranges of motion set forth in the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, he found all measures to be within normal range. Other tests conducted, Babinski's, Waddell, and Fabere-Patrick, were negative and the straight leg raising test was within normal range. No inflammation was observed. Dr. Weiland found that the alleged injury to the lumbosacral spine had resolved, that the neurologic examination was normal and that there was no residual permanency or disability. Dr Eric Cantos reviewed an MRI of Plaintiff's spine on behalf of Defendants. The MRI was taken on November 13, 2014. Dr. Cantos concluded that the degree of degeneration observed was not consistent with a three-month time interval. He concluded that Plaintiff "had an ongoing and pre-existing degenerative condition long before the accident occurrence." He also stated that a herniation he observed could not be dated. Plaintiff testified that he had three injections in his back over the 2014-2015 period. Plaintiff received no physical therapy, chiropractic care or acupuncture. No surgery was recommended. Plaintiff only treated with a pain management physician and he ceased such treatment during the first half of 2016 because he "wanted to function on [his] own." Plaintiff missed no work and was not confined to bed or home for any period of time following the accident. Plaintiff's testimony did not establish that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities for 90 of the first 180 days post-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]).

Defendants met their 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 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 Plaintiff to raise a triable issue of fact (*Gaddy v Eyler*, 79 NY2d 955 [1992]). 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 the duration of such limitation (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*; *Tourea 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]; *Faroze v Kamran*, 22 AD3d 458 [2d Dept. 2005]).

Plaintiff’s counsel represents that Plaintiff has undergone significant ongoing treatment over the past four years. This statement is without evidentiary value and is directly contradicted by Plaintiff’s deposition testimony which reveals a two year gap in treatment. Plaintiff provides a medical report by Dr. Benatar, who conducted a record review on behalf of the workers compensation carrier. Part of the treatment history cited by Dr. Benatar is directly contradicted by Plaintiff’s deposition testimony. Dr. Benatar conducted a physical examination of Plaintiff on September 28, 2018 and found limitations in range of motion. Plaintiff also provides offers affirmed medical records of his treating physician, Dr Ylang. In these records, the Court found no objective measures of limitation, no evidence sufficient to establish duration, and no explanation of Plaintiff’s cessation of treatment. Plaintiff also offered a report of a Chiropractor, Dr. Dimitri. Dr. Dimitri examined Plaintiff on April 4, 2018, approximately 3 1/2 years post-accident. Dr. Dimitri measured Plaintiff’s range of motion with a goniometer and found limitations when compared against normal range but Dr. Dimitri did not disclose the standard he used for determining normal range. Dr. Dimitri also determined results of Kempfs, Lasagues and Braggards and Standing Leg Raise tests to be positive. There is no objective evidence in the record, however, as to the range of motion and limitations experienced by Plaintiff contemporaneously with the accident. From this evidence it is not possible for the Court to ascertain the duration of the limitations. Additionally, there is no reasonable medical explanation offered for Plaintiff’s gap in treatment.

Plaintiff has failed in his burden to provide objective medical evidence showing the duration of any limitation and has failed to provide a reasonable explanation for the approximately two-year gap in therapeutic measures. Therefore, Plaintiff has failed to raise a triable issue of fact with respect to any permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system. Furthermore, Plaintiff’s deposition testimony establishes that Plaintiff’s injuries did not prevent him from performing substantially all of the material acts constituting his customary daily activities for 90 of the first 180 days post-accident.

Gergis v Pena

NYSCEF NO. 008795 NO. 38

RECEIVED NYSCEF: 01/16/2019

Page 4

Based upon the foregoing, Defendant's motion seeking summary judgment dismissing the complaint on the ground that Plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted and Plaintiff's motion to dismiss based upon failure to appear for a deposition is denied as moot.

**Dated: Riverhead, New York  
January 16, 2019**

  
\_\_\_\_\_  
**VINCENT J. MARTORANA, J.S.C.**

CHECK ONE: XX FINAL DISPOSITION    \_\_\_ NON-FINAL DISPOSITION