

Carroll v Brucia

2019 NY Slip Op 34801(U)

April 5, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 17-601104

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 17-601104
CAL. No. 18-00306MV

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

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 7-25-18 (001)
MOTION DATE 8-7-18 (002)
ADJ. DATE 10-23-18
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

-----X
SEAN E. CARROLL and FIONNUALA
CARROLL,

Plaintiffs,

- against -

JOSEPH P. BRUCIA, JR.,

Defendant.
-----X

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, uploaded June 19, 2018; by defendant, uploaded June 19, 2018 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiffs, uploaded October 8, 2018; by plaintiffs, uploaded October 8, 2018 ; Replying Affidavits and supporting by defendant, uploaded October 22, 2018; by defendant, uploaded October 22, 2018 ; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions by defendant Joseph Brucia, Jr., are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Joseph Brucia, Jr., for summary judgment dismissing the complaint based on plaintiffs' failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendant Joseph Brucia, Jr., for summary judgment dismissing the complaint on the basis of liability is denied.

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This is an action to recover damages for injuries allegedly sustained by plaintiff Sean Carroll and Fionnuala Carroll, his wife, derivatively, as a result of a motor vehicle accident, which occurred on August 13, 2014, in Babylon, New York. Plaintiffs allege, in relevant part, that Mr. Carroll suffered various injuries as a result of the accident, including aggravation of pre-existing neck, back, and left shoulder injuries, and herniated and bulging discs in his lumbar region.

Defendant seeks an order granting summary judgment dismissing plaintiffs' complaint on the ground that Sean Carroll did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings, the bills of particulars, the transcripts of Mr. Carroll's deposition testimony, and the medical reports of orthopedic surgeon Gary Kelman, M.D., neurologist Edward Weiland, M.D., and radiologist Sheldon Feit, M.D. In opposition, plaintiffs argue that issues of fact remain as to whether Mr. Carroll sustained serious injuries. Plaintiffs submit, in opposition, among other things, plaintiff's affidavit and the medical reports of Alexandre De Moura, M.D., Sean McCance, M.D., and Peter Hollis, M.D.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

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, prima facie, 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 Eyer*, 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, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555

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[2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see Gaddy v Eyler*, *supra*; *Zuckerman v City of New York*, *supra*; *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 demonstrating 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 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]; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *McEachin v City of New York*, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging 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, 797 NYS2d 380 [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]; *Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the “90/180-days” category of “serious injury” must prove the injury is “medically determined,” meaning that the condition must be substantiated by a physician, and the condition must be 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*). A plaintiff must demonstrate that his or her usual activities were curtailed to a “great extent rather than some slight curtailment” (*see Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendants’ submissions establish a prima facie case that Mr. Carroll’s alleged injuries 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*). Mr. Carroll’s alleged 90/180-day injury was sufficiently refuted, prima facie, by his bill of particulars and testimony that he was confined to bed and home for significantly less than the statutory period (*see Ferazzoli v Hamilton*, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; *Pryce v Nelson*, *supra*; *Strenk v Rodas*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). Additionally, defendant presented competent evidence that none of Mr. Carroll’s alleged injuries fall under the “permanent consequential limitation,” “permanent loss,” or “significant limitation” of use categories of the statute (*see Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*; *Rovelo v Volcy*, *supra*).

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Dr. Kelman's affirmed medical report stated, in relevant part, that during a December 2017 orthopedic examination, Mr. Carroll exhibited normal joint function in his cervical and lumbar regions, and that no spasm or tenderness was detected upon palpation of his spine. Dr. Kelman found Mr. Carroll's sensory responses intact throughout his upper extremities and "moderately decreased to the dorsum of the left foot." Mr. Carroll tested negative in the straight leg test. Mr. Carroll further exhibited normal joint function in his shoulders, and Dr. Kelman did not detect any tenderness upon palpation. In addition, Dr. Kelman found no muscle atrophy or crepitus, and plaintiff tested negative in the impingement sign and O'Brien's tests. Mr. Carroll also exhibited normal joint function in his knees, and Dr. Kelman did not detect any tenderness upon palpation. In addition to lack of muscle atrophy and patello-femoral crepitus, Mr. Carroll tested negative in the McMurray's, Lachman's, anterior drawer sign, posterior drawer sign, Valgus and Varus, and sage tests. Dr. Kelman diagnosed Mr. Carroll as having suffered sprains to the cervical and lumbar regions of his spine, left shoulder and left knee, and concluded that such sprains have resolved (*see Brite v Miller, supra; Damas v Valdes, supra; Pagano v Kingsbury, supra*). Finally, Dr. Kelman found "no orthopedic disability" based upon the examination and medical documentation he reviewed.

Dr. Weiland's affirmed medical report stated, in relevant part, that during a December 2017 neurological examination, Mr. Carroll exhibited normal joint function in his shoulders, and cervical and thoracic regions. Mr. Carroll exhibited only slight limitations in his lumbar region. Dr. Weiland reported that Mr. Carroll tested positive in the straight leg raising test at 70 degrees on the left and 80 degrees on the right, and tested negative in the Patrick's and Adson's maneuver and Lhermitte's sign tests. Dr. Weiland diagnosed Mr. Carroll as having suffered headache disorder, and concluded that such condition has resolved. Dr. Weiland also diagnosed Mr. Carroll as having suffered lumbar radiculitis. Dr. Weiland stated that Mr. Carroll exacerbated pre-existing cervical and lumbar myofascial pain disorder, but determined that the neurological examination of the cervical region and upper extremities was normal. Finally, Dr. Weiland determined that Mr. Carroll has no neurologic disability.

In his affirmed report, Dr. Feit opined that the magnetic resonance imaging ("MRI") examinations of Mr. Carroll's lumbosacral region conducted approximately one week and 28 months after the accident showed disc bulges at levels L2-L3, L3-L4, L4-L5, L5-S1, degenerative spondylosis, and no evidence of focal herniation. He opined that the MRI examinations revealed pre-existing degenerative change. He explained that "[d]isc bulges are not post-traumatic, but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity." He did not identify any post-traumatic changes or abnormalities causally related to the subject accident. Dr. Feit further opined that the MRI examinations of plaintiff's cervical region conducted approximately one week and 28 months after the accident showed disc bulges at levels C3-C4 and C4-C5, and a small right-sided herniation at C5-C6. Dr. Feit stated that the MRI examination revealed pre-existing degenerative change.

Although Dr. Kelman, Dr. Weiland, and Dr. Feit failed to address plaintiff's allegation in the bill of particulars that the subject accident aggravated pre-existing conditions in his spine, they did not find any orthopedic or neurologic disabilities, or significant limitations in plaintiff's joint function (*compare Edouazin v Champlain*, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; *Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]; *Rabinowitz v Kahl*, 78 AD3d 678, 910 NYS2d 166 [2d Dept 2010]; *Washington v Asdotel Enters, Inc.*, 66 AD3d 880, 887 NYS2d 623 [2d Dept 2009]).

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Defendant having met his initial burden on the motion, the burden shifted to plaintiffs 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; Pagano v Kingsbury, supra*). Plaintiffs failed to raise an issue of fact as to whether Mr. Carroll's injuries constitute "serious injuries." Plaintiffs' submissions are insufficient to raise a triable issue of fact as to whether plaintiff sustained non-permanent injuries that left him unable to perform substantially all 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., 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]*).

Although a plaintiff may rely upon his or her examining physician's unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see Dietrich v Puff Cab Corp., 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; Kearse v New York City Tr. Auth., 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; Pagano v Kingsbury, supra*), in this instance, defendant did not submit Dr. McCance's and Dr. Hollis' reports that plaintiffs submitted in opposition. As the reports are not affirmed, they are insufficient to raise a triable issue of fact (*see CPLR 4518 [c]; Grasso v Angerami, supra; Kreimerman v Stunis, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; Washington v Mendoza, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]; Shamsodeen v Kibong, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; Pagano v Kingsbury, supra*).

In his affirmed report, Dr. De Moura stated, in relevant part, that during a September 2018 examination, plaintiff exhibited significant limitations in joint function in his lumbar region. However, Dr. De Moura's finding of range of motion restrictions in plaintiff's lumbar region are based only on an examination performed in September 2018, over four years after the accident. Therefore, such a report is insufficient to demonstrate the duration of the claimed range of motion limitations, and that such limitations are significant and causally related to the subject accident (*see Pryce v Nelson, supra; Rovelo v Volcy, supra; McLoud v Reyes, supra*). Further, plaintiff's self-serving affidavit, absent any objective medical evidence to support it, is insufficient to demonstrate that he suffered a serious injury within the meaning of the statute (*see Robinson-Lewis v Grisafi, 74 AD3d 774, 902 NYS2d 170 [2d Dept 2010]; Shvartsman v Vildman, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2010]; Penalosa v Chavez, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]*).

Accordingly, the motion by defendant Joseph Brucia for summary judgment dismissing the complaint based on plaintiffs' failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted. Therefore, in light of this determination, his motion for summary judgment dismissing the complaint on the basis of liability is denied, as moot.

Dated: April 5, 2019

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT

FINAL DISPOSITION NON-FINAL DISPOSITION