

Narvaes-Reyes v Palominio

2019 NY Slip Op 34815(U)

April 11, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 16-618419

Judge: William G. Ford

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.

SHORT FORM ORDER

INDEX No. 16-618419
CAL. No. 18-00454MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 7-19-18
ADJ. DATE 9-27-18
Mot. Seq. # 002 - MG; CASEDISP

-----X
ANDRES NARVAES-REYES,

Plaintiff,

-against-

JORGE JUAN PALOMINIO, III, and
MILAGROS PALOMINIO,

Defendants.
-----X

Attorney for Plaintiff
CANNON & ACOSTA, LLP
1923 New York Avenue
Huntington, New York 11746

Attorney for Defendants
LAW OFFICES OF MARTYN AND
MARTYN
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated June 11, 2018 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers by plaintiff, dated September 20, 2018 ; Replying Affidavits and supporting papers by defendants, dated September 24, 2018 ; Other ___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Jorge Palomino and Milagros Palomino seeking summary judgment dismissing the complaint is granted.

Plaintiff Andres Narvaez-Reyes commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Brook Avenue and William Street in the Town of Islip on May 23, 2016. By his complaint, plaintiff alleges that the accident occurred when the vehicle owned by defendant Milagros Palomino and operated by defendant Jorge Palomino pulled to the side of the curb on Brook Avenue and then made a U-turn directly across path of travel of plaintiff's vehicle, causing his vehicle to strike the left side of the Palomino vehicle. Prior to the accident's occurrence, plaintiff's vehicle was traveling westbound behind the Palomino vehicle. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including disc herniations at levels T11 through L3, and right knee derangement.

Narvaez-Reyes v Palomino
Index No. 16-618419
Page 2

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Gary Kelman and Dr. Sheldon Feit. At defendants' request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on January 24, 2018. Also at defendants' request, Dr. Feit performed an independent radiological review of the magnetic resonance images ("MRI") film of plaintiff's lumbar spine taken on July 29, 2016. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden that he did not sustain a serious injury within the meaning of the Insurance Law, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits uncertified copies of his medical records regarding the injuries at issue, and the sworn medical report of Dr. Maxim Tyorkin.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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 under 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.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory

Narvaez-Reyes v Palomino
Index No. 16-618419
Page 3

standard for “serious injury” under New York’s No-Fault Insurance Law (*see Dufel v Green, supra; Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury, supra*).

Here, defendants have established a prima case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra*). Defendants’ examining orthopedist, Dr. Kelman, used a goniometer to test the ranges of motion in plaintiff’s spine, knees, and hips, and compared his respective findings to the normal range of motion values for each region (*see e.g. Cantave v Gelle*, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). The affirmed medical report of Dr. Kelman states that an examination of plaintiff revealed that he has full range of motion in his spine, knees, and hips, that there is no paraspinal tenderness or spasm upon palpation of the paraspinal muscles, that he does not have a limp or antalgic gait, and that the straight leg raising test is negative. Dr. Kelman states that plaintiff’s muscle strength in his upper and lower extremities is 5/5, that his sensory responses are intact, and that there was no evidence of muscle atrophy. Dr. Kelman opines that the strains/sprains sustained to plaintiff’s spine, right knee, and left hip as a result of the subject accident have resolved, that there is evidence “plaintiff responded to the treatment he received with an objective functional gain,” and that the objective findings are not consistent with or proportional to the subjective complaints by plaintiff. Dr. Kelman further states that plaintiff does not require any further treatment or orthopedic treatment, that there is no evidence of an orthopedic disability causally related to the subject accident, and that plaintiff is capable of working full time without restrictions.

Furthermore, reference to plaintiff’s own deposition testimony sufficiently refutes the allegations that he sustained injuries within the limitations of use categories and within the 90/180 category of the Insurance Law (*see Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; *Rico v Figueroa*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that he was a student at the time of the accident, and was on summer vacation from school when the accident occurred, so he did not miss any classes as a result of the accident. Plaintiff testified that he did not miss any time from his summer employment due to any injuries that he sustained in the accident, and that his duties at work were not altered following the accident. Plaintiff further testified that he received physical therapy for approximately five months, but he ceased all physical therapy and medical treatment at the end of October 2016, and that he does not have any medical treatments or appointments currently scheduled related to the injuries he sustained in the accident.

Defendants, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendants’ submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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];

Narvaez-Reyes v Palomino
Index No. 16-618419
Page 4

Kearse v New York City Tr. Auth., 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, *supra* at 798). To prove the extent or degree of physical limitation with respect to the “limitations of use” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; *Toure v Avis Rent A Car Systems, Inc.*, *supra* at 350; see also *Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (see *Perl v Meher*, *supra*; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury as a result of the subject accident (*Romero v Braithwaite*, 154 AD3d 894, 62 NYS3d 170 [2d Dept 2017]; *Small v City of New York*, 148 AD3d 959, 49 NYS3d 176 [2d Dept 2017]; *Washington v Pichardo*, 140 AD3d 950, 32 NYS3d 508 [2d Dept 2016]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was causally related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (see *Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has submitted the affirmed medical report of Dr. Maxim Tyorkin, who concludes that plaintiff sustained cervicgia, lumbar radiculopathy, internal derangement of the right knee, and significant range of motion restrictions in his spine, which prevent him from performing his usual and customary daily living activities, and that such injuries and limitations are directly related to the trauma he sustained in the subject accident. Dr. Tyorkin also states that plaintiff was asymptomatic prior to the subject accident, that he continues to display positive symptomology in his spine, and that the symptomology is related to the trauma he underwent in the subject accident and not from a degenerative condition. However, Dr. Tyorkin’s initial examination of plaintiff occurred on August 22, 2018, more than two years after the subject accident. Thus, Dr. Tyorkin is unable to substantiate the extent or degree of the limitation to plaintiff’s cervical and lumbar regions or right knee caused by the alleged injury and its duration (see *Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]), since he did not examine plaintiff contemporaneously with the subject accident. More important, Dr. Tyorkin, in his medical report, relies upon the unsworn, inadmissible medical reports of other doctors and physical therapists in deriving his conclusions. Thus, his report fails to raise a triable issue of fact (see *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 315, 837 NYS2d 728 [2d Dept 2007]; *Margras v Colasuonno*, 278 AD2d 388, 717 NYS2d 627 [2d Dept 2000]).

Narvaez-Reyes v Palomino
Index No. 16-618419
Page 5

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (see *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Haber v Ullah*, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted; and it is

ORDERED that, if applicable, within 30 days of the entry of this decision and order that defendant is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that defendant serve a copy of this decision and order with a notice of entry on the defendant.

Dated: April 11, 2019
Riverhead, New York



WILLIAM G. FORD J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION