

<b>James v Tucciarone</b>
2020 NY Slip Op 34975(U)
January 8, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 16-617296
Judge: Sanford Neil Berland
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SHORT FORM ORDER

INDEX No. 16-617296  
CAL. No. 19-00372MV

**E-FILE**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. SANFORD NEIL BERLAND  
Acting Justice of the Supreme Court

MOTION DATE 6-4-19  
ADJ. DATE 7-30-19  
Mot. Seq. # 002 -MotD

-----X  
ALICIA A. JAMES,

Plaintiff,

- against -

STEVEN TUCCIARONE and MARTIN P.  
TUCCIARONE,

Defendants.  
-----X

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant, dated April 18, 2019 ; Answering Affidavits and supporting papers by plaintiff, dated July 18, 2019; and Replying Affidavits and supporting papers by defendant, dated July 24, 2019, it is

**ORDERED** that the motion by defendant Steven Tucciarone seeking summary judgment dismissing the complaint is granted to the extent indicated below and is otherwise denied.

Plaintiff Alicia James commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Elwood Road and Clay Pitts Road in the Town of Huntington on November 7, 2015. It is alleged that the accident occurred when the vehicle operated by defendant Steven Tucciarone and owned by defendant Martin Tucciarone<sup>1</sup> made a left turn directly into the path of the vehicle operated by plaintiff, striking the driver's side of plaintiff's vehicle. Plaintiff's vehicle was traveling northbound on Elwood Road, and defendants' vehicle was traveling southbound on Elwood Road. By her bill of particulars, plaintiff alleges that as a result of the collision, she

<sup>1</sup> The action was discontinued as against defendant Martin Tucciarone pursuant to a stipulation of discontinuance dated April 16, 2018.

James v Tucciarone  
Index No. 16-617296  
Page 2

sustained a series of physical injuries, including a tear in the lateral plantar plate of her right foot, internal scarring of her right foot and a concussion, as well as anxiety, depression and cognitive difficulties. Plaintiff further alleges that as a result of the injuries she sustained in the accident, she was incapacitated from her employment.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the November 7, 2015 accident (“the accident”) do not meet the “serious injury” threshold of Insurance Law § 5102 (d). In support of his motion, defendant submits copies of the pleadings, the transcript of plaintiff’s deposition and the sworn medical reports of, respectively, Dr. Matthew Skolnick, Dr. Kishore Ranade and Dr. Sheldon Feit. At defendant’s request, Dr. Skolnick conducted an orthopedic examination of plaintiff on October 8, 2018. Also at defendant’s request, Dr. Ranade, performed a neurological review of plaintiff’s medical records on December 3, 2018. In addition, Dr. Feit performed a radiological review of the magnetic resonance images (“MRI”) films of plaintiff’s right foot taken on March 8, 2016. Plaintiff opposes the motion on the basis that defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law and that the evidence submitted in opposition to the motion demonstrates that as a result of the subject accident, she sustained injuries that fall within the “limitations of use” and the “90/180” categories of serious injury under the Insurance Law. In opposition to the motion, plaintiff submits the sworn medical reports of Dr. Mark Decker, Dr. Stacey Baptiste and Dr. Jason Feinberg.

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.” 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 [1984], *aff’d* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

In order to recover under the “limitations of use” categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *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]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a

James v Tucciarone  
Index No. 16-617296  
Page 3

plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (see *Grasso v Anegarmi*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (see *Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

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 defendant has met this burden, 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 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*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant endeavors to establish, based upon plaintiff's deposition testimony and the affirmed reports of his medical witnesses, a prima facie case that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the accident (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Davis-Hassan v Siad*, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]; *Torres v Ozel*, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]). Thus, with respect to plaintiff's claims alleging physical injury meeting the statutory definition of serious injury, defendant offers, first, the report of his examining orthopedist, Dr. Skolnick, who states that as of the time of his examination of the plaintiff in October 2018, she exhibited full range of motion<sup>2</sup> in her spine, no paraspinal spasms or tenderness upon palpation of the paraspinal muscles, no evidence of atrophy of the intrinsic muscles, normal sensation to light touch and a negative straight leg raising test. Dr. Skolnick further states in his report that his examination of plaintiff's ankles and feet revealed full range of motion in those areas and that there was no

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<sup>2</sup> Consistent with the requirements of caselaw, Dr. Skolnick used a goniometer to test the ranges of motion in plaintiff's spine, ankles and feet, 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 AD2d 614, 874 NYS2d 180 [2d Dept 2009]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]).

James v Tucciarone  
Index No. 16-617296  
Page 4

evidence of tenderness upon palpation or of soft tissue swelling and that sensation to light touch was normal. Based upon his review of plaintiff's medical records and his physical examination of plaintiff, Dr. Skolnick opines that the strains to plaintiff's cervical and lumbar regions and the contusion to her right foot were correctly diagnosed and were causally related to the to the November 7, 2015 accident, that the treatment plaintiff received was appropriate and necessary, that there is evidence that plaintiff responded to the treatment she received with an objective functional gain, that the strains and contusion have resolved and that plaintiff requires no further physical therapy or orthopedic treatment for those conditions. Further, Dr. Skolnick states that based upon both the "available medical documentation" and his physical examination of plaintiff, he found "no orthopedic disability . . . at this time" and that plaintiff "is capable of maintaining full employment without restrictions" and that "[t]here are no permanent residuals."

Defendant also offers the report Dr. Feit, his reviewing radiologist, who states that his review of the MRI films taken of plaintiff's right foot reveals that there is no evidence of tendinopathy or ligamentous injury or fracture, and that there is a soft tissue mass within the second intermetatarsal interspace compatible with a neuroma. Dr. Feit further states in his report that plaintiff exhibits pre-existing degenerative changes in her right foot and that there are no abnormalities causally related to the accident.

Finally, defendant offers the report of his reviewing neurologist, Dr. Ranade, who opines that as plaintiff's medical records show that plaintiff's diagnoses of seizure disorder and anxiety disorder preceded the accident, those conditions are not causally related to the accident. Dr. Ranade further opines that notwithstanding plaintiff having been "given" a diagnosis of concussion, as plaintiff's neurologist's notes indicate that plaintiff experienced no tinnitus and no change in mental acuity following the accident and there is no record indicating that she lost consciousness, her medical records do not support a diagnosis of concussion as a result of the accident. However, although noting that plaintiff's "doctor has diagnosed her to have PTSD as a result of the injury of 11/07/15," Dr. Ranade offers no opinion with respect to causation, stating rather that he "will defer comment regarding causality of PTSD to the appropriate specialist."<sup>3</sup> Further, he states that he could not, "determine," based upon his review of plaintiff's medical records, whether plaintiff could "return to work with or without restrictions" and "whether [she] can return to full or modified duty."

In addition to seeking to refute plaintiff's claims of physical injury or impairment meeting the statutory definition of serious injury, defendant also argues that plaintiff did not sustain an injury within the so-called "90/180" category of serious injury under 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 ADOK3d 778, 853 NYS2d 129 [2d Dept 2008]). Defendant cites to plaintiff's testimony that she attended a baptism the day after the accident and a day later went out to locate her vehicle, which had been towed away from the accident site; that she did not receive "physical therapy" for the injuries she sustained in the accident; and that she still drives, attends family gatherings on Long Island and in her free time helps her mother with household chores and watches television, as showing that "plaintiff was not

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<sup>3</sup> Dr. Ranade also states in his report that he could not "determine," based upon his review of plaintiff's medical records, whether plaintiff could "return to work with or without restrictions" and "whether [she] can return to full or modified duty."

James v Tucciarone  
Index No. 16-617296  
Page 5

confined to her home or bed in the time frame immediately after this accident” and “does not qualify under the 90/180 category” of the Insurance Law.

With respect to the specific physical injuries alleged by plaintiff - a tear in the lateral plantar plate of her right foot, internal scarring of her right foot and a concussion - defendant has made a prima facie showing that the plaintiff did not sustain a serious permanent physical injury as defined in Section 5102[d] of the Insurance Law. The burden of coming forward with evidence demonstrating the existence of triable issues of fact with respect to those alleged injuries and as to whether they meet the statutory definition of serious injury thus shifted to the plaintiff (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Specifically, to the extent plaintiff is claiming that she has suffered a significant permanent limitation of use of a body function or system as a result of any of these claimed injuries, she must substantiate her complaint 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]; *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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, *supra*). 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]). 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]).

With respect to those specific physical injuries, plaintiff has failed to sustain her burden of showing the existence of a triable issue of fact in opposition to defendant’s prima facie showing that she did not sustain a serious physical injury within the permanent consequential limitation and significant limitation of use categories of Insurance Law § 5102 (d) as a result of the accident (*see Carpriglione v Rivera*, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]; *Heumann v JACO Transp., Inc.*, 82 AD3d 1046, 919 NYS2d 198 [2d Dept 2011]; *Posa v Guerrero*, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]). 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]). Although the affirmed podiatric medical report of the two podiatrists from whom she received treatment, Drs. Stacey Baptiste and Jason Feinberg, show that she sustained a right foot plantar ligament plate tear as a result of the subject accident, a tear without any evidence of continuing limitation does not constitute a serious injury and is insufficient to raise a triable issue (*see Corporan v Erichsen*, 148 AD3d 549, 49 NYS3d 678 [1st

James v Tucciarone  
Index No. 16-617296  
Page 6

Dept 2017]). Moreover, although plaintiff received treatment for her right foot condition for more than a year after the accident, her last such treatment was in December 2016, and she has failed to submit any objective admissible medical proof demonstrating that she continues to have range of motion deficits or qualitative limitations based upon a recent examination (*see Sukalic v Ozone*, 136 AD3d 1018, 26 NYS3d 188 [2d Dept 2016]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; *Nesci v Romanelli*, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]; *see generally Ramkumar v Grand Style Transp. Enters., Inc.*, 22 NY3d 905, 976 NYS2d 1 [2013]; *Pommells v Perez*, *supra*; *David v Caceres*, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]). Indeed, plaintiff testified at her deposition that she does not have any current limitations with her right foot. Thus, Drs. Baptiste and Feinberg, absent findings from a recent examination, cannot substantiate the extent or degree of the further duration of the limitations in plaintiff's right foot caused by the claimed injury (*see Wong v Cruz*, 140 AD3d 860, 32 NYS3d 641 [2d Dept 2016]; *Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept]). Similarly, although the affirmed medical report of Dr. Mark Decker, plaintiff's examining radiologist, states that there is a retracted lateral tear of the second plantar plate and ill-defined scarring in plaintiff's right foot, as well as minor degenerative changes in the metatarsal joints of the right foot, his report is based upon an MRI taken on March 8, 2016 and does not address the progression or permanency, *vel non*, of the conditions identified in his report (*see Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]; *Depena v Sylla*, 63 AD3d 504, 880 NYS2d 641 [1st Dept 2009]; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]).

However, with respect to plaintiff's claims of post-traumatic stress disorder and under the 90/180-day category of serious injury, defendant has failed to make a prima facie showing of entitlement to judgment in his favor as a matter of law. It is well settled that "'a causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury'" within the meaning of Insurance Law § 5102 (d)" (*Kranis v Biederbeck*, 83 AD3d 903 [2d Dept 2011], *quoting Villeda v Casas*, 56 AD3d 762, 762 [2d Dept 2008], *quoting Taranto v McCaffrey*, 40 AD3d 626, 627 [2d Dept 2007]), provided such injury is "serious and verifiable, and . . . established by objective medical evidence" (*Kranis v Biederbeck*, *supra*, 83 AD3d at 903. *See generally Chapman v Capoccia*, 283 AD2d 798, 799 [3d Dept 2001], *citing Sellitto v. Casey*, 268 A.D.2d 753 [3d Dept 2000]; *Spinrad v. Gasser*, 235 A.D.2d 687 [3d Dept 1997]; *Wyman by Wyman v. Giarnella & Son*, 170 A.D.2d 229 [1st Dept 1991]; *Quaglio v. Tomaselli*, 99 A.D.2d 487 [2d Dept 1984]; *and Arno v. Kennedy*, 88 A.D.2d 754 [4th Dept 1982] (every judicial department "recognizes that an emotional injury, causally related to an automobile accident, can constitute a serious injury sufficient to maintain a cause of action to recover damages for noneconomic loss"))).

Although defendant cites to plaintiff's testimony that she attended a baptism and retrieved her damaged car shortly after the accident, drives and at some unspecified subsequent time assisted her mother with housework and attended family events (plaintiff was deposed in July 2018, more than two-and-a-half years after the accident), plaintiff also testified that following the accident, she ceased her employment as a bakery clerk at King Kullen and did not begin working again until the spring of 2018. Although defendant chose not to inquire further into plaintiff's cessation of employment in the aftermath of the accident, plaintiff did testify that within one week of the accident, she was diagnosed by her primary care physician as suffering from post-traumatic stress disorder as a result of the accident, that she was referred to a therapist for PTSD treatment, that she began attending therapy for her PTSD "a few months after the accident," that those therapy sessions continued for eight months, and that although she did not have any treatment sessions

James v Tucciarone  
Index No. 16-617296  
Page 7


scheduled at the time of her deposition, she continued to be a patient of the same neurologist who had long been treating her for her seizure disorder and, at times, for depression and whose records document plaintiff's post-accident PTSD diagnosis. Moreover, as recounted above, Dr. Ranade, defendant's own reviewing neurologist, acknowledges that plaintiff has been diagnosed as suffering from PTSD as a result of the accident, and he not only declined to offer any contrary opinion, he also declined to opine on whether plaintiff could "return to work with or without restrictions." Further, plaintiff also testified, and the medical records of Drs. Baptiste and Feinberg and the report of Dr. Decker show, that following the accident, she sought podiatric treatment for the painful condition her right foot, was found to have sustained, among other things, a right foot plantar ligament plate tear as a result of the subject accident, was given insoles for her shoes and a cortisone shot in her right foot and continued receiving podiatric treatment for the condition of her right foot for approximately one year after that. Thus, even if it were somehow possible to find that the defendant, even if only by his attorney's ipse dixit, had made out a prima facie case in his favor with respect to plaintiff's claims based upon post-traumatic stress syndrome and under the 90/180-day category of serious injury of Insurance Law § 5102[d], the parties' submissions amply demonstrate that there are triable issues of fact with respect to those claims, necessitating the denial of defendant's motion for summary judgment to that extent (*see generally Mangarella v Card Trans Corp.*, 305 AD2d 378 [2d Dept 2003]).

Accordingly, and for the reasons stated above, defendant's motion for summary judgment is granted in part and is otherwise denied.

The foregoing constitutes the decision and order of the court.

Dated:

1/8/2020  
Riverhead, New York

  
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HON. SANFORD NEIL BERLAND, A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION