

DiPietro v Mullen

2020 NY Slip Op 35161(U)

August 3, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 608456-18

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 608456-18CAL. No. 19-02245MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 2-13-20
ADJ. DATE 7-2-20
Mot. Seq. # 001 - MG; CASEDISP-----X
ROSE ANN DIPIETRO,

Plaintiff,

- against -

FRANK L. MULLEN,

Defendant.
-----XDELL & DEAN, PLLC
Attorney for Plaintiff
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Garden City, New York 11530GENTILE & TAMBASCO, ESQS.
Attorney for Defendant
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant, dated December 10, 2019; Answering Affidavits and supporting papers by plaintiff, dated June 18, 2020; Replying Affidavits and supporting papers by defendant, dated June 30, 2020; it is,

ORDERED that the motion by the defendant for summary judgment dismissing the plaintiff's complaint is granted.

This action was commenced by plaintiff Rose Ann DiPietro to recover damages for injuries she allegedly sustained on May 14, 2015, when the motor vehicle she was operating was struck in the rear by a vehicle owned and operated by defendant Frank L. Mullen. By her bill of particulars, the plaintiff claims she suffered, among other things, "severe lower back pain," "severe neck pain," "lumbar sprain and strain," "limited range of motion of the lower back," "cervical sprain and strain," and "limit range of motion of the cervical spine."

The defendant now moves for summary judgment in his favor, arguing that Insurance Law § 5104 precludes the plaintiff from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of his motion, the defendant submits, among other things, a transcript of the plaintiff's deposition testimony, and a sworn orthopedic examination report by Stuart J. Hershon, M.D.

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The plaintiff testified that she refused medical attention at the scene of the subject accident, but presented to Brookhaven Memorial Hospital later the same evening complaining of neck and lower back pain. She stated that she was prescribed pain medications and discharged. The plaintiff next sought treatment from Dr. Jeffrey Epstein, who examined her and ordered physical therapy. Upon Dr. Epstein's order, she underwent approximately 20 physical therapy sessions at Island Musculoskeletal, but was not subjected to any radiological examinations. The plaintiff indicated that she ceased physical therapy, and all other medical treatment, after seven weeks because it was "[m]aking it worse." At the time of her deposition, nearly four years after her accident, she stated that while her neck pain has diminished somewhat, her lower back remains "[c]onstantly" painful. Upon questioning, the plaintiff explained that she sought no further medical care because "they are always trying to put you on medicine or mess you up with a surgery . . . [and she would] rather leave it alone."

The plaintiff initially testified that she missed two days of work following the subject motor vehicle accident, but later stated that she may have been absent for a week. She indicated that for an approximately one month period following her return to work, she was unable to perform all of the usual functions of her employment as a cashier, such as lifting heavy objects. The plaintiff stated that her physical limitations during such time also forced her to reduce the number of hours she worked each week.

Dr. Stuart Hershon submits an affirmation drafted at the request of the defendant, wherein he states that he is a physician licensed to practice medicine in New York, and that he performed an independent orthopedic examination of the plaintiff on May 7, 2019. He indicates that the plaintiff presented with current complaints of pain in her neck, as well as lower back pain which radiates to her lower extremities. Dr. Hershon states that he measured the plaintiff's ranges of motion using a goniometer and compared his findings to normal values enumerated in the AMA "Guides to the Evaluation of Permanent Impairment," 5th Edition. As to plaintiff's cervical spine, Dr. Hershon states that range of motion testing revealed the following measurements: flexion to 50 degrees, where normal is 50 degrees; extension to 60 degrees, where normal is 60 degrees; right rotation to 80 degrees, where normal is 80 degrees; left rotation to 80 degrees, where normal is 80 degrees; right lateral bending to 45 degrees, where the normal is 45 degrees; and left lateral bending to 45 degrees, where the normal is 45 degrees. As to plaintiff's lumbar spine, range of motion testing revealed forward flexion to 60 degrees, where the normal range of motion is 60 degrees; extension to 25 degrees, where normal is 25 degrees; and right and left lateral bending to 25 degrees, where normal is 25 degrees. Dr. Hershon noted that the plaintiff's straight leg raise test revealed normal results, and that she exhibited no tenderness on palpation, and no evidence of muscle spasm in the tested regions.

Based upon his examination of the plaintiff, as well as his review of the plaintiff's medical records, Dr. Hershon diagnosed her with cervical and lumbar spine sprains, both resolved. In conclusion, Dr. Hershon opines, based upon a reasonable degree of medical certainty, that "there is no evidence of an orthopedic disability."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material

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issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained “serious injury” and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). 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 moving for 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 a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). A defendant can establish that a plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102 (d) “by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Nuñez v Teel*, 162 AD3d 1058, 1059, 75 NYS3d 541 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83-84, 707 NYS2d 233 [2d Dept 2000]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eycler, supra; see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

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 showing 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,

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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, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced 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." To qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that the plaintiff's activities were significantly curtailed due to such injury (*see Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Ocasio v Henry*, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see Penalosa v Chavez*, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]).

Here, the defendant established a prima facie case of entitlement to summary judgment in his favor (*see Toussaint v Zomah*, 183 AD3d 657, 121 NYS3d 615 [2d Dept 2020]; *see generally Alvarez v Prospect Hosp.*, *supra*). Through plaintiff's testimony, the defendant demonstrated, prima facie, that the plaintiff ceased medical treatment after only seven weeks and returned to work in her full capacity less than 90 days after the subject accident and, thus, has not suffered a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see Amato v Gorecik*, 167 AD3d 557, 86 NYS3d 905 [2d Dept 2018]; *Yunatanov v Stein*, 69 AD3d 708, 893 NYS2d 569 [2d Dept 2010]). The defendant also submitted competent medical evidence, namely the affirmation of Dr. Hershon, that the alleged injuries to the plaintiff's cervical and lumbar regions have not resulted in restrictions in her relevant ranges of motion, and do not constitute serious injuries under the "permanent consequential limitation of use" and "significant limitation of use" categories. The burden thus shifted to the plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

In opposition, the plaintiff submits, among other things, the affirmation of Sunil Butani, M.D., and various unaffirmed and uncertified medical records. In his affirmation, Dr. Butani states that the plaintiff presented to his office for an examination on June 3, 2020, more than five years after the subject accident, at which time the plaintiff complained of lower back pain at a severity of 10 on a scale of 1-10. He avers that the plaintiff also complained that her lower back pain radiated down her right lower extremity. Dr. Butani indicates that upon physical examination of the plaintiff, he noted "tenderness across the L4-L5 and L5-S1 on both sides," and that when measured with a goniometer, plaintiff's flexion in her lumbosacral spine was restricted to 60 degrees, where "normal is 90 degrees." However, he does not state the authority from which that normal range of motion was derived. Dr. Butani also recorded "positive" results of a straight leg raising test, finding the plaintiff's range of motion to be 30 degrees in her right leg and 70 degrees in her left. As to causation, Dr. Butani states that "[i]f the patient's history is correct, the patient's continued low back pain is caused by motor accident (sic) of

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5/14/2015 . . . [as there] have been no intervening accidents and she does not have any previous low back pain syndrome.” In conclusion, Dr. Butani opines that the plaintiff “continues to have low back pain syndrome with 33% restriction of flexion of the lumbosacral spine,” and “has got permanent partial disability with regards to lower back (sic).”

Even viewing the evidence in the light most favorable to her, the plaintiff fails to raise a triable issue (see *Washington v County of Nassau*, 176 AD3d 903, 111 NYS3d 107 [2d Dept 2019]). A “plaintiff’s complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury” (*Calabro v Petersen*, 82 AD3d 1030, 1031, 918 NYS2d 900 [2d Dept 2011]). As her medical records were unaffirmed and her hospital records uncertified, “plaintiff did not submit medical proof in admissible form that was contemporaneous with the accident showing any initial range of motion restrictions in her spine” (*Li v Woo Sung Yun*, 27 AD3d 624, 625, 812 NYS2d 604 [2d Dept 2006]; see *Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; see also *Nicholson v Kwarteng*, 180 AD3d 695, 115 NYS3d 707 [2d Dept 2020]). However, even if such records were deemed admissible by this Court, as the plaintiff argues, due to the fact that they were provided by defendants to Dr. Hershon, and despite no evidence that he relied upon them in the drafting of his affirmation, they would not raise a triable issue (see *Cennamo v Themistokleous*, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]). Notably, in the single report drafted by Dr. Jeffrey Epstein on October 1, 2015, he recorded that his examination of the plaintiff revealed only a “mild” restriction in her lumbar range of motion in extension, no restriction in her lumbar spine in flexion, and straight leg raising was to 90 degrees bilaterally. According to his notes, Dr. Epstein diagnosed the plaintiff with a sprain of her lumbar ligaments, and recommended X-rays and physical therapy. In treatment notes generated by Island Musculoskeletal Care in the period from June 12, 2015 through July 23, 2015, during which the plaintiff attended eight physical therapy sessions, her diagnosis is recorded as “Thoracolumbar Strain.” At two of the physical therapy sessions, some measurement of the plaintiff’s ranges of motion was made, but the values recorded were not compared to normal values. Further, the notes of six of the plaintiff’s eight visits, including her last, state that she is “improving.”

Further, Dr. Butani, who met the plaintiff for the first time immediately prior to drafting his examination report, failed to establish, using objective medical evidence, a connection between her subjective complaints of pain and any injury (see *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Mamun Khan v Shoaib Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Despite her admitted financial ability to do so, the plaintiff underwent no diagnostic imaging of her spine in an attempt to discern the source of her pain. Plaintiff submits no evidence of spinal fractures, bulging or herniated disks, or any other physical abnormality (cf. *Toure v Avis Rent A Car Systems, Inc.*, *supra*). Dr. Butani’s affirmation lacks any explanation of the physiological source of the plaintiff’s alleged pain and restricted ranges of motion. He does not state what physical process, if any, would result in the plaintiff’s pain, nor did he indicate why “low back pain syndrome” might persist for more than five years.

The plaintiff also fails to offer adequate explanation for her complete cessation of medical treatment after approximately seven weeks (see *Hwang v Ilgar*, 178 AD3d 784, 111 NYS3d 899 [2d Dept 2019]; *Atken v Jackson*, 164 AD3d 869, 79 NYS3d 917 [2d Dept 2018]; *West v Martinez*, 78

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AD3d 934, 910 NYS2d 661 [2d Dept 2010]). The plaintiff's medical records, which she asks the Court to consider, are devoid of any opinion that further treatment would be ineffective or merely palliative. Therefore, the plaintiff's failure to seek additional treatment for multiple years "renders the opinion of her medical expert speculative as to the permanency, significance, and causation of the claimed injuries" (*Bogle v Paredes*, 170 AD3d 455, 456, 95 NYS3d 193 [1st Dept 2019] [internal quotation marks omitted], quoting *Vila v Foxglove Taxi Corp.*, 159 AD3d 431, 431-432, 71 NYS3d 69 [1st Dept 2018]).

Accordingly, the motion by the defendant for summary judgment dismissing the complaint against him is granted.

Dated: AUG 03 2020



HON. JOSEPH A. SANTORELLI
J.S.C.

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