Thaler v Roman
2020 NY Slip Op 35304(U)
January 3, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 604581/2015
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 604581/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 08/08/2019
SUBMIT DATE: 09/26/2019
Mot. Seq.: #002 - MG

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Andrew M. Thaler Chapter 7 Trustee of the Bankruptcy Estate of DOMINQUE RAHKEY SANDS,

Plaintiff,

- against -

KELLY ANN ROMAN and ROBERTO ROMAN,

Defendant(s).

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Upon the following papers read on this motion for an order granting defendants summary judgment dismissing the complaint; Notice of Motion and supporting papers (Doc #18-25); Affirmation in Opposition and supporting papers (Doc #28-31); Affirmation in Reply (Doc #33); it is,

ORDERED that the motion by defendants Kelly Ann Roman and Roberto Roman for summary judgment dismissing the complaint on the ground that plaintiff Dominque Rahkey Sands did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Dominque Rahkey Sands as a result of a motor vehicle accident which occurred on May 21, 2012, in the Town of Islip, Suffolk County, New York, at the intersection of Spur Drive North at or near Ferndale Boulevard.

The defendants move for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that as a result of the subject accident, she sustained serious injuries including lumbar derangement, lumbar sprain/strain, permanent consequential limitation of the lumbar spine, significant limitation in the lumbar spine, and loss of range of motion in the lumbar spine; as well as cervical sprain/strain, neck stiffness radiating to the bilateral upper extremities with intermittent numbness, permanent consequential limitation of the cervical spine, cervical derangement, significant limitation in the cervical spine, and loss of range of motion in the cervical spine. In support of the motion defendants submit copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, and the affirmation of orthopedic surgeon Ronald A. Light, M.D. In opposition, plaintiff argues

that issue of fact remain as to whether plaintiff sustained serious injuries and submits the medical records of Southside Hospital, Premier East Physical Medicine and Rehabilitation and Orlin & Cohen.

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 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [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 [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 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070 [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 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87 [2d Dept 2011], *citing Pagano v Kingsbury*, 182 AD2d 268 [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 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431 [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 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848 [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 [2011]; *Toure v Avis Rent A Car Systems, Inc., supra*; *McEachin v City*

of New York, 137 AD3d 753 [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 [2005]; *Hayes v Vasilios*, 96 AD3d 1010 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751 [2d Dept 2012]; *Stevens v Sampson*, 72 AD3d 793 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093 [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 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category 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 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920 [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 [1982]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming "serious injury," must offer some reasonable explanation for having done so to prevail on his or her claim (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]; *Pommells v Perez, supra*; *David v Caceres*, 96 AD3d 990 [2d Dept 2012]).

Defendants' submissions establish a prima facie case that the alleged injuries to plaintiff's spine 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*). Plaintiff's alleged 90/180-day injury was sufficiently refuted, prima facie, by her deposition testimony where she stated that she missed only two or three days of work (*see Ferazzoli v Hamilton*, 141 AD3d 686 [2d Dept 2016]; *Pryce v Nelson, supra*; *Strenk v Rodas, supra*; *Beltran v Powow Limo, Inc., supra*). Additionally, defendants presented competent evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation," or "significant limitation" of use categories of the statute (*see Perl v Meher, supra*; *Schilling v Labrador, supra*; *Rovelo v Volcy, supra*).

The affirmed medical report of Dr. Light stated, in relevant part, that during an April 2019 orthopedic examination plaintiff exhibited full range of motion in her cervical spine, lumbar spine, knees and ankles with only slight restrictions in the thoracic spin and hips. Regarding plaintiff's right and left hips Dr. Light notes no heat, swelling, or redness appreciated and no complaint of tenderness upon palpation. Dr. Light found plaintiff exhibited normal joint function in her left and right knees and she tested negative on the Lachman's test, Apley test, and Patella Tracking test, and stable on the Varus/Valgus test. Dr. Light notes there is no heat, swelling, effusion, erythema, crepitus, instability or atrophy appreciated in either the right or left ankle, as well plaintiff tested negative in the Drawer test for both the right and left ankle. Finally Dr. Light determined that plaintiff's alleged injury to the cervical spine and thoracic spine, as well as plaintiff's alleged bilateral hip, knee and ankle/foot sprain, were all resolved and that plaintiff had no evidence of permanency.

Defendants having met their initial burden on the motion, the burden shifted to plaintiff 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*). Plaintiff failed to raise an issue of fact as to whether her

injuries constitute "serious injuries." The findings within all the medical records submitted in opposition are not based on contemporaneous and recent examinations, and fail to rebut defendants' prima facie showing that plaintiff did not suffer a "serious injury" within the meaning of the statute (*see* Insurance Law § 5102 [d]; *Perl v Meher*, *supra*; *Pommells v Perez*, *supra*; *Zuckerman v City of New York*, *supra*).

Here the medical records of Southside Hospital and Orlin & Cohen are insufficient to raise a triable issue of fact, as they are uncertified (*see D'Orsa v Bryan*, 83 AD3d 646 [2d Dept 2011]; *McLoud v Reyes*, *supra*; *Singh v Mohamed*, 54 AD3d 933 [2d Dept 2008]; *Verette v Zia*, 44 AD3d 747 [2d Dept 2007]; *Nociforo v Penna*, 42 AD3d 514 [2d Dept 2007]). Assuming, *arguendo*, that the medical records were in admissible form, they fail to raise a triable issue of fact. The medical records of Southside Hospital and Orlin & Cohen failed to provide objective medical evidence showing that the accident resulted in significant physical limitations (*see Pommells v Perez*, *supra*; *Hayes v Vasilios*, *supra*; *Scheker v Brown*, *supra*).

In his affirmed report, Dr. Chughtai stated, in relevant part, that during an examination conducted three days after the accident, plaintiff exhibited significant limitations in joint function in her cervical and lumbar regions of her spine and slight limitations in joint function of her shoulders. However, Dr. Chughtai's finding of range of motion restrictions are based only on an examination performed three days after the accident. Therefore, Dr. Chughtai's report is insufficient to demonstrate the duration of the claimed range of motion limitations (*see Pryce v Nelson*, *supra*; *Rovelo v Volcy*, *supra*; *McLoud v Reyes*, *supra*).

Plaintiff's submissions are insufficient to raise a triable issue of fact as to whether she sustained non-permanent injuries that left her unable to perform substantially all her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712 [2d Dept 2009]).

Accordingly, the motion by defendants Kelly Ann Roman and Roberto Roman for summary judgment dismissing the complaint is granted.

This constitutes the Order and decision of the Court.

Dated: January 3, 2020

Hon. Robert F. Quinlan, J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION