

Van Deusen v Bunsis
2021 NY Slip Op 30141(U)
January 5, 2021
Supreme Court, Suffolk County
Docket Number: 003269/2016
Judge: George M. Nolan
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CAL. No. 201901210MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 11/6/19
ADJ. DATE 11/5/20
Mot. Seq. # 003 MotD
004 MG CASEDISP

-----X
WILLIAM VAN DEUSEN and HELEN VAN
DEUSEN,

Plaintiffs,

- against -

BARRY BUNSI and BERNARD DUNNE,

Defendants.
-----X

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 19; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 32; 33 - 35; Replying Affidavits and supporting papers 36 - 37; Other ; it is

ORDERED that the following motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Bernard Dunne for summary judgment dismissing the complaint on the issue of liability and for failure to meet the serious injury threshold pursuant to Insurance Law § 5102 (d) is granted to the extent of granting summary judgment dismissing the complaint on the ground that plaintiff William Van Deusen did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and is otherwise denied; and it is further

ORDERED that the motion by defendant Barry Bunsis for summary judgment dismissing the complaint on the ground that plaintiff William Van Deusen did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

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This is an action to recover personal damages for injuries allegedly sustained by plaintiff William Van Deusen when his vehicle collided with a vehicle owned and operated by defendant Bernard Dunne, which collided with a vehicle owned and operated by defendant Barry Bunsis. The accident allegedly occurred on October 18, 2015, at approximately 4:15 p.m., on Veterans Memorial Highway, at or near the intersection with Ledgewood Drive, in Smithtown, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, he sustained various serious injuries and conditions, including a triangular fibrocartilage complex tear and an extensor carpi ulnaris tendon tear in the right wrist, sprains and strains in the right wrist and the left shoulder, and bulging and herniated discs in the lumbar region. Plaintiff's wife, Helen Van Deusen, seeks damages for loss of services.

Defendant Dunne moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, defendant Dunne made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the moving defendant's examining physician (*see Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On October 23, 2018, approximately three years after the subject accident, an independent examining orthopedist, Dr. Willie Thompson, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the Hawkins-Kennedy impingement maneuver, the apprehension test, the Phalen's test, and the Finkelstein's test. Dr. Thompson found that all the test results were negative or normal, and that there was no spasm or tenderness in the spine. He also found that there was no effusion, erythema or crepitus in the left shoulder and right wrist. Dr. Thompson also performed range of motion testing on plaintiff's spine, left shoulder, and right wrist, using a goniometer to measure his joint movement. Dr. Thompson found that plaintiff exhibited normal joint function. Dr. Thompson opined that plaintiff had no orthopedic disability at the time of the examination and that he is capable of working without restrictions (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that following the accident, he was confined to his house for approximately eight weeks. He testified that although he had difficulty in walking long distances, there is no activity that he is unable to perform because of the accident. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days

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following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant Dunne met his initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eycler, supra*). A plaintiff claiming injury within the “limitation of use” categories 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 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]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). 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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *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*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

Plaintiff opposes the motion, arguing defendant Dunne’s expert report is insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians raise a triable issue as to whether he suffered injury within the “significant limitation of use” category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the certified medical records of St. Catherine of Siena Medical Center, the medical records of DocCare, including the various medical reports of Dr. Joseph Stubel from November 15, 2013 to December 12, 2017 and unsworn medical reports of Dr. Anthony Finuoli, the sworn medical report, dated October 29, 2019, of Dr. Finuoli, and the unsworn magnetic resonance imaging (MRI) examination reports of Dr. Cono Gallo, Dr. Ellyahu Engelsohn, and Dr. Alex Rosioreanu, which were certified by a custodian. “The certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury” (*Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *see McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; *Buntin v Rene*, 71 AD3d 938, 896 NYS2d 894 [2d Dept 2010]). The uncertified and unsworn medical reports submitted by plaintiff are insufficient to raise a triable issue of fact, as they are not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Ramirez v Elias-Tejada*, 168 AD3d 401, 405, 92 NYS3d 188 [1st Dept 2019]).

Dr. Stubel's reports indicate that he had treated plaintiff since November 2013, approximately two years prior to the subject accident. On September 8, 2015, approximately six weeks prior to the accident, Dr. Stubel administered range of motion testing on plaintiff's lumbar region and found that there were significant range of motion restrictions. On October 21, 2015, three days after the accident, Dr. Stubel administered range of motion testing on plaintiff's lumbar region and right wrist. Dr. Stubel found that there were significant range of motion restrictions in said regions. However, Dr. Stubel failed to state how he measured the joint function in plaintiff's lumbar region and right wrist. The Court can only assume that Dr. Stubel's tests were visually observed with the input of plaintiff. The failure to state and describe the tests used render the opinion insufficient (*see Harney v Tombstone Pizza Corp.*, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; *Herman v Church*, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]). Moreover, Dr. Stubel failed to compare these findings to the normal range of motion (*see Rivera v Gonzalez*, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; *Lopez v Felton*, 60 AD3d 822, 875 NYS2d 550 [2d Dept 2009]; *Perez v Fugon*, 52 AD3d 668, 861 NYS2d 86 [2d Dept 2008]). Furthermore, Dr. Stubel's report states that during his consultation on December 23, 2015, he administered range of motion testing on plaintiff's right wrist and found that plaintiff exhibited "full" joint function in the right wrist. Dr. Stubel's report, therefore, is insufficient to raise a triable issue of fact.

Dr. Finuoli's October 29, 2019 report set forth plaintiff's complaints and the findings at his initial consultation on January 7, 2016, approximately two and a half months after the subject accident. On March 28, 2016, Dr. Finuoli re-examined plaintiff and found that his right wrist supination was 60 degrees. Dr. Finuoli failed to state how he measured the joint function in plaintiff's right wrist. He also failed to compare this finding to the normal range of motion. Moreover, Dr. Finuoli failed to provide any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see Sukalic v Ozone*, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; *Griffiths v Munoz*, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see Perl v Meher, supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see Griffiths v Munoz, supra*). Dr. Finuoli's report, therefore, is insufficient to raise a triable issue of fact.

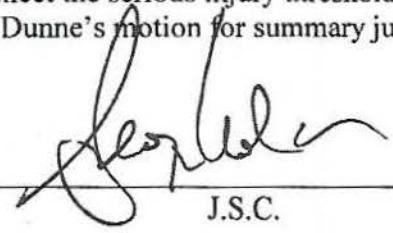
Further, even assuming that plaintiff was entitled to rely on the unaffirmed MRI reports prepared by Dr. Gallo, Dr. Engelsohn, and Dr. Rosioreanu, such reports are insufficient to warrant denial of the defendant Dunne's motion for summary judgment. Said MRI reports revealed tears in plaintiff's right wrist and herniated and bulging discs in his lumbar region. However, the mere existence of a tear or a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see McLoud v Reyes*, 82 AD3d 848, 849, 919 NYS2d 32 [2d Dept 2011]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Byrd v J.R.R. Limo*, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform substantially all of 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., supra*).

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Accordingly, the defendant Bunsis' motion for summary judgment and the branch of defendant Dunne's motion for summary judgment on plaintiff's failure to meet the serious injury threshold are granted and the complaint dismissed. The branch of defendant Dunne's motion for summary judgment on the issue of liability is denied as moot.

Dated: January 5, 2021



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION