Daly v Parveez
2021 NY Slip Op 32922(U)
September 20, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 20618/2015
Judge: Vincent J. Martorana

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

MICHAEL W. DALY and CATHERINE A. PLESICH,

Plaintiff,

- against-

RAJA KHALID PARVEEZ and USMAN KHALID,

Defendants.

ORIG. RETURN DATE: 10/21/20
ADJOURNED DATE: 2/25/21
MOTION SEQ. NO.: 003 - MD

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Upon the efiled documents numbered 3-17; 21-26; it is

ORDERED that Defendants' motion seeking summary judgment dismissing Plaintiff's complaint based upon Plaintiff's failure to meet the "serious injury" threshold defined in Insurance Law §5102(d) is denied.

The within action seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 2, 2012. Issue was joined, the claims of Plaintiff Catherine A. Plesich have been discontinued and Defendants now seek summary judgment, pursuant to CPLR 3212, dismissing Plaintiff's claims on the basis that Plaintiff Michael W. Daly has not sustained a serious injury as defined in Insurance Law 5102(d).

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."

Plaintiff's injuries as set forth in his bill of particulars are as follows: lumbar trauma, lumbar pain, L5-S1 disc herniation., L5-S1 disc bulge, bilateral fluoroscopic sacroiliac joint injection on

January 08, 2013, bilateral fluorescopic sacroiliac joint injection on March 19, 2013, right fluoroscopic sacroiliac joint injection on July 30, 2013, lumbar epidural steroid injection under fluoroscopy at L5-S1 on September 17, 2013, fluoroscopic lumbar epidural steroid injection on December 11, 2013, fluoroscopic lumbar epidural steroid injection on September 25, 2015, electrodiagnostic study reveals L4/5 radiculopathy on April 23, 2013, lumbar radiculopathy, abnormal gait, significant and ongoing restricted ranges of motion in all planes of the lumbar spine, cervical trauma, cervical pain, cervical stiffness, significant and ongoing restricted ranges of motion in all planes of the cervical spine, thoracic trauma, thoracic pain, significant and ongoing restricted ranges of motion in all planes of the thoracic spine, right leg trauma, right leg pain, loss of quality of life. Plaintiff also alleges that the foregoing injuries are "accompanied by severe pain, deformity, distress, numbness, tenderness, swelling, stiffness, discomfort, psychological difficulties, stress, depression, restriction of motion and with related injuries to the underlying soft tissues, blood vessels, nerves, tendons, ligaments, and musculature, and all of the natural consequences flowing therefrom" and that "any and all injuries are permanent in nature and duration and were caused and or aggravated by the aforementioned occurrence."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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 of the plaintiff 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***, *supra*; ***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***, *supra*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009].

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* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]; ***Sanclemente v. MTA Bus Co.***, 116 AD3d 688, 983 NYS2d 280 [2d Dept. 2014]; ***Torres v. Rettaliata***, 171 AD3d 829, 95 NYS3d 829 [2d Dept. 2019]). 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]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]). 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 (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v. Bank of the West.,*** 28 NY3d 439, 448, 68 NE3d 683, 688 [2016](quoting ***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept. 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Here, Defendants offer a report by their examining orthopedist, David J. Weissberg ("Weissberg"), dated January 7, 2020. Weissberg measured range of motion with a goniometer and, comparing values to those set forth in the AMA Guides to Evaluation of Permanent Impairment, 6th Edition, he found that cervical spine flexion, extension and right and left tilt were with in normal range and that rotation was impaired approximately 14% (measured at 70, normal being 80). Weissberg found the thoracolumbar spine to be close to normal, with only slight variation from normal range. Plaintiff stated to Weissberg that he had experienced pain in his neck and back with pain in the lower back radiating down to his right leg. During the examination, Plaintiff complained of pain during range of motion testing along the right sacroiliac joint and right paraspinal musculature system. Weissberg reported that tenderness with associated spasms in the right paraspinal musculature region and sacroiliac joint were observed. Weissberg concluded that the accident caused Plaintiff to sustain an aggravation to pre-existing problems in his cervical and lumbar spine, such as "severe lumbar spinal stenosis as well as cervical degenerative disc disease with associated foraminal issues." Weissberg stated that the claimant could perform all activities of daily living at the time of the examination and that he did not require any further orthopedic care.

Defendant's radiologist, David A. Fisher, reviewed MRIs taken 20 months pre-accident, three months post-accident and thirty months post-accident. In a report dated January 2, 2020, he concluded that there were no disc herniations or fractures and that there was "no radiographic evidence of traumatic or causally related injury to the lumbar spine. Defendants also argue that Plaintiff did not miss any significant time from work immediately after the accident and that there are no activities that he can no longer engage in as a result. Defendants also note that Plaintiff was involved in two prior accidents in which he suffered injuries, asserting that he had pre-existing injuries at the time of the accident.

Plaintiff submits an affirmation of his treating chiropractor, Frank Pernice, D.C. ("Pernice"), dated January 5, 2021. Pernice has treated Plaintiff for more than ten years, commencing prior to the accident date. He attests that Plaintiff's injuries and symptoms are solely causally related to the accident of December 2, 2012. Pernice notes that Plaintiff had been involved in prior accidents which resulted in lower back pain but that such pain had diminished to intermittent and mild pain prior to the accident here at issue. He further states that, as a result of the injuries sustained in the accident, Plaintiff has "continuously been restricted in his ranges of motion in his lower back radiating to both legs and feet and continues to suffer from severe pain." Pernice attests that Plaintiff suffered pain, spasm, tenderness and tightness and nerve root involvement with reduced lumbar range of motion found upon examination in December 2012, June 2013 and September 2013. Pernice continued to treat Plaintiff through April 2019. Upon examination on April 18, 2019, Plaintiff continued to complain of lower back pain which interfered with his daily activities and was exacerbated by bending, sitting and walking. At that time Pernice diagnosed ongoing and significant lumbar muscle spasms and lumbar sciatica. There was no significant improvement during the treatment period; limited ranges of motion continued throughout the treatment period. Pernice avers that he objectively observed the restricted ranges of motion which were the result of pain, tightness, fixation of the spine and subluxation. Pernice's diagnosis is lumbar disc herniation, lumbar radiculopathy and spondylolthesis, with guarded prognosis, and that the injuries are permanent and causally related to the accident. He further states that the lumbar spine does not function normally. Plaintiff, in his affidavit in opposition, attests that he was in prior accidents and had mild intermittent pain from injuries sustained in those accidents but that his pain levels more than doubled after the accident at issue. He now suffers continuous pain that radiates down into his right foot, which he had not experienced prior to the accident, and he has restricted range of motion. He asserts that he has difficulty doing all physical activity, including getting out of bed and tying his shoes as well as in performing household chores, causing him to hire people to do the chores for him. Plaintiff received treatment through 2019 and he continues to do home treatments with heating pads, hot showers, ice packs, TENS unit, pain medication, massages and stretching exercises. He further claims that he continues to be in acute pain and has been unable to return to his usual activities.

Based upon the foregoing, the court finds that material issues of fact exist with respect to whether or not Plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) and whether or not such injuries were causally related to the accident (***Rodgers v. Duffy***, 95 A.D3d 864, 944 NYS2d 175[2d Dept. 2012]; ***Sanclemente v. MTA Bus Co.***, *supra*; ***Torres v. Rettaliata***, *supra*). Accordingly, Defendants' summary judgment motion is denied.

Dated: September 20, 2021
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION