

Vernet v Williams
2022 NY Slip Op 35237(U)
November 1, 2022
Supreme Court, Nassau County
Docket Number: Index No. 602020/2020
Judge: Thomas Rademaker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 16 NASSAU COUNTY

PRESENT:

Honorable Thomas Rademaker
Justice of the Supreme Court

_____X

BAUDOUIN VERNET

Plaintiff,

Index No. 602020/2020

Motion Seq. No.: 001

Motion Submitted: 9/8/2022

-against-

**WANDALYN L. WILLIAMS and BRIANNA
MARIE WILLIAMS**

Defendant.

_____X

The following papers read on this motion:

Notice of Motion.....X
Notice of Cross Motion.....X
Affirmation in Opposition/Reply.....X

The Defendants move this court for an order, pursuant to CPLR §3212, awarding him summary judgment in favor of the Defendants and against the Plaintiff both on liability and on the theory that Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

This action arises out of a motor vehicle accident which occurred on November 7,

2018, at approximately 7:05 a.m. on Pinebrook Court, in the Lakeview, New York. This was an intersection action in which the Defendants' vehicle struck the Plaintiff's vehicle while the Plaintiff was making a left hand turn.

The Plaintiff commenced this action to recover damages for personal injuries by serving a Summons and Complaint on or about February 7, 2020. Issues was joined by the service of the Defendants' Answer on March 17, 2020. The parties engaged in and completed the discovery process, with the Court issuing its Certification Order on January 12, 2022, and the Plaintiff filing Note of Issue on January 13, 2022. The Defendant timely filed its summary judgment motion.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action. (*Zuckerman*, 49 NY2d 557, *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

With respect to liability, the Plaintiff was in the process of making a left hand turn from Pinebrook Court onto Pinebrook Avenue when the driver's side door of the Plaintiff's vehicle was struck by the "front left side" of the Defendants' vehicle. The Defendants contend that they are entitled to judgment as a matter of law by demonstrating that the operator of the adverse vehicle violated Vehicle and Traffic Law § 1141 when he/she made a left turn directly into the path of Defendants' vehicle.

In contrast, the Plaintiff contends that his vehicle was struck when he was well into making his turn, and that the Defendants did not exercise due care in their entrance into the intersection. The Plaintiff contends that the operator of the motor vehicle, who as 18 years old at the time, was apologetic at the scene of the accident, and that Defendant driver's father, who as at the scene of the accident, claimed that his "daughter" did not have "enough experience driving."

Upon review of a careful review of the parties submissions, including their annexed exhibits, and given the differing interpretations of fact presented by both the Plaintiff and the Defendant, the Defendants' motion for summary judgment with respect to liability is **DENIED**.

With respect to the no fault threshold, the Court will restrict its analysis to two

categories of the Insurance Law; to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system. Ultimately, whether he can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]).

To meet the threshold of the "significant limitation of use of a body function or system" or "permanent consequential limitation of use of a body organ or member" categories of the serious injury statute, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot, supra; Gaddy v. Eyler*, 79 NY2d 955 [1992]). That is, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]), as is an expert's qualitative assessment of a plaintiff's condition provided that the latter evaluation has an objective basis, and compares the plaintiff's limitations to the normal function, purpose and use of the affected "body organ, member, function or system" (*Id.*). Ultimately however, a minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot, supra; Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

In support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (CPLR 2106; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendant's motion, to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Licari v. Elliot, supra*).

In order to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unsworn reports of plaintiff's health care providers are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*Reid v. Wu*, 2003 WL 21087012 [Sup. Ct. Bronx 2003] *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept. 1998]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective medical proof of a plaintiff's injury (*Toure v. Avis Rent A Car Systems, supra*). However, even where there is ample objective proof of a plaintiff's injury, the Court

of Appeals held in *Pommels v. Perez*, 4 NY3d 566 [2005], that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id.*). As a result, to establish a claim for "serious injury" plaintiff must offer contemporaneous findings with the accident (*Perl v. Meher*, 18 NY3d 208 [2011]) as well as recent findings based upon medical examinations.

In 2011, the Court of Appeals in *Perl v. Meher*, *supra*, also reconciled the need to require both quantitative proof of a "serious injury" and "contemporaneous" evidence of a "serious injury" by holding that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation. *Id.*

The law is clear that "[t]he mere existence of a herniated or bulging disc, and even a tear in a tendon, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration" (*Shvartsman v. Vildman*, 47 AD3d 700 [2nd Dept. 2008] [citations omitted]). However, in the present instance, Plaintiff has produced such objective evidence in regard to the extent of the alleged physical limitations resulting from the injury.

The Plaintiff's treating neurologist Dr. Nicky Bhatia performed objective range of motion testing using a goniometer and athrodial protractor, and determined that the Plaintiff had sustained loss of range of motion in the lumbar and thoracic spine. Dr. Bhatia concludes that the Plaintiff sustained a lumbar disc herniation at L4/5 with "chronic lumbar pain." The Plaintiff was described as a thirty three old man who did not have a history of prior back pain.

Ultimately, the differences between Dr. Bhatia's report and the conclusions reached by the Defendants' medical consultant, an orthopedist, are reserved to the trier of fact. The Defendants' consulting orthopedist submitted the Plaintiff to numerous tests and concluded that the Plaintiff had sustained cervical and lumbar spine strain which has been "resolved," while discounting the Plaintiff's complaints of pain in the lower back and left shoulder as being "subjective," concluding there were "no positive, objective, correlative findings noted" in the Plaintiff's examination to support subjective pain complaints.

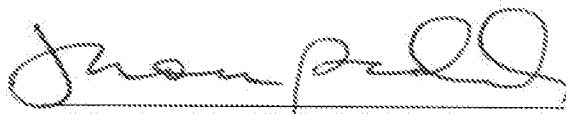
Given the foregoing, this Court finds that Plaintiff's proof is sufficient to raise a triable issue of fact as to whether Plaintiff's injuries satisfy the permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system categories of Insurance Law §5102(d).

Accordingly, it is hereby:

ORDERED, that Defendant's motion for summary judgment on the issue of the "Serious Injury" threshold is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: November 1, 2022
Mineola, N.Y.


HON. THOMAS RADEMAKER, J.S.C.

ENTERED

Dec 12 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE