

Chancy v Almendarez
2024 NY Slip Op 35281(U)
March 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 610398/2019
Judge: Frank A. Tinari
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SHORT FORM ORDER

INDEX No. 610398/2019
 CAL. No. 202101085MV

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. FRANK A. TINARI
 Justice of the Supreme Court

MOTION DATE 2/25/22
 ADJ. DATE 10/11/22
 Mot. Seq. # 002 MD

-----X
 REINALDO A. CHANCY A/K/A REYNALDO
 CHANCY,

Plaintiff,

- against -

BENIGNO ALMENDAREZ and MICHAEL A.
 ZAVALA,

Defendants.
 -----X

THE ODIERNO LAW FIRM, P.C.
 Attorney for Plaintiff
 560 Broadhallow Road, Suite 102
 Melville, New York 11747

SIEGEL & O'LEARY LLP
 Attorney for Defendants
 135 Pinelawn Road, Suite 245n
 Melville, New York 11747

Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated February 25, 2022; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated September 27, 2022; Replying Affidavits and supporting papers by defendants, dated October 10, 2022; Other ____; it is

ORDERED that the motion by defendants Benigno Almendarez and Michael Zavala seeking summary judgment dismissing the complaint is denied.

Plaintiff Reinaldo Chancy a/k/a Reynaldo Chancy commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of State Avenue and Straight Path in the Town of Babylon on February 17, 2018. By his complaint, plaintiff alleges that while his vehicle was stopped at a stop sign on State Avenue it was struck in the front by the vehicle owned by defendant Michael Zavala and operated by defendant Benigno Almendarez when defendant Almendarez attempted to reverse into his driveway. By his bill of particulars, plaintiff alleges that he sustained various personal injuries due to the subject collision, including disc herniations at level L3 through S1; disc bulges at level L1 through L4; peripheral tearing of the medial meniscal posterior horn in the left knee; horizontal tearing and scarring of the lateral meniscal body segment and anterior horn in the right knee; a medial meniscal tear in the right knee; and lumbar and cervical radiculopathy.

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Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition testimony, and the sworn medical reports of Dr. Pierce Ferriter and Dr. David Fisher. At defendant's request, Dr. Ferriter conducted an independent orthopedic review of plaintiff on April 15, 2021. Also at defendants' request, Dr. Fisher performed an independent radiological review of the magnetic resonance images (MRI) films of plaintiff's lumbar spine, cervical spine, and left and right knees taken on March 5, 2018, March 12, 2018 and March 22, 2018, respectively. In addition, Dr. Fisher reviewed the prior MRI studies of plaintiff's lumbar spine, left knee, and right knee taken on January 7, 2011, November 22, 2016, and March 21, 2006, respectively. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition, plaintiff submits a copy of his own affidavit, an uncertified copy of the police accident report, and sworn medical reports of Dr. Marc Katzman and Dr. Lam Quan.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "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."

In order to recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (see *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *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]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). 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]). Further, evidence of pain and discomfort alone,

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unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see Grasso v Anegarmi*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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 Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants, through the submission of competent medical evidence and plaintiff's deposition transcript, established a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Davis-Hassan v Siad*, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]). Defendants' examining orthopedist, Dr. Ferriter, found that although plaintiff sustained an aggravation of the prior injury to his knees as a result of the accident, his examination of plaintiff revealed normal range of motion in this area. A defendant may demonstrate a prima facie case by submitting his or her expert findings of no deficits in range of motion in the subject body part and opinion that MRI findings were pre-existing and not caused by the subject accident (*see Kendig v Kendig*, 115 AD3d 438, 981 NYS2d 411 [1st Dept 2014]; *Jacobs v Slaght*, 47 AD3d 679, 850 NYS3d 166 [2d Dept 2008]). In addition, Dr. Ferriter states that plaintiff has full range of motion in his spine and hips, that plaintiff does not require any additional orthopedic treatment or show any evidence of permanence from the subject accident, and that plaintiff is capable of working full time and performing his normal activities of daily living without restriction (*see e.g. Cabrera v Apple Provisions, Inc.*, 151 AD3d 594, 57 NYS3d 471 [1st Dept 2017]; *Watt v Eastern*

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Investigative Bureau, Inc., 273 AD2d 226, 708 NYS2d 472 [2d Dept 2001]; compare *Marshall v Institute for Community Living, Inc.*, 50 AD3d 975, 856 NYS2d 660 [2d Dept 2008]).

Furthermore, Dr. Fisher, defendants' examining radiologist, states in his sworn medical reports that there are no findings on plaintiff's lumbar spine, cervical spine, right or left knee MRI examinations that are causally related to the subject accident, and that there is no evidence of disc herniations or fractures. In fact, Dr. Fisher states that a comparison between the prior MRI studies taken of plaintiff's right and left knees and the MRI examinations taken following the subject accident reveals that both studies show the existence of a chronic pre-existing condition that predates the subject accident. Dr. Fisher further states that plaintiff's cervical spine and lumbar spine MRI examinations show that plaintiff has moderate degenerative changes in this area of the body, most pronounced in the area where he alleges he sustained injuries as a result of the subject accident.

Moreover, reference to plaintiff's deposition testimony sufficiently refutes the allegations that plaintiff sustained injuries within the limitations of use categories or within the 90/180 category of the Insurance Law (see *Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; *Rico v Figueroa*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]).

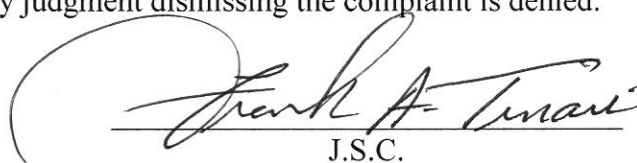
Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; *Toure v Avis Rent A Car Systems, Inc.*, *supra* at 350; see also *Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (see *Perl v Meher*, *supra*; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

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In opposition, plaintiff raised an issue of fact as to whether his injuries were significant, permanent and causally related to the subject accident (*see Garafano v Alvarado*, 977 NYS2d 316 [2d Dept 2013]; *Bakare v Kakaouras*, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; *David v Caceres*, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff submitted the affirmed medical records of Dr. Quan, which demonstrate that plaintiff sustained significant range of motion limitations in his cervical and lumbar regions and knees, bilaterally, as a result of the subject accident (*see Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2d Dept 2011]; *Tai Ho Kang v YoungSun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; *Jules v Barbecho*, 55 AD3d 548, 866 NYS2d 214 [2d Dept 2008]). Dr. Quan examined plaintiff immediately after the subject accident's occurrence and found that plaintiff sustained range of motion limitations to spine, and knees. Upon re-examination on June 20, 2022, Dr. Quan found continuing significant limitations in the ranges of motion in plaintiff's spine and knees, bilaterally. Dr. Quan opines that plaintiff's injuries were causally related to the subject accident, and that considering the duration of the symptoms and associated impairments, such limitations were permanent in nature and would require plaintiff to receive future treatment. Consequently, plaintiff's doctor's report is sufficient to raise a triable issue of fact as to whether he sustained serious injuries within the limitations of use categories of the Insurance Law as a result of the subject accident (*see Young Chool Yoi v Rui Dong Wang*, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; *Gussack v McCoy*, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]). Moreover, Dr. Katzman's medical report states he reviewed plaintiff's lumbar spine MRI films and that plaintiff has disc herniations at levels L4 through S1, and disc bulges at level L1 through L4, and that plaintiff has suffered disc hydration loss at L4/L5 since his MRI examination from January 7, 2011.

Plaintiff's medical evidence, therefore, conflicts with that of defendants' experts, who found that the injuries sustained by plaintiff were resolved. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see Johnson v Garcia*, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; *LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Ocasio v Zorbas*, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; *Reynolds v Burgezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, where a plaintiff establishes that "at least some of his injuries meet the 'No Fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (*Linton v Nawaz*, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: 3/18/24


J.S.C.

HON. FRANK A. TINARI

___ FINAL DISPOSITION ___ ☒ NON-FINAL DISPOSITION