

Descul v Condello
2024 NY Slip Op 35590(U)
June 20, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 604354/2023
Judge: Geroge Nolan
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Short Form Order

Index No. 604354/2023

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY**P R E S E N T:****Hon. George Nolan**

Justice Supreme Court

-----x
JOHN DESCUL,

Plaintiff,

-against-

CHRISTIAN CONDELLO and
MICHELE CONDELLO,Defendants.
-----x

Mot. Seq. No. 001 – MG CASEDISP

Orig. Return Date: 11/29/2023

Mot. Submit Date: 02/08/2024

PLAINTIFF'S ATTORNEY

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Upon the e-filed documents numbered 15 through 30, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the motion by defendants Christian Condello and Michelle Condello pursuant to CPLR 3212 for an order granting them summary judgment dismissing the complaint for failure to demonstrate a serious injury pursuant to Insurance Law §5102 is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff John Descul as a result of a motor vehicle accident, which occurred on July 5, 2019, on New York Avenue, at or near its intersection with Union Place, in Huntington, New York. Plaintiff alleges that he suffered various injuries as a result of the accident, including cervical radiculopathy and sprain, lumbar radiculopathy and sprain, and tears of the left shoulder.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion they submit, a statement of material facts, copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, and the affirmed medical report of orthopedic surgeon Pierce Ferriter, M.D. In opposition, plaintiff submits a certified police report, plaintiff's sworn affidavit, a supplemental bill of particulars, an MRI report of the left shoulder and the affirmed narrative report of Dr. Ali E. Guy. Plaintiff argues that triable issues of fact remain as to whether he sustained a serious injury.

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*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, 427 NYS2d 595 [1980]).

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 to establish, *prima facie*, that the plaintiff did not sustain a "serious injury" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in . . . 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."

Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (*Brite v Miller*, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], citing *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [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 (*Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Pagano v Kingsbury*, *supra*). 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 (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *McLoud v Reyes*, *supra*; *Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Further, an injury under the "90/180-days" category of "serious injury" must be "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, *supra*). Specifically,

plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (*Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

The submissions established a *prima facie* case that plaintiff's alleged injuries to his spine and left shoulder 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 his deposition testimony that he missed less than two weeks from work and did not seek treatment until "several months" following the accident (see *Ferazzoli v Hamilton*, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; *Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, *supra*). In addition, defendants presented competent evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

The affirmed medical report of Dr. Ferriter stated, in relevant part, that during an August 2023 orthopedic examination, plaintiff exhibited normal joint function in the cervical, thoracic, and lumbar regions of his spine and both his shoulders. He stated that plaintiff did not exhibit spasm or tenderness upon palpation of his cervical thoracic and lumbar regions, and that plaintiff's sensory responses were intact throughout his upper and lower extremities. While plaintiff had a complaint of "only stiffness in the neck," Dr. Ferriter found no swelling, discoloration or deformity. In addition, Dr. Ferriter stated that plaintiff tested negative in the Spurling's, supine straight leg raise, and Faber Patrick tests. There were no complaints of tenderness upon palpation in the acromioclavicular or supraspinatus of the left shoulder. Finally, Dr. Ferriter conducted range of motion testing with a goniometer and found all range of motion to be normal. Dr. Ferriter diagnosed plaintiff as having suffered resolved sprains/strains to his cervical, thoracic, and lumbar spine and both shoulders (see *Brite v Miller*, *supra*; *Damas v Valdes*, *supra*; *Pagano v Kingsbury*, *supra*).

Defendants Condello having met their burden on the motion, the burden shifted to the 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's submissions are insufficient to raise a triable issue of fact as to whether he sustained non-permanent injuries that left him unable to perform substantially all 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.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

The affirmed medical report of Dr. Ali Guy is also insufficient to raise a triable issue of fact. Dr. Guy, who examined plaintiff on only one occasion, nearly four years after the accident and after the filing of the instant motion, improperly relied on the unsworn reports of other medical providers in reaching his conclusion that plaintiff suffers from significant limitations of movement in his spine and left shoulder as a result of the accident (see *Vilomar v. Castillo*, 73 AD3d 758, 901 NYS2d 6541 [2d Dept 2010]). Dr. Guy states in his report, in relevant part, that he first saw

plaintiff in consultation on November 27, 2023, at which time plaintiff exhibited a “permanent partial disability causally related to the subject accident.” Dr. Guy’s findings of range of motion restrictions are based on this sole examination but Dr. Guy did not set forth the objective tests utilized to measure the joint function of plaintiff’s spine, such as through the use of a goniometer or inclinometer (*see Bayk v Martini*, 142 AD3d 484, 35 NYS3d 923 [2d Dept 2016]; *Schilling v Labrador, supra*; *Durand v Urick*, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]; *see also Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]; *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 [2d Dept 2001]; *Junco v Ranzi*, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]). Therefore, Dr. Guy’s report is insufficient to demonstrate the duration of the claimed range of motion limitations, and that such limitations are causally related to the subject accident (*see Pryce v Nelson, supra*; *Rovelo v Volcy, supra*; *McLoud v Reyes, supra*).

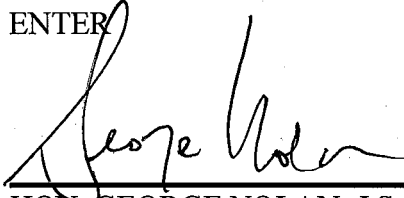
The affirmation of Dr. Bhumin Patel and the Zwanger-Pesiri radiological report neither provide objective medical evidence showing that the accident resulted in significant limitations nor demonstrate the duration of the claimed range of motion limitations in plaintiff’s spine and left shoulder, and that such limitations are causally related to the subject accident (*see Perl v Meher, supra*; *Pommells v Perez, supra*; *Hayes v Vasilios, supra*; *Scheker v Brown, supra*; *Rovelo v Volcy, supra*).

Accordingly, the motion is granted, and the plaintiff’s complaint is dismissed.

The foregoing constitutes the decision and Order of the Court.

DATE: June 20, 2024
Riverhead, NY

ENTER


HON. GEORGE NOLAN, J.S.C.

☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION