

Vinh Le v Aldochina
2024 NY Slip Op 35598(U)
June 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 607896/2021
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 607896/2021
CAL. No. 202301902MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**P R E S E N T :**Hon. LINDA J. KEVINS
Justice of the Supreme CourtMOTION DATE 2/6/24
ADJ. DATE 4/9/24
Mot. Seq. # 001 MD-----X
VINH LE,

Plaintiff,

- against -

SVETLANA ALDOCHINA and YURIY
NAMISNYAK,Defendants.
-----XLAW OFFICES OF GARY P. KAUGET
Attorney for Plaintiff
9201 Fourth Avenue, Suite 707
Brooklyn, New York 11209MARTYN SMITH MURRAY & YONG
Attorney for Defendants
102 Motor Parkway, Suite 230
Hauppauge, New York 11788

Upon the following papers read on this e-filed motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers by defendants, dated December 26, 2023 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; it is

ORDERED that the motion by defendants Svetlana Aldochina and Yuriy Namisnyak seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff Vinh Le commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Northville Turnpike and Old Country Road in the Town of Riverhead on March 1, 2021. It is alleged that the accident occurred when the vehicle owned by defendant Yuriy Namisnyak and operated by defendant Svetlana Aldochina struck the rear of plaintiff's vehicle while he was stopped at a yield sign in the right turning lane of Northville Turnpike waiting for traffic to clear so he could proceed onto Old Country Road. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including disc protusions at levels C5 through C7 and internal derangement of the lumbar spine.

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Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained 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 transcript, and the sworn medical report of Dr. Steven Goodman. At defendants' request, Dr. Goodman conducted an independent orthopedic examination of plaintiff on October 16, 2023. Plaintiff does not oppose the motion.

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]; *Van Nostrand v Froehlich*, 44 AD3d 54, 844 NYS2d 923 [2d Dept 2007]).

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 *Rumford v Singh*, 130 AD3d 1002, 14 NYS3d 462 [2d Dept 2015]; *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]). 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.*, 98 NY2d 345, 746 NYS2d 865; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900; *Reefer v Adom Rental Transp., Inc.*, 68 AD3d 1086, 892 NYS2d 153 [2d Dept 2009]). 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). Further, evidence of pain and discomfort alone, 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

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the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990). 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*, 84 NY2d 795, 622 NYS2d 900; *Irizarry v Lindo*, 110 AD3d 846, 973 NYS3d 846 [2d Dept 2013]). 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 *Xin Fang Xia v Saft*, 177 AD3d 823, 113 NYS3d 249 [2d Dept 2019]; *Rosenblum v Schloss*, 175 AD3d 1339, 105 NYS3d 894 [2d Dept 2019]; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants have failed to make a prima facie case that plaintiff’s alleged injuries do not meet the serious injury threshold requirement of section 5102 (d) of the Insurance Law (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*). During his examinations of plaintiff, conducted approximately two years after the subject accident, defendant’s examining orthopedist, Dr. Goodman, found that plaintiff had significant range of motion limitations in his cervical spine (see *Borras v Lewis*, 79 AD3d 1084, 913 NYS2d 577 [2d Dept 2010]; *Cabrera v Momperousse*, 47 AD3d 864, 850 NYS2d 620 [2d Dept 2008]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; see also *Sequeira v W&E Auto Repair*, 17 AD3d 442, 793 NYS2d 129 [2d Dept 2005]). Dr. Goodman also states in his medical report that the identified limitations in plaintiff’s spine are the result of plaintiff voluntarily restricting his range of motion during the examination. Yet, Dr. Goodman fails to explain or substantiate with any objective medical evidence the basis for his conclusion that the noted limitations in plaintiff’s spinal movement were voluntary (see *Kim v Orouke*, 70 AD3d 995, 893 NYS2d 892 [2d Dept 2010]; *Mondert v Iglesia De Dios Pentecostal Cristo Viene, Inc.*, 69 AD3d 590, 892 NYS2d 493 [2d Dept 2010]; *Bengaly v Singh*, 68 AD3d 1030, 890 NYS2d 352 [2d Dept 2009]). Thus, Dr. Goodman’s conclusions that plaintiff’s examination was normal, and that the strains plaintiff sustained to his spine as a result of the subject accident have resolved are without merit, and insufficient to meet defendants’ prima facie burden on the motion (see *Pierre v Wagner*, 186 AD3d 1276, 127 NYS3d 900 [2d Dept 2020]; *Gui Hyun NA v Five Stars Trucking, Inc.*, 178 AD3d 673, 111 NYS3d 236 [2d Dept 2019]; *Nunez v Teel*, 162 AD3d 1058, 75 NYS3d 541 [2d Dept 2018]). Accordingly, defendants’ motion for summary judgment dismissing the complaint is denied.

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Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 6.18.24



LINDA KEVINS, JSC

____ FINAL DISPOSITION X NON-FINAL DISPOSITION