Bod v Frenkel
2018 NY Slip Op 30374(U)
March 1, 2018
Supreme Court, Suffolk County
Docket Number: 15-16761
Judge: Martha L. Luft

SHORT FORM ORDER

INDEX No. 15-16761
CAL. No. 17-00358MV

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

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 7-18-17
ADJ. DATE 9-19-17
Mot. Seq. # 002 - MG; CASEDISP

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BRANDI BOD,

Plaintiff,

- against -

LANCE FRENKEL and DINA FRENKEL,

Defendants.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-16; Replying Affidavits and supporting papers 18-19; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Lance Frenkel and Dina Frenkel seeking summary judgment dismissing the complaint is granted.

Plaintiff Brandi Bod commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Larkfield Road and Wicks Road in the Town of Huntington on March 4, 2013. It is alleged that the accident occurred when the vehicle operated by defendant Dina Frenkel and owned by defendant Lance Frenkel struck the rear of the vehicle owned and operated by Brandi Bod while it was stopped at a flashing yellow traffic light on Larkfield Road. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including bulging discs at levels C3 through C6, cervical and lumbar radiculopathy, cervical and lumbar radiculitis, and sciatica.

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 transcript, and the sworn medical report of Dr. Leon Sultan. At defendants' request, Dr. Sultan conducted an independent orthopedic examination of plaintiff on December 22, 2016.

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* ***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 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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."

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 a defendant has met this burden, the 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*).

Here, defendants, through the submission of plaintiff's deposition transcript and competent medical evidence, have established a prima facie case of entitlement to judgment as a matter of law that

plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendant's examining orthopedist, Dr. Sultan, used a goniometer to test plaintiff's ranges of motion in her spine, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Sultan states in his medical report that an examination of plaintiff reveals full range of motion in her spine, that there was no evidence of muscle spasms, tenderness, or trigger points upon palpation of the paraspinal muscles, that sensory testing of the upper and lower extremities is intact, and that plaintiff's heel and toe standing is unimpaired. Dr. Sultan states that plaintiff's spinal column is normally aligned, that the lordotic curvature is maintained, that the straight leg raising test is negative, and that the sacroiliac joints are non-tender to palpation. Dr. Sultan opines that the trauma plaintiff sustained to her cervical and thoracolumbar regions as a result of the subject accident have resolved, and that there are no objective findings consistent with or proportional to plaintiff's subjective complaints. Dr. Sultan further states that there is no indication that plaintiff requires any additional orthopedic testing or treatment for any injuries causally related to the subject accident, that plaintiff does not have any residual post-traumatic functional impairment, and that plaintiff is capable of participating in her activities of daily living without restrictions.

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of her daily activities were not curtailed (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Plaintiff testified at an examination before trial that following the accident she only missed one day from her employment as an attorney due the injuries she sustained in the accident, and that her duties at work and her salary remained the same, as well as received her annual bonus. Plaintiff further testified that she ceased treatment after six months, because her No-Fault benefits were terminated, that she received chiropractic treatment for approximately one-and-an-half years, and that she currently does not have any appointments scheduled with any medical providers to treat her injuries.

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez.***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 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 Angerami***, 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 Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Plaintiff opposes the motion on the grounds that defendants failed to make a prima facie case that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the 90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits her own affidavit, uncertified copies of her medical records regarding the injuries at issue, and the affidavits of Dr. Jennifer Carrasco and Dr. Arjang Abbasi.

In opposition, the evidence submitted by plaintiff failed to raise a triable issue of fact as to whether she sustained an injury to her spine within the limitations of use categories of the Insurance Law (*see* ***Perl v Meher***, 74 AD3d 930, 902 NYS2d 632 [2d Dept 2010]; ***Krerimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). 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]). The medical evidence proffered by plaintiff was insufficient to establish a serious injury or to defeat defendants' prima facie showing. While Dr. Carrasco states that she conducted an examination of plaintiff on June 27, 2017 and concludes that plaintiff has sustained a significant limitation of use of her cervical and lumbar spines as a result of the subject accident, Dr. Carrasco fails to state when she initially examined plaintiff. Indeed, Dr. Carrasco states that another doctor, Dr. Alan Furman, initially examined plaintiff on October 13, 2013, approximately seven months after the subject accident occurred. Yet, plaintiff has not submitted an affirmed medical report from Dr. Furman. As a result, Dr. Carrasco is unable to substantiate the extent or degree of the limitation to plaintiff's cervical and lumbar regions caused by the alleged injuries and their duration (see ***Caliendo v Ellington***, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]). In addition, Dr. Carrasco impermissibly relied upon the unsworn medical records and reports of other physicians in deriving her conclusions (*see* ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 870 NYS2d 398 [2d Dept 2005]).

Likewise, Dr. Abbasi, in his medical report, impermissibly relied upon unsworn and/or unaffirmed reports of other medical providers, including the unsworn magnetic resonance imaging report of Dr. Melissa Sapan, in reaching his conclusions that plaintiff suffers from cervical myofascial pain

syndrome and a significant limitation of use of her cervical spine (*see* ***Marziotto v Striano***, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]; ***Iusmen v Konopka***, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006). Additionally, the limitations that were observed by Dr. Abbasi during her re-examination of plaintiff on July 27, 2017 are insignificant within the meaning of the No-Fault statute (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d dept 2013]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). Thus, Dr. Abbasi's report is without probative value in opposing defendants' motion for summary judgment (*see* ***Quinatana v Arena Transp., Inc.***, 89 Ad3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***Ali v Mirshah***, 41 AD3d 748, 840 NYS2d 83 [2d Dept 2007]; ***Elder v Stokes***, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]). In the absence of any admissible objective evidence that plaintiff sustained a serious injury as a result of the subject accident, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Brobeck v Jolloh***, 32 AD3d 526, 819 NYS2d 840 [2d Dept 2006]; ***Fisher v Wiliams***, 289 AD2d 288, 734 NYS2d 497 [2d Dept 2001]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: March 1, 2018

Marsha C Ch
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION