Mares v Rodillado
2013 NY Slip Op 32482(U)
October 7, 2013
Supreme Court, Suffolk County
Docket Number: 37298/2011
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Angela M. Mates,

Plaintiff,

-against-

Sharyn P. Rodillado,

Defendant.

Index No.: 37298/2011

Motion Sequence No.: 001; MG
Motion Date: 6/5/13
Submitted: 6/12/13

Motion Sequence No.: 002; MD; CD
Motion Date: 6/12/13
Submitted: 6/12/13

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Clerk of the Court

Upon the following papers numbered 1 to 21 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 9; Notice of Cross Motion and supporting papers, 10 - 17; Answering Affidavits and supporting papers, 18 - 19; Replying Affidavits and supporting papers, 20 - 21; it is

ORDERED that the motion by defendant Sharyn Rodillado seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross-motion by plaintiff Angela Mates seeking summary judgment in her favor on the issue of liability is denied as moot.

Plaintiff Angela Mates 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 Route 347 and Mark Tree Road in the Town of Brookhaven on December 6, 2010. By her complaint, plaintiff alleges that while she was traveling in the right "merge" lane of east Route 347, her vehicle was struck in the driver's side by the vehicle owned and operated by defendant Sharyn Rodillado when she made a U-turn from westbound Route 347 onto eastbound Route 347. By her bill of particulars, plaintiff alleges. among other things, that she sustained various personal injuries as a result of the subject accident, including sprains to the lumbar, cervical and thoracic regions, cervical lordosis, thoracic kyphosis, and a phobia of driving. Plaintiff alleges that she was confined to her bed and missed her classes at Stony Brook University for approximately two weeks as a result of the injuries she sustained in the collision. Plaintiff further alleges that due to the injuries she sustained in the accident she has been unable to return to her employment as a cashier at Kohl's Department Store.

Defendant now moves 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, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the medical report of Dr. Alan Zimmerman. Dr. Zimmerman, at defendant's request, conducted an independent orthopedic examination of plaintiff on February 28, 2013. Plaintiff opposes the motion on the ground that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitation of use" categories and the "90/180" category of the Insurance Law. In opposition, plaintiff submits her own affidavit, photographs of the accident site and her motor vehicle, and an uncertified medical note from Dr. Nestor Blyznak. Plaintiff also cross-moves for summary judgment on the issue of liability, arguing that defendant's negligent operation of her vehicle was the sole proximate cause of the subject accident.

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, defendant has established her *prima facie* entitlement to judgment as a matter on the basis that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Scotto v Suh***, 50 AD3d 1012, 857 NYS2d 185 [2d Dept 2008]). Defendant's examining orthopedist, Dr. Zimmerman, tested the ranges of motion in plaintiff's spine using a goniometer and set forth his specific measurements, and compared plaintiff's ranges of motion to the normal ranges (*see* ***Cantave v Gelle***, 60 AD3d 988 , 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Dr. Zimmerman in his report states that an examination of plaintiff reveals full range of motion in her spine, a normal gait, muscle strength of 5/5, and no evidence of muscle spasm or tenderness upon palpitation of her spine. Dr. Zimmerman states that the straight leg raising test is negative, that plaintiff movements are carried out without complaints, that she is able to walk on her heels and toes, and that she is able to perform routine activities without difficulty. Dr. Zimmerman opines that the sprains plaintiff sustained to her spine as a result of the subject accident have resolved and that there is no evidence of a disability. Dr. Zimmerman's report concludes that plaintiff is currently working and attending school, which she may continue to do so without any restriction, that no further treatment is medically necessary from an orthopedic perspective, and that the amount of treatment that plaintiff received was excessive in duration based upon the injuries she sustained.

Defendant, by submitting plaintiff's deposition transcript, also established that plaintiff's

alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily living activities during at least 90 of the first 180 days following the subject accident (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Dunbar v Prahovo Taxi, Inc.***, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]; ***Richards v Tyson***, 64 AD3d 760, 883 NYS2d 575 [2d Dept 2009]). Plaintiff testified at an examination before trial that she did not miss any time from school and that her grades did not suffer as a result of the alleged injuries she sustained in the subject collision. She testified that, although she substituted her gym class for a "book work" class due to the injuries she sustained in the collision, she also testified that she received all of her credits for her class work. Therefore, the curtailments claimed by plaintiff only indicate a slight curtailment of her daily activities, which are not sufficient to establish a serious injury within the 90/180 category (*see* ***Licari v Elliott***, *supra*; ***Siew Hwee Lim v Dan Dan Tr., Inc.***, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Having made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of the statute, defendant shifted the burden plaintiff to come forward with evidence to overcome defendant's 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]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). 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]). 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]).

In opposition to defendant's prima facie showing, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101

AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]). In fact, plaintiff failed to submit any objective medical evidence, contemporaneously or recent, by her treating physicians or medical records in admissible form to demonstrate that she sustained any injury to her spine (*see e.g.* ***Capriglione v Rivera***, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]). "Any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based upon a recent examination" (***Rovelo v Volcy***, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011], *quoting* ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; *see* ***Sham v B&P Chimney Cleaning & Repair, Co., Inc.***, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]; ***Ambos v New York Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2d Dept 2010]; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189, *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]; *see also* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Absent any objective medical proof of a serious injury, plaintiff's own affidavit is insufficient to raise a triable issue of fact (*see* ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]; ***Luizzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2d Dept 2009]).

Similarly, although "a mental or emotional impairment may in certain circumstances constitute a "significant limitation of use of a bodily function or system under Insurance Law § 5102(d) (***Sellitto v Casey***, 268 AD2d 753, 753, 702 NYS2d 177 [3d Dept 2000]; *see* ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]; ***Taranto v McCaffrey***, 40 AD3d, 626, 627, 835 NYS2d 365 [2d Dept 2007]; ***Bissonette v Compo***, 307 AD2d 673, 674, 762 NYS2d [3d Dept 2003]), such injury must be established by objective medical evidence (*see* ***Chapman v Capoccia***, 283 AD2d 798, 725 NYS2d 430 [3d Dept 2001]). Although, plaintiff testified that she received treatment from a cognitive therapist, Dr. Anthony Anzalone, to help alleviate her phobia of driving, plaintiff failed to submit any competent medical evidence to substantiate said phobia (*see* ***Kranis v Biederbeck***, 83 AD3d 903, 920 NYS2d 725 [2d Dept 2011]; ***Sellitto v Casey***, *supra*). Moreover, plaintiff testified that she no longer has a fear of driving and that she did not seek any further treatment after she was treated by Dr. Anzalone from February 2011 to January 2012.

Likewise, 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]). The submission of Dr. Blyznak's note stating that plaintiff was not allowed to return to work until further notice is without probative value, since it was not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Diaz v Chaudhry***, 91 AD3d 590, 935 NYS2d 901 [2d Dept 2012]; ***Koldoziej v Savarese***, 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]). Accordingly, the motion by defendant Sharyn Rodillado seeking summary judgment dismissing the complaint is granted.

As plaintiff did not sustain a serious injury within the meaning of §5102 (d) of the Insurance Law, plaintiff's cross-motion for summary judgment in her favor on the issue of liability is denied

as moot.

Dated: 10/7/2013

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION