Collins v Basile
2011 NY Slip Op 30809(U)
March 29, 2011
Supreme Court, Suffolk County
Docket Number: 09-16489
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

INDEX No. 09-16489
CAL. No. 10-01391MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 8-24-10
ADJ. DATE 12-8-10
Mot. Seq. # 002 - MD

---X
EVA G. COLLINS and MICHAEL C. COLLINS,

Plaintiffs,

- against -

FRANK J. BASILE and MARIA A. BASILE,

Defendants.
---X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 14 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Frank Basile and Maria Basile seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Eva Collins as a result of a motor vehicle accident that occurred on the westbound Long Island Expressway, approximately 500 feet west of South Oyster Bay Road, in the County of Nassau, New York on May 13, 2008. The accident allegedly occurred when the vehicle operated by defendant Maria Basile and owned by defendant Frank Basile struck the rear of the vehicle operated by plaintiff Michael Collins while it was stopped in traffic. Plaintiff at the time of the accident was a front seat passenger in the vehicle operated by her husband, Michael Collins. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including straightening of the cervical and lumbar curvature; disc bulges at levels C3 through C6 and level L4-L5; vertebral subluxation complex; and derangement of the left shoulder. Plaintiff alleges that she was confined to her bed and home for approximately two days immediately after the accident. Plaintiff further alleges that she was totally incapacitated from her employment as a registered nurse at North Shore University Hospital for approximately three days following the accident and continues to be partially incapacitated from her employment to date.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Maria DeJesus, Dr. Robert Snitkoff, Dr. Eric Roth, Dr. Stuart Stauber, and Dr. Joseph Marguiles. At defendants' request, Dr. DeJesus, a neurologist, Dr. Snitkoff, a chiropractor, and Dr. Roth, a physiatrist licensed in medical acupuncture, conducted independent examinations of plaintiff on September 23, 2008. Also at defendants' request, Dr. Stauber conducted an independent internal medical examination of plaintiff on September 19, 2008, and Dr. Marguiles conducted an independent orthopedic examination of plaintiff on April 27, 2010. Plaintiff opposes the instant motion on the ground that defendants failed to meet their burden of establishing that her injuries do not come within the meaning of the serious injury threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiff asserts that she sustained injuries within the "limitation of use" and the "90/180 days" categories of serious injury as a result of the accident. In opposition to the motion, plaintiff submits her own affidavit, the affidavit of her treating chiropractor, Dr. Douglas Wright, and the sworn medical reports of Dr. F. Scott Nowakowski and Dr. John Rigney.

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 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 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 [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 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***,

208 AD2d 519,616 NYS2d 1006 [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 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). 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 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the Court notes that the report submitted by defendants' chiropractor, Dr. Snitkoff, is inadmissible, inasmuch as it was not sworn to before a notary or other authorized official (*see* ***Hartley v White***, 63 AD3d 1689, 881 NYS2d 583 [2009]; ***Feggins v Fagard***, 52 AD3d 1221, 860 NYS2d 346 [2008]; ***Shinn v Catanazaro***, 1 AD3d 195, 767 NYS2d 88 [2003]; ***Grossman v Wright***, *supra*). CPLR 2106 does not allow for a chiropractor to affirm the truth of his statement with the same force as an affidavit. Thus, defendants' failure to submit the chiropractor's report in admissible form requires that it be excluded from consideration (*see* ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]; ***Shinn v Catanzaro***, 1 AD3d 195, 767 NYS2d 88 [2003]; ***Sanchez v Romano***, 292 AD2d 202, 739 NYS2d 368 [2002]).

However, defendants have established their prima facie burden 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*; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). The reports of defendants' various experts state that plaintiff has full ranges of motion in her cervical and lumbar regions when compared with the normal ranges of motion for those areas. The reports also state that although plaintiff complains of minimal tenderness upon palpation over the cervical and lumbar spines, no muscle spasm is elicited when the cervical or lumbosacral musculature is palpated and that there is no tenderness upon palpation of the thoracic spine. The reports further state that the cervical and lumbar spines sprains that plaintiff sustained as a result of the subject accident have resolved and that plaintiff is capable of performing all of her daily living activities without restriction. Furthermore, reference to plaintiff's own deposition testimony sufficiently refuted the "limitation of use" categories of serious injury (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2008]) and the "90/180 days" category under Insurance Law § 5102(d) (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]).

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a "serious injury" (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 227, 577 NYS2d 272 [1991], *lv denied* 79 NY2d 754, 581 NYS2d 665 [1992]). A plaintiff alleging an injury within the limitation of use categories must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in

order to prove the extent or degree of physical limitation he or she sustained (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [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]).

In opposition, plaintiff raised a triable issue of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Walker v Esses***, 72 AD3d 938; 899 NYS2d 321 [2010]; ***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2009]). Plaintiff relies upon the affidavit of her treating chiropractor, Dr. Wright, which states that he initially began treating plaintiff on May 2, 2008 and continued to treat her until February 2010. Dr. Wright's affidavit reveals that plaintiff had significant range of motion limitations in her cervical and thoracolumbosacral regions contemporaneous with the subject accident, and that those limitations still were present when he re-examined plaintiff on September 25, 2010. Dr. Wright opines that plaintiff's range of motion limitations are permanent and are the direct result of the subject accident. The report further states that the injuries plaintiff's sustained as a result of the accident will "inhibit her ability to carry out her normal living activities of daily living, which involve prolonged sitting, standing, bending, walking, lifting or extreme physical exertion."

Additionally, plaintiff submits the affirmed radiological reports of Dr. Rigney and Dr. Nowakowski, who reviewed the MRI films of plaintiff's lumbar and cervical spines. Dr. Rigney's report states that the images produced of plaintiff's lumbar spine showed that there is "a posterior bulge that becomes more prominent at the origin of the foramina, resulting in bilateral mild proximal foraminal narrowing at level L4-L5," and that there is straightening of the lumbar curvature. Dr. Nowakowski's report states that the MRI of plaintiff's cervical spine was an abnormal study, and that the findings indicate "physiologic dysfunction of tissues supporting normal spinal articular function, and is consistent with vertebral subluxation complex." As a consequence, the medical reports of plaintiff's experts conflict with those of defendants' experts, who found that plaintiff did not have any significant limitations in her cervical or lumbar regions. "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 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS2d 17 [2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). Although disc bulges and herniations, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]).

Contrary to defendants' contention, plaintiff adequately explained her gap in treatment (*see*

Abdelaziz v Fazel, 78 AD3d 1086, 912 NYS2d 103 [2010]; ***Domanas v Delgado Travel Agency, Inc.***, 56 AD3d 717, 868 NYS2d 132 [2008]; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2002]). Dr. Wright's explanation for the gap in treatment essentially is that plaintiff reached her maximum medical improvement and any further treatment would have merely been palliative in nature (*see* ***Pommells v Perez***, *supra*; ***Vaco v Arellano***, 74 AD3d 791, 901 NYS2d 549 [2010]; ***Eusebio v Yannetti***, 68 AD3d 919, 892 NYS2d 127 [2009]). Furthermore, inasmuch as plaintiff established that at least some of her injuries meet the "No Fault" threshold, it is unnecessary to address whether her proof with respect to other injuries she allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment (*see* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 239 [2010]). Accordingly, defendants' motion for summary judgment is denied.

Dated: 29 March 2011

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**