Lorthe v Adeyeye
2002 NY Slip Op 30000(U)
May 6, 2002
Supreme Court, Queens County
Docket Number: 0017671/1999
Judge: William T. Glover
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **WILLIAM T. GLOVER** IAS PART 23
Justice

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LOUIBERT LORTHE and HOMATI LORTHE,

Plaintiff(s),

-against-

JOHN ADEYEYE and ROSELYN A. ADEYEYE,

Defendant(s),

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Index No.: 17671/99
Motion Date: 2/20/02
Motion Cal. No.: 18

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment in their favor on the grounds that the plaintiffs have not suffered a serious injury as defined by New York State Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits	5 - 7
Replying Affidavits	8 - 10

Upon the foregoing papers it is ordered that the motion for summary judgment in defendants' favor dismissing the plaintiffs' complaint on the grounds that the plaintiffs did not sustain a "serious injury "as defined in Insurance Law §5102(d) is granted.

On a motion for summary judgment, the initial burden is on the moving party to establish, *prima facie*, entitlement to judgment as a matter of law. (Alvarez v Prospect Hospital, 68 NY2d 320.) In this instance, the affirmed medical reports of the physicians who examined the plaintiffs on behalf of the defendants were sufficient to establish a *prima facie* case that the plaintiffs did not sustain such serious injury as a result of the underlying collision (Gaddy v Eyler, 79 NY2d 955; Gill v O.N.S. Trucking, 239 AD2d 463). The burden therefore shifts to the plaintiffs to come forward with sufficient evidence that they sustained a serious injury (*see,* Licari v Elliott, 57 NY2d 230; Lopez v Senatore, 65 NY2d 1017).

The plaintiffs' evidence submitted in opposition to the defendants' motion is insufficient to raise a triable issue of fact as to whether they sustained a serious injury. First, the affirmations of Irving M. Etkind, M.D., an orthopedic surgeon and the affirmed reports of Steven W. Prufer, M.D., a radiologist fail to set forth objective, quantitative findings. Dr. Etkind

examined and treated the plaintiffs with regard to the injuries they sustained in the accident of December 24, 1998, on February 16, 1999. He again examined the plaintiffs on December 3, 2001, over two and a half years after the initial examination. However, he does not explain how these restrictions were objectively measured. Plaintiffs' restrictions of motion, if it is to form the basis of the claims of serious injury, must be objectively measured and quantified. (*See,* Grossman v Wright, 268 AD2d 79; McHaffie v Antieri, 190 AD2d 780.) In addition, no explanation is offered for the almost three year gap since the last treatment and the current examination of plaintiffs. (*See,* DeCayette v Kreger Truck Renting Inc., 260 AD2d 342; Diaz v Speedy Rent A Car, 259 AD2d 726; Stowe v Simmons, 253 AD2d 422; Rum v Pam Transport, 250 AD2d 751; Williams v Ciaramella, 250 AD2d 763.) Furthermore, the plaintiffs' also failed to submit any objective medical proof that was contemporaneous with the accident showing any initial range of motion restrictions. (*See,* Lanza v Carlick, 279 AD2d 613; Passarelle v Burger, 278 AD2d 294; Jimenez v Kambli, 272 AD2d 581). It is apparent that the affirmation of Dr. Etkind is simply tailored to meet the statutory definition of a serious injury. (*See*, Lopez v Senatore, 65 NY2d 1017.)

The plaintiffs were allegedly treated by Dr. Scott Denny, a chiropractor. However there is no proof by affidavit of such continuing treatment and no indication of the type or nature of treatment that he performed.

The affidavit of plaintiffs' attorney is not probative on medical issues. (*See*, Armstrong v Wolfe, 133 AD2d 957.) Since plaintiffs have not submitted any medical evidence in admissible form, or offered any excuse for the failure to do so, the defendants' motion for summary judgment must be granted. (*See*, Grasso v Angerami, 79 NY2d 813; Jacondino v Lovis, 186 AD2d 109.)

Dated: May 6, 2002

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William T. Glover, J.S.C.