

Marte v New York City Tr. Auth.

2007 NY Slip Op 31979(U)

June 26, 2007

Supreme Court, Queens County

Docket Number: 0007645/2005

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 7645/05
CARMEN MARTE,	Motion
Plaintiff,	Date June 5, 2007
-against-	Motion
NEW YORK CITY TRANSIT AUTHORITY,	Cal. No. 3
JOSE CONTRERAS and A. MAGARIN-ADAMES,	Motion
Defendants.	Sequence No. C004

The following papers numbered 1 to 15 read on this motion by defendant A. Magarin-Adames for an order pursuant to CPLR 3212 for summary judgement due to plaintiff's failure to meet the threshold limits set by New York State Insurance Law §§ 5102 and 5104; cross motion by defendants New York City Transit Authority and Jose Contreras for the same relief.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion-Answering Affidavits.....	5-11
Reply Affidavits.....	12-15

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

This action arises out of an automobile accident that occurred on November 29, 2004. Defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment, for all injuries alleged in the bill of particulars except for the injury to the right ankle. Specifically, *inter alia*, the defendants submitted affirmed reports from multiple independent examining and/or evaluating physicians (two orthopedic surgeons, two neurologists and a radiologist) and plaintiff's own examination before trial transcript testimony which reveals that plaintiff missed only two

weeks of work as a result of the accident.

In opposition to the motion, plaintiff submitted: an uncertified police accident report, a sworn affirmation of plaintiff's treating physician, Gaston Sterlin, M.D. dated May 14, 2007, a sworn affirmation of plaintiff's treating orthopedic surgeon, Eric Senat, M.D. dated May 11, 2007, a sworn affirmation of plaintiff's radiologist, Clifford Beinart dated May 11, 2007, plaintiff's own affidavit, plaintiff's examination before trial transcript testimony, and an attorney's affirmation.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v. Bennett*, 122 AD2d 728, 511 NYS2d 603 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot*, *supra*; *Lopez v. Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). Thus, a medical affirmation or affidavit which is

based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418, 668 NYS2d 167 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441, 700 NYS2d 863 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377, 619 NYS2d 593 [2d Dept. 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261, 686 NYS2d 18 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708, 652 NYS2d 911 [3rd Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412, 647 NYS2d 189 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]). For example, in *Parker, supra*, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Through the submission of affirmed experts' reports and plaintiff's examination before trial transcript testimony, defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d) for all injuries alleged in the bill of particulars except for the injury to the right ankle.

At the outset, the Court notes that in the bill of particulars, plaintiff alleges physical injuries to the right knee, right ankle, and cervical spine only. As these are the only injuries alleged in both the bill of particulars and the complaint, and since plaintiff never moved to amend the bill of particulars, those portions of the proof discussing other parts of the body including the lumbar sacral and thoracic spines will not be considered (see, *Seymour v. Roe*, 301 AD2d 991 [3d Dept 2003]; see also, *Robinson v. Schiavoni*, 249 AD2d 99 [4th Dept 1998]).

The defendants' independent examining / evaluating medical doctors consist of: Edward Toriello, M.D., Edward Weiland, M.D., Barbara Freeman, M.D., Steven Schwartz, M.D., Joseph Tuvia, M.D., and Jane Tuvia, M.D.

None of the defendants' doctors' reports, were sufficient to establish a *prima facie* case of a lack of "serious injury" to the right ankle. Drs. Toriello, Weiland, and Tuvia failed to perform any exam or evaluation of the right ankle at all. Dr. Freeman did perform an exam of the right ankle, but while she did quantify ranges of motion, she failed to compare her findings to what is normal, hence, her determination as to findings of the right ankle are insufficient to establish an entitlement to summary judgment as a matter of law so as to shift the burden to plaintiff on the injury to the right ankle (*Yashayev v. Rodriguez*, 28 AD3d 651 [2d Dept 2006]; *Tchjevskaja v. Chase*, 15 AD3d 389 [2d Dept 2005]). Dr. Schwartz also appears to have examined the right ankle, but he does not report any clinical findings of the ankle, rather, he merely just states that the plaintiff does not move the right ankle and that movements in the right foot cause pain in the ankle. Such an exam of the right ankle, void of objective tests, will not be sufficient to establish an entitlement to summary judgment as a matter of law so as to shift the burden to plaintiff on the injury to the right ankle (see, *Yashayev, supra*; see also, *Black v. Robinson*, 305 AD2d 438 [2d Dept 2003]) (stating that doctors must set forth the objective tests performed in supporting their conclusions).

As defendants failed to make a *prima facie* showing that the plaintiff did not sustain a serious injury to the right ankle, it is unnecessary to consider the sufficiency of the plaintiff's opposition papers regarding the injury to the right ankle (see *Torres v. Safety Cab Corp.*, 25 AD3d 548 [2d Dept 2006]); *Barrett v. Jennot*, 18 AD3d 679 [2d Dept 2005]). Accordingly, defendants are denied summary judgment with regard to the injury to the right ankle.

Regarding the remaining injuries to the right knee and cervical spine, as will be discussed hereafter, partial summary judgment is granted to the defendants on these injuries.

The affirmed report of defendant's independent examining orthopedist, Edward A. Toriello, M.D., indicates that an examination conducted on October 4, 2006 revealed that there is evidence of a resolved hyperextension injury, resolved low back strain and resolved knee contusions. He opines that there is no evidence of orthopedic disability and no further orthopedic treatment is needed. Dr. Toriello concludes that no further physical therapy treatment is needed and that plaintiff is presently able to perform the duties of her occupation. While plaintiff argues in its opposition papers that Dr. Toriello finds a decreased flexion in the lumbar spine, the Court reiterates that no such injury is alleged in the bill of particulars, and as such, this body part will not be taken into account.

The affirmed report of defendant's independent examining neurologist, Edward M. Weiland, M.D., indicates that an examination conducted on November 30, 2006 revealed that there is no evidence of lateralizing neurologic deficits and an impression of resolved strains/sprains/contusions. He opines that there is no primary neurologic disability relating to any injury reportedly occurring on November 29, 2004. Dr. Weiland concludes that from a neurologic perspective, the plaintiff can perform activities of daily living and continue employment, without limitation. While plaintiff, argues in its opposition papers that Dr. Weiland does not include in his report a range of motion testing of the lumbar spine, the Court reiterates that no such injury is alleged in the bill of particulars, and as such, this body part will not be taken into account.

The affirmed report of defendant's independent examining orthopedic surgeon, Barbara Freeman, M.D., indicates that an examination conducted on January 17, 2006 revealed that there is

no orthopedic disability and no restrictions to activity. She concludes that no orthopedic intervention is necessary. While plaintiff argues in its opposition papers that Dr. Freeman finds a restricted range of motion in the lumbar spine, the Court reiterates that no such injury is alleged in the bill of particulars, and as such, this body part will not be taken into account.

The affirmed report of defendant's independent examining neurologist, Steven J. Schwartz, M.D., indicates that an examination conducted on January 17, 2006 revealed that there is no objective evidence of any neurologic deficits. He opines that there is neurologic disability or functional impairment. Dr. Schwartz concludes that plaintiff can participate in all activities of daily living, including work, without limitations.

The affirmed report of defendants' independent evaluating radiologists, Jane Tuvia, M.D. and Joseph Tuvia, M.D., indicates that an MRI of the right knee taken on December 21, 2004 revealed an impression of "findings consistent with myxoid degeneration of the posterior horn medial meniscus, otherwise unremarkable study. There are no finding to suggest trauma or sequela of such."

Additionally, the plaintiff's examination before trial transcript testimony reveals that plaintiff missed only two weeks of work as a result of the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury, for all injuries alleged in the bill of particulars except for an injury to the right ankle."

Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, *Gaddy v. Eyster*, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, *Licari v Elliott*, *supra*).

B. Plaintiff fails to raise an issue of fact

In opposition to the motion, plaintiff submitted: an

uncertified police accident report, a sworn affirmation of plaintiff's treating physician, Gaston Sterlin, M.D. dated May 14, 2007, a sworn affirmation of plaintiff's treating orthopedic surgeon, Eric Senat, M.D. dated May 11, 2007, a sworn affirmation of plaintiff's radiologist, Clifford Beinart dated May 11, 2007, plaintiff's own affidavit, plaintiff's examination before trial transcript testimony, and an attorney's affirmation.

In a sworn affirmation dated May 11, 2007, plaintiff's radiologist, Clifford Benait, M.D., indicates that he oversaw the taking of an MRI film of plaintiff's right knee on December 20, 2004, and on December 23, 2004, he read the film and found "oblique tear posterior horn lateral meniscus." While Dr. Beinart states in his affirmation that a copy of his report is annexed to the affirmation, the report is not annexed to the plaintiff's papers.

Additionally, plaintiff was treated by Gaston Sterlin, M.D. from November 29, 2004 - March 9, 2005. In his affirmation of May 14, 2007, Dr. Sterlin states "I have reviewed the pertinent medical records of Ms. Marte with respect to the injuries she sustained to her right knee, left knee, neck and back as a result of the aforesaid accident, including, but not limited to the MRI of Ms. Marte's right knee and an EMG examination." However, no such medical records or medical reports are before this Court. Therefore, the probative value of Dr. Sterlin's affirmation is reduced by his reliance on MRI's, medical reports and records that are not before the Court in admissible form. Since Dr. Sterlin's conclusions improperly rested on other experts work products which are not before this Court, it is insufficient to raise a material triable factual issue (*see, Constantinou v. Surinder*, 8 AD3d 323 [2d Dept 2004], *Claude v. Clements*, 301 AD2d 432 [2d Dept 2003]; *Dominguez-Gionta v. Smith*, 306 AD2d 432 [2d Dept 2003]).

Plaintiff was also examined initially by Dr. Eric Senat, orthopedist, on March 9, 2005, and re-evaluated on March 28, 2007. In reaching his conclusion, Dr. Senat indicates that he reviewed, *inter alia*, the MRI of plaintiff's right knee, which is not attached to the plaintiff's papers, and EMG results which are also not attached to plaintiff's papers. Therefore, the probative value of Dr. Senat's affirmation is reduced by his reliance on MRI's and reports that are not before the Court in admissible form. Since Dr. Senat's conclusions improperly rested on other experts work products which are not before this Court,

it is insufficient to raise a material triable factual issue (see, *Constantinou v. Surinder, supra*; *Claude v. Clements, supra*, *Dominguez-Gionta v. Smith, supra*).

There also exists an unexplained gap or cessation in treatment. It is undisputed that plaintiff stopped receiving treatment from Drs. Sterlin and Senat in March 2005 and did not return to these providers for re-evaluation until March 2007. The Court of Appeals held in *Pommells v. Perez*, 4 NY3d 566 (2005), that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Courts applying the *Pommells* standard have consistently held that in order for the explanation to be considered reasonable it must be "concrete and substantiated by the record." (*Gomez v. Ford Motor Credit Co.*, 10 Misc 3d 900 [Sup. Ct., Bronx Cty 2005]). The affirmed reports submitted by Drs. Sterlin and Senat do not provide any information concerning an explanation for the 2-year gap between plaintiffs' medical treatment in March 2005 and plaintiff's re-evaluation by Drs. Sterlin and Senat in March 2007 (*Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]). Here, plaintiff's doctors provide no explanation as to why plaintiff failed to pursue any treatment during the period from March 2005 - March 2007. In the instant case, plaintiff herself states in her affidavit that she stopped receiving treatment in March 2005 when she learned that her no-fault insurance benefits were no longer going to pay for the treatment. However, she has provided no substantiation or corroboration of this explanation to the Court (see, *Gomez, supra*). There is no evidence of any letter from the insurance carrier as to when and why the carrier discontinued coverage. (*Id.*). Nor did plaintiff offer an explanation as to why she could not have continued treatment by paying out-of-pocket. (*Id.*). "Absent such substantiation, the reason proffered by plaintiff for discontinuing treatment remains conclusory and non-probative." (*Id.* at 903). Moreover, plaintiff's self-serving affidavit concerning her cessation in medical treatment without medical authorization is entitled to little weight and is insufficient to raise an issue of fact (see, *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]; *Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]).

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (*Slona v. Schoen*, 251 AD2d 319 [2d Dept

1998]).

Also, the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (*Savatarre v. Barnathan*, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of his/her customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). Plaintiff's experts failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. Instead, to support its contention that the plaintiff satisfied the 90/180 day serious injury category, plaintiff relied in part on the plaintiff's own deposition testimony which established that she lost only two weeks from employment (see, *Candia v. Omoria Cab. Corp.*, 6 AD3d 641 [1st Dept 2004]). As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, *Graham v Shuttle Bay*, 281 AD2d 372 [1st Dept 2001]; *Hernandez v. Cerda*, 271 AD2d 569 [2d Dept 2000]; *Ocasio v. Henry*, 276 AD2d 611 [2d Dept 2000]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion and cross-motion for summary judgment is partially granted as to all categories of serious injury except for the injury to the right ankle.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 26, 2007

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Howard G. Lane, J.S.C.