

<b>Georges v Jeanjulien</b>
2007 NY Slip Op 33302(U)
September 28, 2007
Supreme Court, Queens County
Docket Number: 0032743/2002
Judge: Patricia P. Satterfield
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Rent A Car Sys., 98 NY2d 345 [2002].) Defendant may meet this burden by presenting the affidavits or affirmations of medical experts who have examined plaintiffs, and who have concluded that no objective medical findings support plaintiffs' claims. (Grossman v Wright, 268 AD2d 79 [2000].) Upon establishing entitlement to summary judgment, the burden shifts to plaintiffs to present evidence establishing a triable issue of fact regarding whether a serious injury was sustained. (Id. at 84.) Such evidence may be the opinion of a medical expert who must submit "quantitative findings in addition to an opinion as to the significance of the injury." (Id.)

Defendant has established his prima facie entitlement to summary judgment as a matter of law. With respect to plaintiff J. Georges, defendant submits the affirmations of neurologist, Ravi Tikoo, M.D., orthopedist, Barry M. Katzman, M.D., radiologist, Richard Heiden, M.D. and this plaintiff's medical records maintained by Irage Yehudian, M.D. Dr. Tikoo examined J. Georges on December 13, 2006, performed objective tests which he identified, and found that there were no objective findings to support J. Georges' subjective complaints of pain. Dr. Tikoo concluded that J. George has sustained no permanent neurological injury as a result of the subject accident. Dr. Katzman examined this plaintiff on December 14, 2006, and found full range of motion in his cervical and lumbar spine, left shoulder and left knee, and concluded that the strains suffered in these areas have been resolved. After reviewing this plaintiff's magnetic resonance imaging (MRI) films from December 12, 2001, Dr. Heiden reported that there was dehydration at the C2-3 and C4-5 levels, and a herniation at the C4-5 level of the spine. Dr. Heiden, however, attributes these conditions to degeneration, and concluded that they were long-standing and pre-existed the subject accident. (Gordover v Balandina, 41 AD3d 537 [2007]; Shamsodeen v Kibong, 41 AD3d 577 [2007]; Yu v C & A Seneca Const., 40 AD3d 630 [2007].)

Further, there is no proof of the existence of a medically determined injury resulting from the accident that prevented plaintiff from performing substantially all of his daily activities for not less than 90 of the first 180 days following the occurrence. (Mohamed v Siffrain, 19 AD3d 561 [2005]; Teodoru v Conway Transp. Serv., 19 AD3d 479 [2005]; Bruce v New York City Tr. Auth., 16 AD3d 608 [2005].) Thus, plaintiff's deposition testimony that he was unable to work for four and a half months is self serving. (Gross v Singson, 2 AD3d 583 [2003]; Mu Ying Zhu v Zhi Rong Lin, 1 AD3d 416 [2003].)

Plaintiff J. Georges failed to raise a triable issue of fact. Plaintiff submitted the affirmation of Dr. Yehudian, who first

examined him on November 7, 2001, and most recently on April 27, 2007. Although Dr. Yehudian reported that, as of the April 27, 2007 examination, plaintiff exhibited limitation in range of motion in the lumbar and cervical spine, and that the condition is permanent in nature, Dr. Yehudian's findings failed to address Dr. Heiden's conclusion that this plaintiff's back condition is degenerative in nature, and that it pre-existed the subject accident. (See Khan v Finchler, 33 AD3d 966 [2006].)

With respect to the 90/180 day category of Insurance Law § 5102(d), plaintiff J. George also failed to raise a triable issue of fact. Plaintiff's own doctor, Dr. Yehudian, stated in his affirmation that he did not advise plaintiff to remain home from work for four and a half months. Rather, he advised plaintiff not to work for only six to eight weeks, thus failing to satisfy this category of serious injury. Further, his deposition testimony does not establish that he was prevented from performing substantially all of his daily activities for not less than 90 of the first 180 days following the occurrence. (DeFilippo v White, 101 AD2d 801 [1984].) Finally, in the absence of competent medical evidence, plaintiff's affidavit, in which he asserts claims of restricted activity, is self-serving. (Tobias v Chupenko, 41 AD3d 583 [2007]; Garcia v Solbes, 41 AD3d 426 [2007].)

Defendant has also met his burden of proof with respect to plaintiff R. Georges. Defendant submitted the affirmations of Dr. Tikoo, Dr. Katzman and Dr. Heiden. Dr. Tikoo reported that this plaintiff's neurological examination was normal, and that there were no indications of permanent neurological injury. By identifying the specific tests he performed and comparing his findings to the normal range, Dr. Katzman concluded that this plaintiff's cervical and lumbar strain was resolved. Dr. Katzman also found no indication of permanent injury. Dr. Heiden's MRI examination revealed dehydration at C2-3, C3-4 and C5-6, disc bulge at C5-6 and central C4-5 disc herniation. Dr. Heiden, however, reported that these conditions are degenerative, and that they pre-existed the subject accident.

Further, the record is bare of any indication that, as a result of the subject accident, R. Georges was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the occurrence. In fact, she alleged in her bill of particulars that she only missed three weeks from work. (Amato v Fast Repair, 42 AD3d 477 [2007].)

In opposition, R. Georges also failed to raise a triable issue of fact. Plaintiff submitted the affirmation of Dr. Yehudian. Dr. Yehudian reported that, as of his April 27, 2007 examination,

this plaintiff continues to exhibit significant limitation in range of motion in the spine, and that the condition is permanent in nature. Dr. Yehudian failed, however, to address Dr. Heiden's conclusion that plaintiff's back condition is degenerative in nature, and that it pre-existed the subject accident. (See Khan v Finchler, supra.)

Plaintiff submitted her own affidavit that after the accident, she was unable to tend to her three children, or to perform at work as she normally could. However, in the absence of competent medical evidence, plaintiff's claims of restricted activity are self-serving. (Parente v Kang, 37 AD3d 687 [2007]; Bruce v New York City Tr. Auth., 16 AD3d 608 [2005]; Gross v Singson, 2 AD3d 583 [2003]; Mu Ying Zhu v Zhi Rong Lin, 1 AD3d 416 [2003].)

The cross motion by Jeanjulien for summary judgment is untimely. The October 18, 2006 stipulation directed all parties to make their motions for summary judgment returnable no later than February 23, 2007, and the cross motion for summary judgment on the issue of liability was made returnable on March 7, 2007. (Miceli v State Farm Mut. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004].) Nevertheless, in light of this court's determination that plaintiffs did not sustain a serious injury under Insurance Law § 5102(d), it is unnecessary to address the cross motion for summary judgment on the issue of liability. (See Houston v Gajdos, 11 AD3d 514 [2004].)

Accordingly, the motion for summary judgment is granted, and plaintiffs' complaint is dismissed in its entirety. The cross motion is denied as moot.

Dated: September 28, 2007

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J.S.C.