

Fernandez v Niamou
2008 NY Slip Op 33667(U)
July 10, 2008
Supreme Court, Bronx County
Docket Number: 22724/05
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 15

Present: Honorable Mary Ann Brigantti-Hughes

MARGIE FERNANDEZ,

DECISION/ORDER

Plaintiff,

Index No.: 22724/05

-against-

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JUL 15 2008

OUMAROU NIAMOU, ODIENNE TRANSPORT
SERVICES INC., DORIS LANIER, and SHAREE
LANIER,

Defendants.

PAID

NO FEE

The following papers numbered 1 to 7 read on these Motions noticed on December 4, 2007 and January 10, 2008 and Nos. 31 & 32 on the Motion Calendar of February 14, 2008 of Part IA15

<u>Papers Submitted</u>	<u>Numbered</u>
Motion, Affirmation & Exhibits	1, 2, 3
Motion, Affirmation & Exhibits	4, 5, 6
Affirmation in Opposition & Exhibits	7, 8
Reply Affirmation & Exhibits	9, 10
Memorandum of Law	11

Upon the foregoing papers, the Decision and Order on this motion is as follows:

In this action, plaintiff seeks to recover money damages for personal injuries sustained during an automobile accident which occurred on December 4, 2004. Reportedly, the accident occurred when plaintiff, a passenger in an automobile owned by defendant Doris Lanier and operated by defendant Sharee Lanier, collided with an automobile owned by defendant Odienne Transport Services "Odienne" and operated by defendant Oumarou Niamou "Niamou". Defendants Odienne and Niamou as well as defendants Doris Lanier and Sharee Lanier now move for summary judgment dismissing the action pursuant to CPLR 3212, on the ground that plaintiff Fernandez did not sustain a "serious injury," as that term is defined by Insurance Law §§5102 & 5104.

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 N.Y.2d 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 N.Y.2d 320 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on the defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." *Lowe v. Bennet*, 122 A.D.2d 728 (1st Dept. 1986), aff'd 69 N.Y.2d 701(1986).

If defendants satisfy this standard, the burden shifts to plaintiff to rebut defendants' prima facie showing, by producing admissible evidence sufficient to require a trial of material fact as to whether he sustained a "serious injury" as defined in Insurance Law § 5102 (d). *Franchini v. Palmieri*, 1 NY 3d 536, 537 (2003) ; *Martin v. Schwartz*, 308 A.D. 2d 318, 319 (1st Dept. 2003).

A claim of serious injury can be sustained by a physician's expert designation of the numeric percentage of the loss of range of motion showing the extent or degree of the plaintiff's physical limitation; or by an expert's qualitative assessment, upon an objective basis, of a plaintiff's condition and compares the plaintiff's limitations to the normal function, purpose or use of the affected organ, member, function or system. *Toure v. Avis Rent A Car Systems*, 98 N.Y. 2d 345 (2002).

Defendants claim that no objective evidence supports a finding that plaintiff sustained a serious injury. Plaintiff claims that his medical evidence sufficiently raises factual issues regarding serious injury. Specifically, defendants moving papers aver to an admission by Plaintiff's attorney that for the period immediately after the accident (December 4, 2004) until the time of the loss of fetus, (the end of December 2004), plaintiff had never been examined by an obstetrician/ gynecologist "OB/GYN," that plaintiff's sonogram taken at Lincoln Medical and Mental Health Center emergency room at the date of the accident confirms a positive fetal heartbeat, that the unaffirmed reports of plaintiff's only treating physician Dr. Umana is a not a OB/GYN specialist but a Pediatrician.

Defendants further purport that out of the four medical reports submitted by Dr. Umana,(the first report dated April 6, 2005 approximately four months after the accident); it is the last and only submitted report dated July 25, 2006, seven months after the accident, that Dr. Umana mentions Plaintiff's 8 week gestation-pregnancy. Moreover, it is also the only medical report

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which Dr. Umana alleges for the first time having examined plaintiff on January 2, 2005, more than a year and a half after the accident without any written proof that said examination actually took place as said January 2nd examination is absent in Dr. Umana's reports.

Defendants further aver that on December 17, 2004 plaintiff was examined by a neurologist Dr. Opam who noted that plaintiff was 9 weeks pregnant. Consequently, defendants argue that plaintiff did not suffer a trauma induced spontaneous abortion.

Despite Plaintiff's evidentiary defects and discrepancies emphasized in Defendants' attorneys affirmations regarding plaintiff's loss of fetus claim as a serious injury under Insurance Law § 5102 (d) defendants failed to submit any expert testimony from a certified Obstetrics/Gynecologist or other competent evidence to reveal that the accident did not proximately cause plaintiff's miscarriage several weeks later. *Alladkani v. Daily News, L.P.*, 262 AD 2d 511 (1999) *Leon v. Manhattan Beer Distributors* 2006 NY Slip Op 50545 (App. T. 1st Dept.) Furthermore, an attorneys affirmation is not admissible probative evidence in medical issues and therefore defendants medical proof is held insufficient. To be sure, even if Plaintiff at trial cannot make out a prima facie case and prove causation by establishing that Plaintiff's fetus was healthy and viable and establish that the loss of the fetus was the result of the accident, for the purposes of this summary judgment, the burden rests on Defendants to establish that it did not cause said injury. Accordingly, defendants failed to make out a prima facie case of loss of fetus claim for judgment as a matter of law.

With respect to that portion of the motion dealing with the remaining threshold categories, Defendants present the affirmations of Dr. David L. Milbauer, a radiologist, Dr. Marianna Goldman, a neurologist and Dr. Gregory Montalbano, an orthopedist. Dr. David L. Milbauer, attests that after reviewing the MRI's, they show no disc herniation. Dr. Marianna Goldman confirms Dr. Gregory Montalbano findings that revealed no evidence of disc herniations on the canal area or any abnormalities within the paravertebral soft tissues, nor are there any findings of a neurological disability Romberg's, Patrick's and Kernig's test are negative, bilateral straight raising test is normal and that Plaintiff's range of motion of cervical and lumbosacral spine was normal, respectively and the following neurological objective tests, i.e., cranial nerves, motor, sensory, cerebellar examinations were negative. Dr. Montalbano notes

4] that plaintiff sought surgical treatment of her right knee on May 19, 2005 at the Hospital for Special Surgery and upon examination and range of motion tests plaintiff's extension and flexion were within normal limits. The following orthopedic objective tests, i.e., McMurray, and Lachman were negative. Dr. Montalbano found no evidence of acute traumatic injury to the cervical or lumbar spine despite the diffuse posterior bulging discs, which he concludes are degenerative physiologic findings and opined that plaintiff's flexion and extension are within normal limits, that cervical and lumbar lordosis and straight leg raising test are normal. Dr. Montalbano further found plaintiff's right shoulder flexion, abduction within normal limits, rotator's strength testing is 5/5 and drop arm test, apprehension and relocation tests are negative and absent a right shoulder MRI examination, no objective evidence of permanency or disability of right shoulder exists. Dr. Montalbano opined that Plaintiff did not suffer from any disability or permanency on right knee or cervical and lumbar spine and that said conditions are not casually related to the accident. *Caddy v. Eyler*, 79 N.Y.2d 955 (1992) (an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shifts to the plaintiff the burden of establishing the existence of a triable issue of fact.)

Moreover, defendants highlight plaintiff's deposition testimony where she indicates she was confined to her bed for approximately one week following the accident and was not confined to her home after the accident nor was there any testimony that her home/bed confinement *was* medically directed nor did she demonstrate that after the subject accident she was unable or had difficulty performing her usual and customary activities for the required 90 days. Plaintiff also presents no medical evidence of her disability from working as is required to raise a factual issue of impairment that prevented her functioning for 90 of the 180 days following the collision. *Thomas v. Abbasi*, 15 AD3d 95 (1st Dept. 2005); *Bent v. Jackson*, 15 AD3d 46 (1st Dept. 2005); *Brown v. Achy*, 9 AD3d 30 (1st Dept. 2004)

In opposition, Plaintiff submits an affirmed medical report dated July 25th 2006 from Dr. Okon Umana, a pediatrician, who for the first time refers to an examination of plaintiff which purportedly took place on January 12, 2005, an unaffirmed medical report of from Dr. Robert Scott, radiologist regarding plaintiff's cervical, lumbosacral spine and right knee. Plaintiff

further presents an affidavit from A chiropractor, Dr. Walter Ostrowski medical affidavit dated August 18,2006 and June 16,2007 who attests that he examined plaintiff and found restrictions in her cervical spine and in the right and left rotation as well as limitations in extension and flexion. Dr. Ostrowski tested plaintiff using a range of motion test using a goniometer and inclinometer found restrictions on all levels. Dr. Ostrowski concludes that plaintiff's injuries are permanent and attributes them to the December 4, 2004 collision. The report of August 18, 2006 is dated well after the initial examination of December 12, 2004 and reveals a gap in treatment from June 27, 2005 to August 18, 2006. Then, for the purposes of this summary judgment motion, the Plaintiff had another examination June 6, 2007. Interesting to note, Dr. Ostrowski's reports indicated that Plaintiff will require "lifetime conservative care." However, Plaintiff failed to provide an adequate explanation for the cessation of treatment and proof that the cessation of treatment was medically approved or advised. The First Department has held that an unexplained gap in treatment renders the medical proof by the plaintiff insufficient. *Melendez v. Feinberg*, 306 A.D.2d 98 (1st Dept. 2003). Therefore, Dr. Ostrowski medical proof is insufficient.

Plaintiff further submits an affirmed medical report by Dr. Osafradu Opam, a neurologist, who saw plaintiff only once, December 17, 2004, two weeks after the accident, noted that the Straight leg raising was positive, limited range of motion positive on the right at 40 degrees and on the left at 50 degrees. Cervical spine was restricted during anterior flexion by 10 degrees and posterior extension by 10 degrees. Right lateral rotation by 15 degrees. Left Lateral rotation by 10 degrees. Lumbar spine was restricted during anterior flexion by 30 degrees and posterior extension by 15 degrees. Lumbar spine with lateral rotation restricted by 10 degrees. Lumbar spine left lateral rotation by 10 degrees. Right shoulder restricted during abduction by 30 degrees, external by 20 degrees. Recommendation was for plaintiff to followup in four weeks.

Plaintiff can not rely upon her radiologist Dr. Robert Scott, unaffirmed report nor the unaffirmed operative record from the Hospital for Special Surgery of plaintiff's right knee arthroscopy as it was not affirmed is without probative value in opposing defendants motion *Grasso v. Angerami*, 79 NYS 2d 813, 814, therefore insufficient to raise a triable issue of fact. *Cohen v. A. One Products, Inc.*, 34 AD3d 517 (2nd Dept 2006). Accordingly, it is hereby

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Ordered, that Defendants' motions for summary judgment and dismissing Plaintiff's complaint are hereby **granted** only to the extent that all of Plaintiff's threshold claims, except for the loss of fetus claim are hereby dismissed.

This constitutes the Decision and Order of this Court

Dated: July 10, 2008



Hon. Mary Ann Brigantti-Hughes, J.S.C.