Kariyeva v Morel
2009 NY Slip Op 30367(U)
February 2, 2009
Supreme Court, Queens County
Docket Number: 5063/07
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

MARGARITA KARIYEVA, Plaintiff,	Index No. 5063/07
-against-	Motion Date December 23, 2008
ARCENIO MOREL and IRINA SHALOMOVA, Defendants.	Motion Cal. No. 8
	Motion Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants Arcenio Morel and Irina Shalamova for summary judgment dismissing the complaint of plaintiff, Margarita Kariyeva, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) and the cross motion by defendant Irina Shalamova for summary judgment dismissing the complaint of plaintiff and any and all cross-claims by co-defendants on the grounds of liability pursuant to CPLR 3212 are hereby decided as follows:

This action arises out of an automobile accident that occurred on August 4, 2006. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendants submitted *inter alia*, affirmed reports from three independent examining physicians (a neurologist, an orthopedist, and a radiologist), and plaintiff’s verified bill of particulars.

In opposition to the motion, plaintiff submitted: an affirmation and sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Randolph Rosarion, M.D., an affirmation of plaintiff's radiologist, Allen Rothpearl, M.D., sworn MRI reports of plaintiff's right shoulder and lumbar spine, an attorney's affirmation, and plaintiff's own examination before trial transcript testimony.

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. *Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.*

The affirmed report of defendants’ independent examining neurologist, Guoping Zhou, M.D., indicates that an examination conducted on January 15, 2008 revealed a normal neurological

examination of the cervical, lumbar, and thoracic spine. He opines that there is no neurologic disability and no permanecy. Dr. Zhou concludes that claimant can perform her normal activities of dailiy living, including employment, without restrictions.

The affirmed report of defendants' independent examining orthopedist, Michael P. Rafiy, M.D., indicates that an examination conducted on January 15, 2008 revealed a diagnosis of: "status post sprain/strain injuries to the neck. Mid back, low back, right shoulder and right wrist which have now resolved." He opines that there is no orthopedic disability or permanency. Dr. Rafiy concludes that claimant can perform her daily activities without restrictions.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D. indicates that an MRI of the lumbar spine taken on September 18, 2006 reveals an impression of "Transitional S1 Vertebra". She opines that the plaintiff was born with this condition. Dr. Eisenstadt concludes that there "is no evidence of any abnormality of the osseous, ligamentous, or intervertebral disc structures traumatic in origin or causally related to the injury".

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D. indicates that an MRI of the cervical spine taken on September 8, 2006 revealed an impression of "Cervical straightening. Bulging C5-6 Intervertebral Disc." She opines that bulging is not a traumatic process, and is degenerative in origin. She further opines that there is no osseous, ligamentous, or intervertebral disc abnormalities caused by the accident. Dr. Eisenstadt concludes that no post-traumatic changes are seen.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D. indicates that an MRI of the right shoulder taken on September 18, 2006 revealed a normal MRI of the right shoulder. She opines that there "are no changes seen to the osseous, tendinous, muscular, or labral structures." Dr. Eisenstadt concludes that no post-traumatic changes are seen.

Additionally, defendants established a *prima facie* case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates: plaintiff's verified bill of particulars which indicates: that she was not confined to the hospital, that she was only confined to home for one (1) day, that she was only confined to bed for one (1) day, and that she was incapacitated for her employment and other duties approximately one (1) day per

week. The plaintiff's examination before trial transcript testimony indicates that plaintiff returned to work the day after her accident.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury." 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. Eyler*, 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 a triable issue of fact

In opposition to the motion, plaintiff submitted: an affirmation and sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Randolph Rosarion, M.D., an affirmation of plaintiff's radiologist, Allen Rothpearl, M.D., sworn MRI reports of plaintiff's right shoulder and lumbar spine, an attorney's affirmation, and plaintiff's own examination before trial transcript testimony.

Plaintiff's medical evidence failed to raise issues of fact. Plaintiff failed to submit a medical affirmation detailing a recent examination of plaintiff, a necessary requirement to rebutting defendants' *prima facie* case (*see*, *Sauer v. Marks*, 278 AD2d 301 [2d Dept 2000]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The most recent medical evidence provided only dates back to the early part of 2007 and the instant motion was made on May 29, 2008.

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 him 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 her customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment (*see*, *Gaddy v. Eyler*, 79 NY2d 955; *Licari v, Elliott*, 57 NY2d 230 (1982); *Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied* 96

NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. 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]).

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 (*Sloan v. Schoen*, 251 AD2d 319 (2d Dept 1998).

Moreover, plaintiff's deposition statements is "entitled to little weight" and are insufficient to raise triable issues of fact (*see, Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

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 for summary judgment on threshold grounds is granted in its entirety and the plaintiff's complaint is dismissed as to all categories. Defendant Irina Shalamova's cross motion for summary judgment dismissing the complaint of plaintiff and any and all cross-claims by co-defendants on the grounds of liability pursuant to CPLR 3212 is hereby rendered moot.

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: February 2, 2009

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Howard G. Lane, J.S.C.