

Liriano v Espinoza

2009 NY Slip Op 30724(U)

March 31, 2009

Supreme Court, New York County

Docket Number: 106125/06

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

DIORAMA LIRIANO and JANNELLY REYES,
Plaintiffs,

- v -

WILSON J. ESPINOZA,
Defendant.

INDEX NO. 106125/06

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. 70

The following papers, numbered 1 to 5, were read on motion by defendant for summary judgment on the threshold "serious injury" issue and on motion by plaintiffs on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

1 _____

3 _____

4, 5 _____

Cross-Motion: Yes No

On May 18, 2003, plaintiffs were in a motor vehicle accident with defendant while on Roosevelt Avenue in Queens County, New York. On or about May 4, 2006 plaintiffs commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The defendant filed an answer timely and issue was joined. The parties completed discovery and a note of issue was filed. Defendant now moves for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint on the basis that plaintiffs cannot prove that they suffered a serious injury, pursuant to Insurance Law § 5102 (d). Plaintiffs cross-move for summary judgment on liability.

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, et seq. - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez*

v New York City Tr. Auth., 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

Insurance Law § 5102 (d) defines "serious injury" as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubenscastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyley*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law §5102(d) (see *Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, a CT scan or

MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, *supra* quoting *Dufel v Green*, *supra*).

SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; *see also Gaddy v Eyler*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of

proof (*see Gaddy v Eyer, supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (*see Grasso v Angerami, 79 NY2d 813 [1991]; Offman v Singh, 813 NY2d 56 [1 Dept 2006]*). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once a defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez, 797 NYS2d 380 [2005]; Gaddy v Eyer, supra; Perez v Rodriguez, supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co., 668 NYS2d 167 [1 Dept 1998]*). However, "where a defendant fails to meet his initial burden of establishing a *prima facie* case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (*see Offman v Singh, supra; Winegrad v New York Univ. Med Ctr., supra*).

DISCUSSION

In support of the motion for summary judgment, defendant proffers the pleadings, plaintiffs' deposition testimonies and the affirmed reports of Dr. Robert Israel, a board certified orthopedic surgeon and Dr. Robert S. April, a board certified neurologist. This evidence establishes that defendant has come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that neither plaintiff has sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*see, Gaddy v Eyer, 79 NY2d 955, 956-957 [1992]; Lowe v Bennett, 511 NYS2d 603 [1 Dept 1986], Affd, 69 NY2d 700 [1 Dept 1986]; Pagano v Kingsbury, 587 NYS2d 692 [2 Dept 1992]*). Thus, the burden shifts to plaintiffs to produce evidentiary proof in admissible form to warrant the showing of the existence of a serious injury

creating a triable issue of fact. (see *Zuckerman v City of New York, supra*; *Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiffs submit the affirmation and reports of Dr. Stanley Liebowitz, a board certified orthopedic surgeon, the un-notarized affidavits and reports of Dr. Barry Pinchefskey, a chiropractor and Vincent Vasil, a physical therapist and various unaffirmed or uncertified medical records. As mentioned above, unaffirmed or unsworn reports are inadmissible on a motion for summary judgment and will not be considered (see *Grasso v Angerami, supra*; *Offman v Singh, supra*; CPLR § 2106). Nevertheless, even if the Court considered these reports, Dr. Pinchefskey's report is still devoid of any details as to what objective tests were utilized, if any, to determine the alleged limitations and diagnosis (*Bent v Jackson, supra*; *Toure v Avis Rent a Car System, supra*; *Vasquez v Reluzco, supra*) and Vincent Vasil's reports are unclear as to when he examined the plaintiffs. His report dated March 3, 2008, lists undated range of motion testing and various other dates in 2003 pertaining to "J-Tech Tracking Testing".

Dr. Liebowitz's reports are also unclear as to what tests were utilized and when. His report appears to indicate that he examined the plaintiffs a few times in 2003, the first of which was on May 22, 3003 and lastly on March 3, 2008. The only objective testing contained in his reports appears to come from the March 3, 2008 examinations. However, these portions of his examinations, performed almost five years after the subject accident, does not constitute objective medical evidence performed contemporaneously with the occurrence of the accident to substantiate plaintiffs' claims (*Pommells v Perez, supra*).

Furthermore, the court also notes that four and a half years elapsed since plaintiffs were treated. Although this gap is not dispositive, it further undermines the plaintiffs' claims of serious injury under Insurance Law § 5102(d) (*Pommells v Perez, supra*). Accordingly, the

evidence submitted by plaintiffs is insufficient to establish the existence of a "serious injury" as defined by Insurance Law § 5102(d).

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed; and it is further,

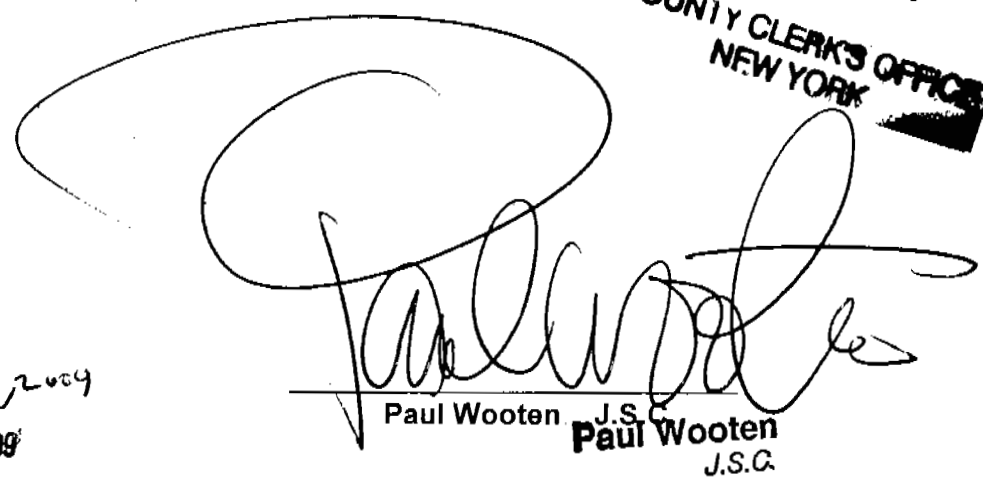
ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk, and it is further,

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied as moot, and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK



Paul Wooten J.S.C.
Paul Wooten J.S.C.

Dated: March 31, 2009
MAR 31 2009

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST