Benjamin v Nunez
2009 NY Slip Op 30729(U)
March 23, 2009
Supreme Court, New York County
Docket Number: 115982/06
Judge: Paul Wooten
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SCANNED ON 4/2/2009

[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

INDEX NO. 115982/06

SYLVIA BENJAMIN,

Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 001

FRANCISCO A. NUNEZ, J.F. MARIA DELROSARIO, JULIO FRANCISCO, and JUAN D. PICHARDO

Defendants.

MOTION CAL. NO. 5

The following papers, numbered 1 to 3, were read on this motion by defendant s Julio Francisco and Juan Pichardo and cross-motion by defendants Francisco A. Nunez and J.F. Maria Delrosario for summary judgment on the threshold "serious injury" [illegible]

	PAPERS NUMBERED
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

Cross-Motion: ■ Yes ☐ No

On February 18, 2006, plaintiff was a passenger in a vehicle owned by defendant Francisco Nunez and operated by J.F. Maria Delrosario which was struck by a vehicle owned by defendant Julio Francisco and operated by Juan D. Pichardo. The accident occurred on West168th Street near its intersection with Broadway in New York County, New York. On or about October 25, 2006, plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The defendant timely filed an answer and issue was joined. The parties completed discovery and a Note of Issue was filed. Defendants Julio Francisco and Juan Pichardo now move for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint on the basis that plaintiff cannot prove that she suffered a serious injury, pursuant to Insurance Law § 5102 (d). Defendants Francisco A. Nunez and J.F. Maria Delrosario cross-move seeking the same relief. In support of their cross motion, defendants Francisco A. Nunez and J.F. Maria Delrosario, rely upon the arguments and evidence submitted by defendants Julio Francisco and

Juan Pichardo.

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 on-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 that 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]; *Rubensccastro 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 Eyler*, 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*).

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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]).

A 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 Eyler*, *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*, *supra*; *Gaddy v Eyler*, *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, defendants proffer, *inter alia*, a copy of the pleadings and the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, Dr. Michael

Rafiy, an orthopedist and Dr. Norman Sobol, a neurologist.

Dr. Einstatd determined that plaintiff's injuries could not have been caused by the subject accident. Dr. Einstadt reviewed MRI films of plaintiff's, cervical spine, right shoulder and right knee. The MRI of plaintiff's cervical spine was taken on March 16, 2006, one month after the subject accident. Dr. Einstadt concluded that such MRI revealed evidence of degenerative disc disease "which could not have occurred in less than six months time". Dr, Einstadt also observed bulging at the C5-6 level. However, Dr. Einstatd explained that "bulging is not traumatic in origin . . .[i]t is degeneratively induced . . .". Dr. Einstadt concluded that the MRI of plaintiff's right shoulder and right knee, both dated April 5, 2006, also revealed evidence of pre-existing degenerative disease "which could not have occurred in less than six months time." In addition, Dr. Rafiy and Dr. Sobol examined plaintiff, without referring to plaintiff's medical records, on August 23, 2007. Dr. Rafly, concluded supported by objective tests, that plaintiff was not disabled as a result of the subject accident. Dr. Sobol concluded supported by objective tests, that the plaintiffs cervical sprain was resolved.

Based on the foregoing, defendant has submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment and a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*see, Gaddy v Eyler, supra; Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a serious injury *(see Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]; *Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v Eyler, supra; Shinn v Catanzaro*, 767 NYS2d 88 [1 Dept 2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest v Jewish Guild for the Blind*, 765 NYS2d 326 [1 Dept 2003]).

In opposition, plaintiff submits, *inter alia*, various unaffirmed or uncertified medical

records from Dr. Peter Kagonowitz and Pain Medicine & Rehabilitation Associates, Dr. Mark Shapiro, a board certified radiologist and Dr. Vidya Malhorta, a board certified radiologist. Plaintiff's unaffirmed medical records are inadmissible and will not be considered on this motion (see *Grasso v Angerami*, *supra*; *Offman v Singh*, *supra*; see CPLR § 2106).

Plaintiff also submits, her own affidavit and the affirmation of Dr. Mark S. McMahon. Dr. McMahon examined plaintiff for the first time on February 10, 2008, two years after the subject accident. Thus, Dr. McMahon's affirmation fails to establish a causal connection between her condition on the date of the subject accident and at the time of his examination (*see Toure v Avis Rent A Car Sys., supra*, *Pommels v Perez, supra, Vaughan v Baez* 758 N.Y.S.2d 648 [1 Dept 2003]; *Atkinson v Oliver*, 830 NYS2d 30 [1 Dept 2007]). Accordingly, plaintiff's evidence fails to establish a material issue of fact on the issue of "serious injury", pursuant to Insurance Law § 5102(d).

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

ORDERED that defendants Julio Francisco and Juan Pichardo's motion and defendants Francisco A. Nunez and J.F. Maria Delrosario's cross-motion for summary judgment on the issue of serious injury is granted and the complaint is hereby dismissed ; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry upon plaintiff.

This constitutes the Decision and Order of the Court.

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COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 23, 2009

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

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**