

Houanche v Diaz

2010 NY Slip Op 30917(U)

April 9, 2010

Supreme Court, Nassau County

Docket Number: 14903/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MIROSE HOUANCHE,

Plaintiff,

- against -

LAZARO S. DIAZ and VICTOR NOGUEIRA ,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14903/08
Motion Seq. No.: 02
Motion Date: 12/17/09

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion for Summary Judgment, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Defendants, Lazaro S. Diaz and Victor Nogueira, move, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment to defendants on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendants' motion.

The action arises from a motor vehicle accident involving a collision between a motor vehicle owned and operated by plaintiff, Mirose Houanche, and a motor vehicle owned by defendant Victor Nogueira and operated by defendant Lazaro S. Diaz. The accident occurred at approximately 6:30 a.m. on August 11, 2008, on Hillside Avenue near 201st Street, County of Queens, State of New York. On or about August 11, 2008, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined on October 3, 2008.

It is well settled that the proponent of a motion for summary judgment must make a

prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). See *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes

incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." See *Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendants' examining physicians or the unsworn reports of the plaintiff's examining physicians. See *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. See *Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. See *Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. See *Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that as a consequence of the above described automobile accident with defendants, she has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law and which fall within the following statutory categories of injuries:

- 1) a permanent consequential limitation of use of a body organ or member; (Category 7)
- 2) a significant limitation of use of a body function or system; (Category 8)
- 3) 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.(Category 9).

As previously stated, to meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eycler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra*. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. *See id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, this Court will now turn to the merits of the defendants' motion. In support of their motion, the defendants submit the pleadings, the plaintiff's Verified Bill of Particulars, the affirmed report of John C. Killian, M.D., who performed an independent orthopedic medical examination of plaintiff on July 15, 2009, the transcript of plaintiff's examination before trial testimony, and plaintiff's medical reports, including MRI reports, from her prior 1997 car accident.

Dr. John C. Killian, a board certified orthopedic surgeon, reviewed plaintiff's medical records and conducted a physical examination of plaintiff on July 15, 2009. *See* Plaintiff's Affirmation in Support Exhibit C. Said examination included an evaluation of the plaintiff's thoracolumbar spine, as well as a neurological examination. With respect to the thoracolumbar spine, Dr. Killian states, "[t]he range of motion of her thoracolumbar spine was tested (by visual observation) and it was found that she bent forward fully to reach within 4" to 6" of the floor (normal 4" to 6") with a normal reversal of the lumbar lordosis and a complaint of pain. Extension was full at 40 degrees (normal 40 degrees), right and left rotation were full at 30 degrees (normal 30 degrees) and right and left lateral flexion were full at 35 degrees (normal 35 degrees). She complained of pain at the extremes of extension and lateral flexion but there was not muscle spasm or restriction." Based on his clinical findings and medical records review, Dr. Killian concluded "that Ms. Houanche was treated for complaints of pain in the thoracic and lumbar regions after the 8/13/07 accident. X-rays of her lumbar spine done on the day of the accident were normal. She had MRIs of her thoracic spine and lumbar spine which reportedly showed curvature changes which can suggest muscle spasm and disc bulges which are commonly seen incidental findings of no clinical significance. EMGs and nerve conduction studies of the lower extremities were normal. Her current complaints are limited to the low back, indicating that any thoracic problems have resolved. The physical examination of the thoracolumbar spine was remarkable for subjective complaints of tenderness and subjective complaints of pain with the motions which were unaccompanied by objective findings including restricted motion or muscle spasm. The neurological examination was normal....Based upon this examination I would conclude that Ms. Houanche has fully recovered from the problems with her back for which she was treated after this accident. She has no residual impairment of her back from injuries from this accident and she has no causally related disability."

However, the Court notes that Dr. Killian fails to set forth the specific tests administered

on plaintiff to arrive at his findings with respect to his examination of the thoracolumbar spine. In fact, Dr. Killian merely bases his thoracolumbar spine conclusions on "visual observation" not any objective tests which he administered, nor were measurements of range of motion taken with a goniometer. Where the defendant's experts fail to set forth objective tests administered which resulted in normal ranges of motion, the court will find that the defendant has failed to meet her *prima facie* burden. See *Perez v. Fugon*, 52 A.D.3d 668, 861 N.Y.S.2d 86 (2d Dept. 2008); *Giammalva v. Winters*, 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009); *Stern v. Oceanside School District*, 55 A.D.3d 596, 865 N.Y.S.2d 325 (2d Dept. 2008); *Giammanco v. Valerio*, 47 A.D.3d 674 (2d Dept. 2007). In fact, defendants' own moving papers state "[w]here the plaintiff seeks to reply upon quantified restricted ranges of motion, the plaintiff must demonstrate objective testing with comparison to normal ranges of motion. *Piperis v. Wan*, 49 A.D.3d 840, 854 N.Y.S.2d 489 (2d Dept. 2008); *Morris v. Edmond*, 48 A.D.3d 432, 850 N.Y.S.2d 641 (2d Dept. 2008). As stated, the same burden applies to the defendants in their moving papers, a burden that was not met by Dr. Killian's "visual observations."

Where, as here, defendants fail to demonstrate that they have met their *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. See *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008). Therefore, the Court hereby holds that defendants' motion for summary judgment is denied.

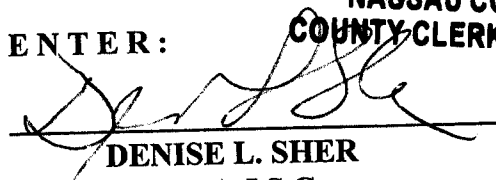
This constitutes the decision and order of this Court.

ENTERED

APR 13 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

ENTER:



**DENISE L. SHER
A.J.S.C.**

Dated: Mineola, New York
April 9, 2010