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

PRESENT: GEORGE J. SILVER PART 22

*Justice*

Index Number : 106567/2008
CHOCOJ, BYRON
VS
BERHE, YACOB
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____



this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

**Cross-Motion:** ☐ Yes ☑ No

**Upon the foregoing papers, it is ordered that this motion**

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendant Yacob Berhe ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiffs Byron Chocoj and Mayra Rivera (collectively "Plaintiffs") on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff Chocoj alleges in his Verified Bill of Particulars and Supplemental Bill of Particulars that, as a result of the accident, he sustained a serious injury by incurring left shoulder tendinosis with impingement, shoulder surgery, lumbar sprain/strain and cervical sprain/strain. Plaintiff Rivera alleges in her Verified Bill of Particulars and Supplemental Bill of Particulars that she sustained posterior bulging at L5-S1, thoracic sprain/strain, cervical sprain/strain and right knee sprain/strain.

Under New York Insurance Law §5102(d), a "serious injury" is defined 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____

_____
*J.S.C.*

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendants' Expert Reports

Plaintiff Chocoj

In support of this motion, Defendant submits the affirmed expert reports of Dr. Audrey Eisenstadt and Dr. Gregory Montalbano. Dr. Eisenstadt reviewed Plaintiff Chocoj's left shoulder MRI. He concluded that there was no evidence of post-traumatic changes and that the film was normal. Dr. Montalbano conducted an orthopedic examination of Plaintiff Chocoj's left shoulder and found normal range of motion with normal rotator cuff strength and negative drop arm test, apprehension test, relocation test and impingement signs. Dr. Montalbano concluded that Plaintiff's shoulder pain and subsequent surgery were related to his occupation involving heavy manual labor. Regarding Plaintiff's lumbar spine injuries, Dr. Montalbano found normal range of motion and negative straight leg raising bilaterally. He concluded that Plaintiff had suffered from a lumbar sprain/strain that had fully resolved. Cervical spine examination revealed normal range of motion and normal motor testing. Further, Dr. Montalbano stated that X-rays of the cervical spine did not show any traumatic changes.

Plaintiff Rivera

Defendant submits the affirmed expert reports of Dr. A. Robert Tantleff, Dr. Charles Bagley and Dr. Robert Israel. Dr. Tantleff reviewed Plaintiff Rivera's lumbar spine MRI. He concluded that there was no evidence of any acute or recent injury and that the film was normal. Dr. Bagley performed a neurological examination on Plaintiff Rivera on March 25, 2009. He found normal range of motion during testing done with a goniometer in accordance with AMA guidelines. Strength testing, motor examination, straight left raising, Babinski signs and sensory examination all yielded normal results. Dr. Israel conducted an orthopedic examination of Plaintiff Rivera on March 20, 2009. His examination of the right knee revealed normal muscle strength and range of motion. Further, McMurray, Lachman, anterior drawer and posterior

drawer tests were all negative. Dr. Israel's examination of Plaintiff's lumbar spine yielded negative Sitting Lasegue's test and negative straight leg raising in both supine and sitting positions. Range of motion testing was also within normal limits.

Defendant's expert reports satisfy his burden of establishing *prima facie* that Plaintiffs did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiffs must now bear the burden of overcoming Defendant's submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiffs' Expert Reports

In opposition to Defendant's motion, Plaintiffs submit their own affidavits and depositions, uncertified medical records and affirmations from Dr. Michael A. Meese, Dr. Chee G. Kim and Dr. Stephen Conte. Though Plaintiffs submit their own testimony, their self-serving statements are entitled to little weight and are insufficient to raise triable issues of fact (*see Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]). Further, the medical records cannot properly satisfy Plaintiff's burden of proof because they are not sworn to or affirmed under penalties of perjury thus, are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Thus, these records are not sufficient to defeat a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]; *Charlton v Almaraz*, 278 A.D.2d 145 [1st Dept 2000]).

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]).

Plaintiff Byron Chocoj

Dr. Meese first treated Plaintiff Chocoj on October 17, 2007. At that time he conducted range of motion testing for the cervical spine with a goniometer and compared Plaintiff's motion to normal. Plaintiff subsequently underwent arthroscopic surgery of the left shoulder on May 1, 2008. Dr. Meese examined Plaintiff again on December 30, 2009 because of ongoing shoulder pain and discomfort and referred him to a neurologist. Dr. Meese's affirmation provides sufficient evidence to qualify as a serious injury under New York Insurance Law §5102(d).

Dr. Conte reviewed the MRI of Plaintiff Chocoj's left shoulder on January 8, 2010. He stated that Plaintiff sustained supraspinatus tendinopathy/tendonitis, glenohumeral joint effusion along with an impingment of the rotator cuff with fluid in the acromioclavicular joint. However, no where in his affirmation does Dr. Conte link these findings to the accident. In fact, Dr. Conte offers no opinion on causation whatsoever, making his affirmation insufficient to defeat defendants' prima facie showing (*see Valentin*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff Mayra Rivera

Dr. Meese first treated Plaintiff Rivera on October 19, 2007. At that time he conducted range of motion testing for the cervical spine with a goniometer and compared Plaintiff's motion to normal. Dr. Meese determined that Plaintiff did suffer from limitations in motion. His initial assessment was right cervical and lumbar radiculopathy. Dr. Meese's affirmation provides sufficient evidence to qualify as a serious injury under New York Insurance Law §5102(d).

Dr. Conte reviewed Plaintiff Rivera's lumbar spine MRI on March 13, 2008. He concluded that she had posterior bulging at L5-S1. However, he fails to causally associate this injury with the present accident, making his affirmation insufficient to defeat defendants' prima facie showing (*see Valentin*, 59 AD3d 184 [1st Dept 2009]).

Dr. Kim first treated Plaintiff Rivera on August 12, 2008. Her examination revealed tenderness on the bilateral lower lumbar paraspinals, bilateral gluteus medius and the right knee. Lumbar spine range of motion measurements were taken at that time on a goniometer. Dr. Kim found limitations in motion and diagnosed lumbar radiculopathy and recommended physical therapy. On October 8, 2008, Plaintiff received an interlaminar epidural injection due to persistent pain. On July 13, 2009, Dr. Kim concluded that Plaintiff had reached a therapeutic plateau and advised her to do home exercises and discontinue therapy. Most recently, on November 30, 2009, Dr. Kim examined Plaintiff and noted that she continues to complain of pain and discomfort. Dr. Kim's affirmation provides sufficient evidence to qualify as a serious injury under New York Insurance Law §5102(d).

Gap in Treatment

Defendant also argues that a gap in treatment interrupts the chain of causation between the accident and Plaintiff's claimed injuries. In opposition, Plaintiff Chocoj contends that he was forced to discontinue therapeutic treatment because his No-Fault benefits were terminated. Plaintiff Rivera avers that she was treated consistently until July 13, 2009, when Dr. Kim recommended that she perform home exercises because she had reached a therapeutic plateau. While a cessation of treatment is not dispositive, a Plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiffs have offered reasonable explanations and as such, Defendant's gap in treatment argument fails (*see Wadford v Gruz*, 35 AD3d 258 [1st Dept 2009]).

Permanent Loss Category

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiffs have not demonstrated that they sustained a permanent and total loss of use of any of their necks, backs, shoulders or knees.

90/180 Category

In order to establish prima facie entitlement to summary judgment under the 90/180 day category of the statute, Defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). Defendant argues that Plaintiff Chocoj testified that he was confined to his home and unable to work for two weeks following the accident and that Plaintiff Rivera testified that she did not miss any time from work following the accident. Though Defendant has met his burden under the 90/180 category, Plaintiffs' affidavits do not raise a question of fact with respect to plaintiff's claim under the 90/180 day category of Insurance Law § 5102 [d] (*see Grossman v Wright*, 268 AD2d at 84).

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted as to Plaintiffs' claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendant's motion for summary judgment is denied as to Plaintiffs' claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendant's motion for summary judgment is granted as to Plaintiffs' claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

George J. Silver, J.S.C.

FILED
GEORGE J. SILVER
MAY 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 17, 2010
New York County

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