Bernier v Torres
2010 NY Slip Op 32207(U)
January 8, 2010
Supreme Court, Queens County
Docket Number: 20671/08
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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MARIE Y. BERNIER,

Plaintiff,

-against-

OSCAR M. TORRES,

Defendant.

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Index No: 20671/08
Motion Date: 11/12/09
Motion Cal. No: 5
Motion Seq. No: 1

The following papers numbered 1 to 13 read on this motion by plaintiff Marie Y. Bernier for an order, pursuant to CPLR § 3212, granting plaintiff summary judgment on liability; and on this cross motion by defendant Oscar M. Torres, for an order, pursuant to CPLR § 3212, granting defendant summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, as defined by NY Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross Motion-Affidavits-Exhibits.....	5 - 8
Affirmation in Opposition to Cross Motion-Exhibits.....	9 - 11
Reply Affirmation.....	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

This is a personal injury action in which plaintiff Marie Y. Bernier ("plaintiff") seeks to recover damages for injuries sustained by her as a result of a motor vehicle accident that occurred on November 4, 2007, when her vehicle was hit in the rear by the vehicle owned and operated by defendant Oscar M. Torres ("defendant"), on the Southern State Parkway at its intersection with Exit 20S in Nassau County, New York. Plaintiff now moves for partial summary judgment on liability, contending that the accident occurred solely because of defendant's negligence. Defendant cross moves for dismissal on the ground that plaintiff did not sustain a serious injury pursuant to the Insurance Law.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

"A rear-end collision with a stopped vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on 'that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision' (citations omitted)." Lampkin v. Chan, 68 A.D.3d 727 (2nd Dept. 2009); see, Oguzturk v. General Elec. Co., 65 A.D.3d 1110 (2nd Dept. 2009); Ramirez v. Konstanzer, 61 A.D.3d 837 (2nd Dept. 2009); Emil Norsic & Son, Inc. v. L.P. Transp., Inc., 30 A.D.3d 368 (2nd Dept. 2006); Johnston v. Spoto, 47 A.D.3d 888 (2nd Dept. 2008); Milskiy v Solanky, 8 A.D.3d 353 (2nd Dept.2004); Barile v. Lazzarini, 222 A.D.2d 635 (2nd Dept. 1995); see also McGregor v Manzo, 295 A.D.2d 487 (2nd Dept. 2002); Gambino v City of New York, 205 A.D.2d 583 (2nd Dept.1994); Power v. Hupart, 260 A.D.2d 458 (2nd Dept. 1999); Caputo v. Schaumeyer, 252 A.D.2d 512 (2nd Dept. 1998); Danza v. Longieliere, 256 A.D.2d 434 (2nd Dept. 1998). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause. Leal v. Wolff, 224 A.D.2d 392 (2nd Dept. 1996). This is because he or she is in the best position to explain whether the collision was due to a reasonable, non-negligent cause. Carter v. Castle Elec. Contr. Co., 26 A.D.2d 83, 85 (2nd Dept. 1966). If the operator cannot come forward with any evidence to rebut the inference of negligence, the moving party may properly be awarded judgment as a matter of law on the issue of liability. McGregor v Manzo, supra; see also Leal v Wolff, 224 A.D.2d 392 (2nd Dept. 1996); Barile v Lazzarini, 222 A.D.2d 635 (2nd 1995); Lopez v. Minot, 258 A.D.2d 564 (2nd Dept. 1999).

Here, plaintiff made the requisite prima facie showing of her entitlement to summary judgment, by the submission of her deposition testimony and that of defendant, who admitted that his vehicle struck plaintiff's vehicle in the rear while both vehicles were exiting, following a stop for a stop sign, the exit ramp to Grand Avenue from Southern State Parkway. Plaintiff's vehicle had gone past the stop sign and was on Grand Avenue and defendant was pulling his vehicle onto Grand Avenue. Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York,

49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

Defendant, rather than submitting opposition to the motion, instead cross moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. Section 5102(d) of the Insurance Law, in pertinent part, defines a "serious injury" as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002).

Plaintiff claims that, as a result of the accident, she sustained injury to her right shoulder, in the form of an impingement syndrome; partial thickness tearing of the rotator cuff intra-articularly; posterior SLAP lesion requiring Arthroscopy of the right shoulder and subacromial space; partial distal claviculectomy and intra-articular debridement of the rotator cuff tearing and SLAP lesion posteriorly; disc herniations and bulges and hypertrophy of the bilateral facet joints. In support of his motion, defendant submitted the affirmed medical report of Dr. Leon Sultan ("Sultan"), an orthopedic surgeon, who examined plaintiff on August 25, 2009. With respect to her shoulder, Dr. Sultan stated:

> Range of motion testing of the right shoulder has been obtained with accurate visual measurements. Right shoulder abduction and forward elevation is to 175° (normal 179-180°), internal rotation is complete and external rotation is to 45° (normal 40-50°). Abduction is to 45° (normal 40-50°) and posterior extension is to 40° (normal 40-45°). Equal range of motion finding are noted on the opposite side. The

> right shoulder impingement is negative as is the Hawkin's test and the drop arm test.

Dr. Sultan also recited normal findings for his testing of plaintiff's cervical and thoracolumbar spine, and concluded:

> This woman claims multiple injuries as described above following the occurrence of 11/4/07. Today's orthopedic and orthopedic neurological examination in regard to her right shoulder, cervical spine and thoracolumbar spine reveals that she is orthopedically stable and neurologically intact. Today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of 11/4/07. From a clinical point of view, there is no correlation between today's examination and the above-described multiple MRI readings.

Defendant also submitted plaintiff's deposition testimony in which she conceded that the course of treatment following her accident consisted primarily of three months of physical therapy; two months of treatment beginning in January 25, 2008 by Dr. Berkowitz, an orthopedic surgeon, who performed arthoscopic surgery on plaintiff's right shoulder on February 25, 2008; was last treated by Dr. Francois, an internist, in the spring or summer of 2008, and has received no additional medical treatment following that visit. Plaintiff also admitted that she was involved in a prior motor vehicle accident on May 13, 2004, in which she sustained injuries to her neck, lower back and shoulders, and treated with a physical therapist for three months following that accident. Finally, she testified that she was a full-time student at the time of the accident; is currently working as a teacher's assistant, a position she has held for seventeen years, and also works at a facility for mentally disabled persons; and that her job responsibilities did not change following the accident; that she missed only two weeks of work following the February surgery, and that she was not confined to her home or bed for any period following the accident. Finally, plaintiff testified that as a result of the accident, she has difficulty on the treadmill, pushing a stroller, helping her grand children and moving furniture.

Through the submission of the affirmed medical report of Dr. Sultan and plaintiff's own testimony, defendant made the requisite prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). He established, prima facie, that plaintiff suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted his customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury or impairment. Defendant thus established his entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler,

79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden then shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

Plaintiff submitted in opposition to defendant's summary judgment motion her attorney's affirmation, annexed to which were unsworn and unaffirmed MRI reports of plaintiff's right shoulder, cervical spine, and lumbar spine; plaintiff's affidavit, and the affidavit of Dr. Jean-Marie L. Francois, her physical therapist, with unsworn and unaffirmed July 10, 2008 and December 18, 2007 reports, unsworn and unaffirmed November 11, 2007 radiology report pertaining to x-rays of plaintiff's cervical spine and treatment records; the unsworn and unaffirmed February 19, 2008 and April 8, 2008 reports of Dr. Dov J. Berkowitz, plaintiff's orthopedic surgeon, and his uncertified operative report dated February 26, 2008; and the unsworn and unaffirmed April 7, 2008 medical reports of Dr. Jean Claude Demetrius, pertaining to his February 2 and 16, 2008 evaluations of plaintiff.

Notwithstanding plaintiff's submissions, she failed to submit competent medical evidence to raise a triable issue of fact. With respect to her attorney's affirmation, it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance [(Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006)], and is insufficient to show that plaintiff sustained a serious injury, particularly where, as here, there was no objective medical evidence to demonstrate that she sustained a serious injury. See, Codrington v. Ahmad, 40 A.D.3d 799 (2nd Dept. 2007). Similarly, the unaffirmed, unsworned and uncertified records and reports of plaintiff's treatment providers, Drs. Francois, Berkowitz and Demetrius, are without any probative value since those records were not properly sworn or affirmed. See, Grasso v. Angerami, 79 N.Y.2d 813 (1999); Magid v. Lincoln Services Corp., 60 A.D.3d 1008 (2nd Dept. 2009); Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009); Sutton v. Yener, 65 A.D.3d 625 (2nd Dept. 2009). The same conclusion applies to the magnetic resonance imaging and x-ray reports, which were not properly sworn or affirmed, and thus they have no probative value. See, Magid v. Lincoln Services Corp., 60 A.D.3d 1008 (2nd Dept. 2009).

Moreover, equally unavailing is Dr. Francois' opinion that plaintiff's "complaints, pain and limitations, including her neck, lower back, both shoulders, central herniation and posterior bulges and right shoulder partial bursal tear, which required an arthoscopic procedure, were proximately caused by the automobile accident." As he did not adequately address plaintiff's prior accident, his conclusions that the noted injuries and limitations were the result of the subject accident were clearly rendered speculative. See, Gentilella v. Board of Educ. of Wantagh Union Free, 60 A.D.3d 629 (2nd Dept. 2009) ; Cantave v. Gelle, 60 A.D.3d 988 (2nd Dept. 2009); Penaloza v. Chavez, 48 A.D.3d 654 (2nd Dept. 2008); Vidor v. Davila, 37 A.D.3d 826 (2nd Dept. 2000). Further, in reaching this conclusion, he relied upon unsworn or unaffirmed medical reports, unsworn or unaffirmed physical therapy records, and unsworn and unaffirmed MRI reports of results of MRIs taken of plaintiff's

shoulder, cervical and lumbar spine. See, Merzguioui-Gray v. Shlomit Express Cab Corp., 56 A.D.3d 439 (2nd Dept. 2008)["affirmation of Dr. Delaleu was without any probative value since he clearly relied on the unsworn report of Dr. Salina Balilo in coming to his conclusions"]; Malave v. Basikov, 45 A.D.3d 539 (2nd Dept. 2007)["affirmation of the plaintiff's treating physician also lacked any probative value since he relied on unaffirmed reports of others"]; Landicho v. Rincon, 53 A.D.3d 568 (2nd Dept. 2008)["magnetic resonance imaging reports. . . as well as the physical therapy reports concerning the plaintiff, were without any probative value since they were unaffirmed"]; Matra v. Raza, 53 A.D.3d 570)["magnetic resonance imaging reports . . . concerning the plaintiff were not competent evidence since they were unaffirmed"]; Benavides v. Peralta, 52 A.D.3d 755 (2nd Dept. 2008)["affirmation of the plaintiff's treating physician was without any probative value since it is clear that in concluding that the plaintiff sustained a herniated disc at L5-S1, he relied on the unsworn magnetic resonance imaging (hereinafter MRI) reports of another physician"]. "Thus, the references to those findings [must be] disregarded (see McNeil v. New York City Tr. Auth., 60 A.D.3d 1018, 1019, 877 N.Y.S.2d 351)." Norton v. Roder, 65 A.D.3d 1317 (2nd Dept. 2009).

Plaintiff further describes her persistent pain; however, the self-serving affidavit of plaintiff also is insufficient to raise a triable issue of fact as to whether she sustained a serious injury. Carrillo v. DiPaola, 56 A.D.3d 712 (2nd Dept. 2008); Gastaldi v. Chen, 56 A.D.3d 420 (2nd Dept. 2008); Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, 49 A.D.3d 692 (2nd Dept. 2008); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006). In any event, her "current complaints, as set forth in [her] affidavit, while suggestive of discomfort, do not suggest the inability to perform substantially all of [her] usual and customary daily activities (see Ingram v. Doe, 296 A.D.2d 530, 745 N.Y.S.2d 215; Berk v. Lopez, 278 A.D.2d 156, 718 N.Y.S.2d 332; Barbarulo v. Allery, 271 A.D.2d 897, 707 N.Y.S.2d 268; Taber v. Skulicz, 265 A.D.2d 902, 695 N.Y.S.2d 810)." Cantave v. Gelle, supra.

Accordingly, based upon the foregoing, defendant's cross motion for summary judgment on the ground that plaintiff failed to sustain a "serious injury" is granted and the complaint hereby is dismissed.

Dated: January 8, 2010

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J.S.C.