Muniz v Singh
2010 NY Slip Op 32220(U)
August 10, 2010
Supreme Court, Queens County
Docket Number: 4266/08
Judge: Howard G. Lane
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** — **IAS PART 6**

BILLY MUNIZ, Plaintiff,	Index No. 4266/08
-against-	Motion Date July 6, 2010
	Motion Cal. No. 19
JASBIR SINGH, Defendant.	Motion Sequence No. 3

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits....	1-4
Opposition....................................	5-6
Reply...	7-8

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Billy Muniz, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)is decided as follows:

This action arises out of an automobile accident that occurred on June 18, 2006. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendant submitted inter alia, affirmed reports from three independent examining and/or evaluating physicians (two radiologists and an orthopedist).

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law

(Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept

1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. *Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories except for the category of "90/180 days."*

The affirmed report of defendant's independent examining radiologist, Audrey Eisenstadt, M.D. indicates that an MRI of the left knee taken on July 12, 2006 revealed an impression of: Mild degenerative subarticular signal change, proximal tibia. Joint effusion. Red marrow replacement to the fatty marrow. She concludes that the MRI shows a small subarticular cyst involving the proximal tibia, which is a degenerative process that has no traumatic basis.

The affirmed report of defendant's independent examining radiologist, Audrey Eisenstadt, M.D. indicates that an MRI of the cervical spine taken on July 19, 2006 revealed an impression of: cervical straightening. Dessication of disc material C2-3 through C6-7 intervertebral disc levels. Bulging C3-4, C4-5, C5-6 and C6-7 intervertebral disc levels. She concludes that the dessication from the C2-3 through C6-7 intervertebral disc levels, is a drying out of disc material, a degenerative process, which clearly predates the accident. She also concludes that bulging is not a traumatic abnormality and is degeneratively induced.

The affirmed report of defendant's independent examining radiologist, David A. Fisher, M.D. revealed an MRI of the left shoulder taken on July 11, 2006 revealed an impression of acromioclavicular hypertrophic changes with mild subacromial/subdeltoid bursal fluid accumulation. He opines that study revealed degenerative changes which are consistent with a preexisting condition. Dr. Fisher concludes that there is no

radiographic evidence of recent traumatic injury or causally related injury to the left shoulder.

The affirmed report of defendant's independent examining radiologist, David A. Fisher, M.D. revealed an MRI of the lumbar spine taken on July 19, 2006 revealed an impression of diffuse degenerative changes. He opines that the degenerative changes are consistent with a preexisting condition. Dr. Fisher concludes that there is no radiographic evidence of recent traumatic or causally related injury to the lumbar spine.

The affirmed report of defendant's independent examining orthopedist indicates that an exam performed on July 10, 2009 revealed that plaintiff did not sustain any substantial or permanent injury to the left knee as a result of this accident. He opines that plaintiff has a preexisting condition of degenerative joint disease. He opines that plaintiff did not sustain any substantial or permanent injury to the left shoulder as a result of this accident, but rather has a preexisting condition of AC joint degeneration. He opines that plaintiff may have sustained a cervical spine sprain/strain as a result of this accident that has now resolved and that no permanent injury was sustained, and there is evidence of preexisting degenerative changes. He opines that an examination of plaintiff's lumbar spine revealed evidence of multilevel degenerative changes and that plaintiff may have sustained a lumbar spine sprain/strain as a result of the accident which has now resolved. He concludes that plaintiff has preexisting degenerative disc disease of the lumbar spine.

Defendant has failed to raise a triable issue of fact as to the 90/180-day claim. When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendant's experts examined plaintiff more than 1 year after the date of plaintiff's alleged injury and accident. Defendant's experts failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. The reports of the IMEs relied upon by defendant fail to discuss this particular category of serious injury and further, the IME's took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendant has failed to meet its initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendant has failed to establish

a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendant's motion on this issue were sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury." for all categories except for the ninth category of "90/180 days."

Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, 57 NY2d 230, supra).

B. Plaintiff fails to raise a triable issue of fact for all categories except for "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an unaffirmed report of plaintiff's orthopedist, Leonard R. Harrison, Jr., M.D., an affirmation and sworn MRI reports of plaintiff's radiologist, Robert D. Solomon, M.D., unaffirmed narrative reports of plaintiff's physician, Andrew D. Brown, M.D., and an affidavit of Kathy McLean, who is employed by Coler Goldwater Specialty Hospital and Nursing Facility in the human resources department.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (see, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]; McLoyrd v. Pennypacker, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident that would prove causality. The only admissible medical proof submitted by plaintiff is the affirmed narrative MRI reports of plaintiff's evaluating radiologist, Robert D. Solomon, M.D. Plaintiff has failed to establish a causal connection between the accident and the injuries. The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]).

Additionally, the record is devoid of any competent evidence of plaintiff's treatment or need for treatment.

Additionally, plaintiff failed to submit a medical affirmation detailing a recent examination of plaintiff, a necessary requirement to rebutting defendant's prima facie case (see, Sauer v. Marks, 278 AD2d 301 [2d Dept 2000]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]; Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]).

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact for all categories except for "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is granted as to all categories except for the "90/180 days."

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this court.

Dated: August 10, 2010

....
Howard G. Lane, J.S.C.