

Brown v Kersellius

2010 NY Slip Op 33550(U)

November 23, 2010

Sup Ct, Queens County

Docket Number: 3010/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

PAMELA A. BROWN,

Plaintiff,

-against-

LYNDON C. KERSELLIUS and "JOHN DOE",
Defendants.

Index No. 3010/08

Motion
Date October 19, 2010

Motion
Cal. No. 2

Motion
Sequence No. 1

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-5
Opposition.....	6-8
Reply.....	9-10

Upon the foregoing papers it is ordered that this motion by defendant, Lyndon C. Kersellius, for summary judgment dismissing the complaint of plaintiff, Pamela A. Brown, 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 January 11, 2007. 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 two independent examining and/or evaluating physicians (an orthopedist and a radiologist) and plaintiff's own verified bill of particulars.

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.

The affirmed report of defendant's independent examining orthopedist, Leon Sultan, M.D., indicates that an examination conducted on January 11, 2010, revealed a diagnosis of: orthopedically stable and neurologically intact. He opines that the examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of January 11, 2007. Dr. Sultan concludes that there is no correlation between the spinal examination and the multiple MRI readings.

The affirmed report of defendant's evaluating radiologist, Sondra J. Pfeffer, M.D. indicates that an MRI of the cervical spine dated February 15, 2007 revealed multi-level disc dessication, disc space narrowing, and disc bulging. She opines that all of her findings are reflective of chronic spondylitic diseases processes clearly predating an accident sustained merely 35 days prior to MRI scanning. She concludes that degenerative changes are obviously present.

The affirmed report of defendant's evaluating radiologist, Sondra J. Pfeffer, M.D. indicates that an MRI of the lumbar spine dated February 15, 2007 revealed moderate disc dessication reflective of pre-existing degenerative disc disease at L4-5 and L5-S1. She concludes that degenerative disc disease is obviously

present.

Additionally, defendant established a *prima facie* case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates that plaintiff was only confined to bed for six weeks following the accident and she was only confined to home for 2 months and 1 week directly following the accident, and plaintiff was incapacitated from employment for 2 months and 1 week directly following the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury." 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, supra*).

B. Plaintiff fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own affidavit, an affirmation of plaintiff's neurologist, Farshad David Hannanian, M.D., an affidavit of plaintiff's physician, Surendranath K. Reddy, M.D., and two affirmations and narrative reports of plaintiff's radiologist, Richard J. Rizzuti, M.D.

Additionally, although defendants' independent examining radiologist opines in her affirmed report that her examination of plaintiff revealed pre-existing degenerative disc disease in both the cervical and lumbar spines that predate the accident, plaintiff's experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (*Francis v. Christopher*, 302 AD2d 425 [2d Dept 2003]; *Monette v. Keller*, 281 AD2d 523 [2d Dept 2001]; *Ifrach v. Neiman*, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiff failed to rebut defendants' claim sufficiently to raise a trial issue of fact (*see, Pommels v. Perez*, 4 NY3d 566, 2005 WL 975859 (2005)).

Also, the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying

accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of her customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). 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 her usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955; Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1st Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

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]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight" and is insufficient to raise triable issues of fact (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the motion by defendant, Lyndon C. Kersellius for summary is granted in its entirety and the plaintiff's Complaint is dismissed as to all categories.

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: November 23, 2010

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Howard G. Lane, J.S.C.