

Marquez v Kouyoudjian

2010 NY Slip Op 33560(U)

November 30, 2010

Sup Ct, Queens County

Docket Number: 15673/08

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

NARCISA MARQUEZ,

Plaintiff,

-against-

SONIA KOUYOUDJIAN and NATALIE
KOUYOUDJIAN,

Defendants.

Index No. 15673/08

Motion
Date September 21, 2010

Motion
Cal. No. 20

Motion
Sequence No. 3

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-6
Reply.....	7-8

Plaintiff's motion for an order pursuant to CPLR 2221(e) granting leave to vacate the Court's prior order of March 29, 2010 is hereby granted. Plaintiff's motion for an order granting plaintiff leave to renew and reargue the plaintiff's opposition to summary judgment motion against the plaintiff is hereby granted in that the newly submitted affirmed reports of Dr.'s Struhl, Rizzuti, and Katz will now be considered, as plaintiff has submitted new facts not offered on the prior motion, with a reasonable explanation of why the facts were not presented on the prior motion (see, CPLR 2221[e]). Upon renewal, the Court finds as follows:

Upon the foregoing papers it is ordered that defendants' motion for summary judgment dismissing the complaint of plaintiff, Narcisa Marquez, 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 25, 2008. Defendants have submitted proof in admissible form in support of the motion for summary judgment,

for all categories of serious injury. The defendants submitted inter alia, affirmed reports from two independent examining and/or evaluating physicians (an orthopedist and a radiologist) and plaintiff's own examination before trial transcript testimony.

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. Defendants 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 defendants' independent examining orthopedist, Salvatore Corso, M.D., indicates that an examination conducted on June 25, 2009 revealed a diagnosis of: resolved cervical, lumbar, right wrist, and right knee sprains. He opines that there is no evidence of an orthopedic disability. Dr. Corso concludes that claimant is capable of returning to work as well as her normal daily activities without restrictions.

The affirmed report of defendants' evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Right Knee

dated September 24, 2005 indicates "Grade II intrasubstance degenerative signal within the posterior horn of the medial meniscus. This represents mucoid degeneration from within the meniscus, rather than from trauma introduced externally. He concludes that there are no findings on the examination which can be attributed to the accident.

The affirmed report of defendants' evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Lumbar Spine dated August 25, 2005 revealed an impression of normal lordosis and degenerative disc disease. He concludes that there are no findings on the examination which can be attributed to the accident.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's examination before trial transcript testimony indicates that she was not confined to bed for any period of time after the accident and she missed one or two days from work as a result of this 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 defendants' 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: sworn reports of plaintiff's physician, Richard J. Rizzutti, M.D., a sworn affirmation of plaintiff's physician, Nodar Katz, M.D., a sworn operative report of Steven Struhl, M.D., an attorney's affirmation, and plaintiff's own affidavit.

Although defendants' independent examining radiologist opines in his affirmed reports that his examination of plaintiff revealed degeneration in the right knee and lumbar spine, 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 triable issue of fact as to the right knee and lumbar spine (see, Pommels v. Perez, 4 NY3d 566, 2005 WL 975859 [2005]).

Additionally, plaintiff failed to submit any medical proof that was contemporaneous with the accident showing any bulges, herniations, or quantified initial range of motion limitations in the cervical spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]; Gianetta v. Mohammed, 2010 NY Slip Op 32208U [Sup Ct, Queens County 2010]).

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 defendants' motion 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 30, 2010

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