Eteng v Dajos Transp.
2010 NY Slip Op 33875(U)
July 9, 2010
Sup Ct, Bronx County
Docket Number: 304049/2008
Judge: Alison Y. Tuitt

NEW YORK SUPREME COURT - COUNTY OF BRONX

L.W.

PART 05

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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ETENG,SERENA

Index №. **0304049/2008**

-against-

Hon. ~~**SALLIE MANZANET**~~ Alison Y. Tuitt Justice.

DAJOS TRANSPORTATION

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The following papers numbered 1 to 6 Read on this motion, **SUMMARY JUDGEMENTDEFENDANT**
Noticed on **September 21 2009** and duly submitted as No. ____ on the Motion Calendar of 2/1/10

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits	3,4	
Replying Affidavit and Exhibits	5,6	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion + cross-motion are decided in accordance with the annexed memorandum decision dated 7/9/10.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/9/10

Hon. ~~SALLIE MANZANET, J.S.C.~~ A.Y.T.

Alison Y. Tuitt, J.S.C.

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

SERENA ETENG and ANDRE ALLEN,

Plaintiffs,

-against-

DAJOS TRANSPORTATION and SOUNOUNOU DIALLO,

Defendants.

INDEX NUMBER: **304049/2008**

Present:
HON. **ALISON Y.TUITT**
Justice

The following papers numbered 1 to 6

Read on this Defendants' Motion and Plaintiffs' Cross Motion for Summary Judgment

On Calendar of **1/2/10**

Notices of Motion-Exhibits and Affirmation	1, 2
Affirmations in Opposition and Exhibits	3, 4
Reply Affirmation	5, 6

Upon the foregoing papers, defendants' motion and plaintiff s' cross-motion for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, defendants' motion for summary judgment is granted and plaintiffs' cross-motion on the issue of liability is denied as moot.

The within action arises from a motor vehicle accident on April 28, 2007 wherein plaintiffs allege they sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue.

Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (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, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, supra. [1]

In the instant action, defendants move for summary judgment arguing that plaintiffs have not suffered a serious injury pursuant to §5102 of the Insurance Law. Defendants have met their burden by producing competent medical evidence showing that neither plaintiffs have sustained a serious injury. The

[1]The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

burden now shifts to the plaintiffs.

Plaintiff Andre Allen

As a result of the subject accident on April 28, 2007, plaintiff alleges to have sustained tear of the posterior horn and body of the medial meniscus of the right knee, confirmed by MRI taken on June 2, 2007; herniated discs at L4-L5 and L5-S1 with central and foraminal narrowing impinging on the thecal sac, confirmed by MRI taken on May 11, 2007. Plaintiff testified that following the accident, he was taken by car to Presbyterian Hospital where he was treated with pain and inflammation medication. Plaintiff submits the Emergency Records but they are not certified or sworn and therefore are not considered by the Court. See, Grasso v. Angerami, 79 N.Y.2d 813 (1991).

Plaintiff next sought treatment on May 4, 2007 with Dr. Jean Daniel Francois, a neurologist. Plaintiff complained on neck pain radiating into his shoulders, lower back pain with numbness to his right foot, and right shoulder and knee pain. Dr. Francois affirmed report for May 4, 2007 shows that upon measuring plaintiff's range of motion in the lumbar and cervical spine, as well as the right knee, he found significant restrictions of limitations for which he provides measurements. He also performed the straight leg raise test which was positive at 40 degrees bilaterally. Dr. Francois recommended physical therapy which the plaintiff received from May 7, 2007 through September 28, 2007.

Plaintiff next saw Dr. Francois on July 9, 2007 with the same complaints. Dr. Francois performed an examination on that date but with respect to restrictions in range of motion, he merely states that "[t]he patient's range of motion was still decreased though to a lesser degree. Complaints of pain at the end range of motion were also noted." He also provides his findings for other tests performed, however, those results all result in a subjective finding of pain by the plaintiff, with the exception of the straight leg raise test which was positive at 50 degrees bilaterally. The next time plaintiff saw Dr. Francois was on September 10, 2007 at which time plaintiff complained of pain in the cervical, lumbar and right knee regions. Again, Dr. Francois summarily states that "[t]he patient's range of motion was still decreased though to a lesser degree. Complaints of pain at the end range of motion were also noted." Also, the findings of Dr. Francois other testing on the plaintiff have an end result of subjective complaints from the plaintiff of pain, except for the straight leg raise test which again he states was positive at 50 degrees bilaterally.

Plaintiff returned to Dr. Francois on October 22, 2007 with the complaints of pain in the aforementioned regions. Dr. Francois again summarily states that plaintiff still showed "restricted movement" with "end range pain" but to a lesser degree. Dr. Francois further states that plaintiff had reached a plateau with physical therapy, and that further therapy will not improve his condition so office treatments were ceased. It should be noted that the plaintiff's physical therapy records were prepared by "Edda R. Lomantas, RPT" and Dr. Francois' signature appears only under "Doctor's Approval". The physical therapy was apparently administered only by Ms. Lomantas, a registered physical therapist. It also appears that all of the notations on these documents were made by Ms. Lomantas with respect to the therapy sessions that she administered to the plaintiff. Therefore, the "affirmation" of Dr. Francois of these physical therapy records does not properly authenticate the documents and are inadmissible as they are not in properly sworn form. See, Grasso v. Angerami, 79 N.Y.2d 813 (1991).

Dr. Francois final examination of plaintiff was on July 13, 2009 at which time plaintiff went to him for a "follow up examination". Dr. Francois states that plaintiff's complaints on that date were of neck pain radiating to his shoulders, lower back pain, right shoulder pain and right knee pain. Dr. Francois further states that he performed range of motion testing of plaintiff's cervical and lumbar spine, as well as plaintiff's right knee and he found restrictions of limitations for which he provides measurements. For the sake of brevity, this Court notes that Dr. Francois noted the specific degrees of limitations he found on plaintiff as compared to normal ranges. The cervical spine showed 33% restriction in different areas, except for right and left rotation where it was found to be 11%. Plaintiff's lumbar spine showed 17% restrictions, except for flexion where it was 22%. Dr. Francois states that plaintiff's injuries are causally related to the accident, that plaintiff has sustained a significant limitation in the use and function of his neck, back and right knee and that plaintiff has sustained injuries that have resulted in a partial impairment and disability.

Defendants' motion with respect to plaintiff Andre Allen is granted as defendants have met their burden of showing an absence of a serious injury as a result of the subject accident. Plaintiff's submissions fail to raise an issue of fact. The Emergency Room and physical therapy records submitted by plaintiff in opposition are unaffirmed and unsworn and, therefore, have no probative value. Hernandez v. Ramirez, 796 N.Y.S.2d 605 (1st Dept. 2005); Simms v. APA Truck Leasing Corp., 788 N.Y.S.2d 63 (1st Dept. 2005). The only submissions properly before the Court show that plaintiff went to Dr. Francois a total of 5 times for treatment of the injuries

he is alleged to have sustained. With the exception of the first and last visit, Dr. Francois fails to identify what tests he performed to substantiate his findings that plaintiff had restrictions in his cervical and lumbar spine and his right knee. Dr. Francois' affirmed reports for the three visits between plaintiff's first and last visit do not provide objective findings of either the specific percentage of restrictions in range of motion or a sufficient description of the qualitative findings. See, Otero v. 971 Only U, 828 N.Y.S.2d 331 (1st Dept. 2007). Moreover, plaintiff fails to address the defendants' expert's, Dr. Audrey Eisenstadt's, opinion that the findings on plaintiff's lumbar and right knee MRI's revealed degeneration. See, Colon v. Taveras, 873 N.Y.S.2d 637 (1st Dept. 2010); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009).

Furthermore, plaintiff has failed to adequately explain her gap in treatment. Dr. Fuzaylov's statements on the matter are conclusory and there is no evidence offered to support his contentions. Pommells v. Perez, 4 N.Y.3d 566 (2005). Bent v. Jackson, 788 N.Y.S.2d 56 (1st Dept. 2005). The explanation must be substantiated by the medical records in order to be deemed reasonable. Plaintiff states that he was unable to continue to receive further therapy because his no-fault benefits were terminated. However, plaintiff does not offer the Court any proof regarding the discontinuation of medical coverage. Gomez v. Ford Motor Company, 810 N.Y.S.2d 838 (Sup. Ct. Bx Cty. 2005). In addition, plaintiff was and has been employed since the date of the accident. He fails to indicate whether he had private insurance from his employer or from another source and why he could not use that insurance to receive further treatment. As such, this evidence is without probative value. Plaintiffs also fail to satisfy the statutory 90 out of 180 day requirement. In support of this claim, plaintiff offers a self serving affidavit that is not supported by medical evidence. Plaintiff fails to raise an issue of fact as to whether he was unable to perform substantially all of her usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted). Even missing 3 months of work out of the first 180 days is insufficient without a showing of other daily activities that were hindered due to the injury. Uddin, 820 N.Y.S.2d at 45. Here, there is no evidence that plaintiff could not perform his usual and customary activities for 90 out of the 180 days. Plaintiff alleges that he

was confined to bed for only two weeks following the accident.

Plaintiff Serena Eteng

As a result of the subject accident on April 28, 2007, plaintiff alleges to have sustained disc herniations at C4-C5, C5-C6 and disc bulge at C3-C4 and disc herniations at L4-L5 and L5-S1 with straightening of the normal lumbar lordosis confirmed by MRIs taken on May 11, 2007. Plaintiff testified that following the accident, she was taken to Columbia Presbyterian Hospital. Plaintiff submits the Emergency Records but they are not certified or sworn and therefore are not considered by the Court. See, Grasso v. Angerami, 79 N.Y.2d 813 (1991).

Plaintiff next sought treatment on May 4, 2007 with Dr. Jean Daniel Francois, a neurologist, and complained on neck pain radiating into her right shoulder, lower back pain with numbness to her right feet, right shoulder pain and upper and mid back pain. Dr. Francois affirmed report for May 4, 2007 shows that upon measuring plaintiff's range of motion in the lumbar and cervical spine, as well as her right shoulder he found significant restrictions of limitations for which he provides measurements. He also performed the straight leg raise test which was positive at 40 degrees bilaterally. Dr. Francois recommended physical therapy which the plaintiff received from May 7, 2007 through October 3, 2007.

Plaintiff next saw Dr. Francois on June 4, 2007 with the same complaints. Dr. Francois performed an examination on that date but with respect to restrictions in range of motion, he merely states that there was "[d]ecreased motion and pain, although still present, was less severe when observing the end range of the affected joints." He also notes "[d]ecreased range of motion with protective guarding and pain at end range of motion was also noted; however, to a lesser extent." He also provides his findings for other tests performed, however, those results all result in a subjective finding of pain by the plaintiff, with the exception of the straight leg raise test which was positive at 50 degrees bilaterally. The next time plaintiff saw Dr. Francois was on July 23, 2007 at which time plaintiff had the same complaints of pain. Again, Dr. Francois summarily states that [d]ecreased motion and pain, although still present, was less severe when observing the end range of the affected joints." He also notes "[d]ecreased range of motion with protective guarding and pain at end range of motion was also noted; however, to a lesser extent." Also, the findings of Dr. Francois other testing on the plaintiff have an end result of subjective complaints from the plaintiff of pain, except for the straight leg raise

test which again he states was positive at 50 degrees bilaterally.

Plaintiff returned to Dr. Francois on September 24, 2007 with the complaints of pain in the aforementioned regions. Dr. Francois again summarily states that plaintiff still showed "restricted movement" with "end range pain" but to a lesser degree. Dr. Francois further states that plaintiff was to continue physical therapy twice per week for an additional six weeks and at that point her condition will be re-assessed. Notwithstanding Dr. Francois' recommendation, plaintiff's physical therapy ended on October 3, 2007. Plaintiff's physical therapy records were prepared by "Edda R. Lomantas, RPT" and Dr. Francois' signature appears only under "Doctor's Approval". The physical therapy was apparently administered only by Ms. Lomantas, a registered physical therapist. It also appears that all of the notations on these documents were made by Ms. Lomantas with respect to the therapy sessions that she administered to the plaintiff. Therefore, the "affirmation" of Dr. Francois of these physical therapy records does not properly authenticate the documents and are inadmissible as they are not in properly sworn form. See, Grasso v. Angerami, 79 N.Y.2d 813 (1991).

Dr. Francois final examination of plaintiff was on July 6, 2009 at which time plaintiff went to him for a "re-examination". Dr. Francois states that plaintiff is presently working part-time/modified assignments to her original line of work and is in his opinion partially disabled from her original line of work. As provided in her bill of particulars, plaintiff was/is employed as a budget analyst at MTA NYCT at 130 Livingston Plaza, Brooklyn, NY. The only proof that the Court has that plaintiff is working part-time or on modified assignment is her self-serving affidavit. Plaintiff fails to provide the Court with any documents from her employer to support her claims. Dr. Francois further states that he performed range of motion testing of plaintiff's cervical and lumbar spine, as well as her right shoulder and found restrictions of limitations for which he provides measurements and compares those to normal ranges. Dr. Francois states that plaintiff's cervical spine showed 33% restriction in different areas, except for right and left rotation where it was found to be 19%. Plaintiff's lumbar spine showed 17% restrictions, except for flexion where it was 22%. (He had the exact same limitations in range of motion for plaintiff Allen - 17% in lumbar spine except for flexion where it was 22%). Dr. Francois states that plaintiff's injuries are causally related to the accident, that plaintiff has sustained a significant limitation in the use and function of her neck, back and right shoulder and that plaintiff has sustained injuries that have resulted in a partial impairment and disability.

Defendants' motion with respect to plaintiff Serena Eteng is granted as defendants have met their

burden of showing an absence of a serious injury as a result of the subject accident. Plaintiff's submissions fail to raise an issue of fact. The Emergency Room and physical therapy records submitted by plaintiff in opposition are unaffirmed and unsworn and, therefore, have no probative value. Hernandez v. Ramirez, 796 N.Y.S.2d 605 (1st Dept. 2005); Simms v. APA Truck Leasing Corp., 788 N.Y.S.2d 63 (1st Dept. 2005). The only submissions properly before the Court show that plaintiff went to Dr. Francois a total of 5 times for treatment of the injuries he is alleged to have sustained. With the exception of the first and last visit, Dr. Francois fails to identify what tests he performed to substantiate his findings that plaintiff had restrictions in his cervical and lumbar spine and his right knee. Dr. Francois' affirmed reports for the three visits between plaintiff's first and last visit do not provide objective findings of either the specific percentage of restrictions in range of motion or a sufficient description of the qualitative findings. See, Otero v. 971 Only U, 828 N.Y.S.2d 331 (1st Dept. 2007). Moreover, plaintiff fails to address the defendants' expert's, Dr. Audrey Eisenstadt's, opinion that the findings on plaintiff's cervical spine MRI revealed desiccation at C4-C5 and C5-C6. See, Colon v. Taveras, 873 N.Y.S.2d 637 (1st Dept. 2010); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009).

Furthermore, plaintiff has failed to adequately explain her gap in treatment. Dr. Francois' statements on the matter are conclusory and there is no evidence offered to support his contentions. Pommells v. Perez, 4 N.Y.3d 566 (2005). Bent v. Jackson, 788 N.Y.S.2d 56 (1st Dept. 2005). The explanation must be substantiated by the medical records in order to be deemed reasonable. Plaintiff states that he was unable to continue to receive further therapy because her no-fault benefits were terminated. However, plaintiff does not offer the Court any proof regarding the discontinuation of medical coverage. Gomez v. Ford Motor Company, 810 N.Y.S.2d 838 (Sup. Ct. Bx Cty. 2005). In addition, plaintiff was and has been employed since the date of the accident and . He fails to indicate whether he had private insurance from his employer or from another source and she fails to explain why she did not insurance to receive further treatment. As such, this evidence is without probative value. Plaintiffs also fail to satisfy the statutory 90 out of 180 day requirement. In support of this claim, plaintiff offers a self serving affidavit that is not supported by medical evidence. Plaintiff fails to raise an issue of fact as to whether he was unable to perform substantially all of her usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept.

1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006) (citations omitted). Even missing 3 months of work out of the first 180 days is insufficient without a showing of other daily activities that were hindered due to the injury. Uddin, 820 N.Y.S.2d at 45. Here, there is no evidence that plaintiff could not perform her usual and customary activities for 90 out of the 180 days. Plaintiff alleges that he was confined to bed for only two weeks and to home one month following the accident. The remainder of plaintiff's claims of what she could not do after the accident do not amount to "substantially all" as is required by the statute.

Accordingly, for the reasons stated, the defendants' motion for summary judgment is granted and the plaintiffs' complaints are dismissed.

This constitutes the decision and order of this Court.

Dated: July 9, 2010

Hon. Alison Y. Tuitt