

Muniz v Singh

2011 NY Slip Op 30563(U)

March 3, 2011

Supreme Court, Queens County

Docket Number: 4266/08

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

BILLY MUNIZ,

Plaintiff,

-against-

JASBIR SINGH,

Defendant.

Index No. 4266/08

Motion
Date January 25, 2011

Motion
Cal. No. 18

Motion
Sequence No. 4

PAPERS
NUMBERED

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Plaintiff's motion for an order pursuant to CPLR 2221 for leave to renew and reargue a prior motion decided on August 10, 2010 by Justice Howard G. Lane and upon such renewal and reargument, denying defendant's motion for summary judgment in its entirety is hereby granted solely to the extent that the prior motion shall be renewed, as plaintiff presented proof that she inadvertently failed to submit a report in affirmed form of Leonard R. Harrison on the prior motion and defendant's cross motion for an order rearguing the Court's order dated August 10, 2010, and granting summary judgment to the defendant on the serious injury threshold category of medically determined injury that prevented the plaintiff from performing substantially all of her normal activities for 90 out of the first 180 days after the accident is granted as to reargument, as defendant presents facts that the Court previously overlooked in making its prior determination. The order of this Court dated August 10, 2010 is hereby vacated. Upon renewal and reargument of the motion, the Court finds as follows:

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 established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d). 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).

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. Dessiccation 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 dessiccation 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.

Additionally, defendant established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates: that she was only confined to her bed for two months after the accident. Additionally, plaintiff failed to provide any certified medical documentation articulating a medical directive to be confined. 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, an affirmed 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., which do not prove causality, and the affirmed narrative report of plaintiff's evaluating orthopedist, Leonard R. Harrison, Jr., M.D. who evaluated plaintiff only one time, on December 16, 2009, 3½ years

after the accident. Plaintiff has failed to establish a causal connection between the accident and the injuries (see, Resek v. Morreale, 74 AD3d 1043 [2d Dept 2010]; Catalano v. Kopman, 73 AD3d 963 [2d Dept 2010]). 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]).

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]).

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 him 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 and deposition statements are "entitled to little weight" and are 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.

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: March 3, 2011

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Howard G. Lane, J.S.C.