

Carpenter v Isme

2011 NY Slip Op 30640(U)

March 9, 2011

Sup Ct, Queens County

Docket Number: 11638/08

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.

(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, Robert Israel, M.D., indicates that an examination conducted on September 23, 2009 revealed an impression of: resolved sprain of the cervical spine, resolved sprain of the lumbar spine, resolved sprain of the right hip, and resolved sprain of the bilateral knees. He opines that the plaintiff has no disability as a result of the accident of record.

The affirmed report of defendants' independent examining neurologist, Monette G. Basson, M.D. indicates that an examination conducted on October 21, 2009 revealed an impression of an entirely normal neurologic examination. She opines that she finds absolutely no evidence of neurologic disability or permanency. Dr. Basson concludes that plaintiff may return to all pre-loss activities including occupational duties with no neurologic restrictions.

The affirmed report of defendants' evaluating radiologist, Alan B. Greenfield, M.D. indicates that an MRI of the Lumbar Spine dated March 31, 2007 revealed a diagnosis of "[d]egenerative disc disease with degenerative disc bulging as well as degenerative bony osteophyte ridging and degenerative facet arthropathy at L5-S1. The constellations of these findings are clearly longstanding and degenerative in origin and cannot be attributed to an accident of 12/15/05 with any reasonable degree

of medical certainty." He concludes that "[t]here are no findings on this examination, which can be attributed to an accident occurring more than one year prior to the imaging date of this examination."

The affirmed report of defendants' evaluating radiologist, Alan B. Greenfield, M.D. indicates that an MRI of the Left Shoulder revealed a diagnosis of: "[d]ownsloping of the AC joint represents an anatomic variant, however, it is also associated with mild degenerative arthropathy along the undersurface of the AC joint, both of which may contribute to bony impingement. These findings are clearly longstanding and are unrelated to trauma including the accident of 12/15/05". He concludes that there are no findings which can be attributed to an accident of December 15, 2005.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates: that plaintiff was confined to bed for approximately one (1) week and confined to home for approximately one (1) week. 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: an attorney's affirmation, a sworn narrative report of plaintiff's internal medicine physician, Munta Majeed, M.D., certified medical records of Muntaz Majeed, M.D., a notarized narrative report of plaintiff's chiropractor, Michael W. Tafreshi, an affirmed narrative report of plaintiff's neuroradiologist, Mark J. Lodespoto, M.D., and an affirmed report of plaintiff's neurologist, Abraham M. Glassman, 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]). Plaintiff testified at her deposition that she was involved in four accidents prior to the subject accident wherein she sustained injury to her neck, back, shoulders and knees. None of plaintiff's medical experts address the significance of the four prior accidents, and thus, their opinions as to causality are rendered speculative. As none of plaintiff's examining doctors were aware of all of plaintiff's prior accidents and none of them reviewed her medical records from these prior accidents, the plaintiff's medical submissions are insufficient to raise a triable issue of fact as to whether plaintiff has a causally-related "serious injury" to her neck, back, shoulders or legs (see, Vidor v. Davila, 37 AD3d 826 [2d Dept 2007; Varveris v. Franco, 71 AD3d 1128 [2d Dept 2010]).

Additionally, although defendants' independent examining radiologist opines in his affirmed reports that his examination of plaintiff revealed longstanding degeneration in the lumbar spine and left shoulder, 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]).

Additionally, 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]).

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: March 9, 2011

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