

Seo v Arevealo-Dominian

2011 NY Slip Op 31049(U)

April 18, 2011

Supreme Court, Queens County

Docket Number: 9467/09

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

YOO J. SEO,

Plaintiff,

-against-

HERMANIA AREVEALO-DOMINIAN,
Defendant.

Index No. 9467/09

Motion
Date February 15, 2011

Motion
Cal. No. 22

Motion
Sequence No. 1

| | |
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Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Yoo J. Seo, 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 March 29, 2009. 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 (Paqano 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, Edward L. Mills, M.D., indicates that an examination conducted on July 1, 2010 revealed a diagnosis of: resolved cervical, lumbar, and right shoulder sprains. He concludes that there is no evidence of disability.

The affirmed report of defendant's evaluating radiologist, Sheldon Feit, M.D., indicates that an MRI of the Right Shoulder dated April 22, 2009 indicates no evidence of rotator cuff tear or fracture and mild impingement on the supraspinatus muscle secondary to hypertrophic change at the acromioclavicular joint. He opines that the impingement is entirely degenerative. Dr. Feit concludes that no posttraumatic changes are identified and there are no abnormalities causally related to the accident.

Additionally, defendant established a *prima facie* case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates: plaintiff was only confined to bed for approximately two weeks and confined to home for approximately one month. 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 raises a triable issue of fact, for all categories except for "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, a sworn affidavit of plaintiff's physician, Yong S. Tak, M.D., plaintiff's own affidavit, and sworn affirmations and MRI reports by Richard Heiden, M.D. of the cervical spine, lumbar spine, and right shoulder.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 (1st Dept. 1980)). 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 submitted medical proof that was contemporaneous with the accident showing range of motion limitations of the cervical and lumbar spines (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries to the cervical and lumbar spines. The affirmation submitted by plaintiff's treating physical medicine and rehabilitation physician, Dr. Yong S. Tak, sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: cervical disc bulges and herniations and lumbar disc bulges. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 29, 2009. Additionally, plaintiff's radiologist, Richard A. Heiden, M.D., interpreted MRI films of plaintiff's cervical and lumbar spines taken on April 29, 2009 and May 6, 2009, respectively and found disc herniations and bulges of the cervical spine and disc bulges of the lumbar spine. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Tak provides that a recent examination by Dr. Tak on November 3, 2010 sets forth the

objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "cervical disc herniation; cervical radiculopathy; lumbosacral radiculopathy; sprain/strain of right shoulders; left paracentral disc herniations at C2-3, C4-5; right paracentral C4-5 disc herniations; central disc herniations at C6-7, C7-T1. He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of March 29, 2009, and may result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

There exists an **explained** gap or cessation in treatment. It is undisputed that plaintiff stopped receiving treatment from Dr. Tak in December 2009 and did not return to the this provider for re-evaluation until November 2010. The Court of Appeals held in Pommells v. Perez, 4 NY3d 566 (2005), that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury", must offer some reasonable explanation for having done so. Courts applying the Pommells standard have consistently held that in order for the explanation to be considered reasonable it must be "concrete and substantiated by the record" (Gomez v. Ford Motor Credit Co., 10 Misc 3d 900 [Sup Ct, Bronx County 2005]). The affidavit of plaintiff wherein she states that she stopped treating because her no-fault benefits were denied, is sufficient in this regard (Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

However, 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]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact on the category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is denied as to all categories except for the category of "90/180 days".

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: April 18, 2011

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Howard G. Lane, J.S.C.