

**Coward v Jasiel**

2011 NY Slip Op 31133(U)

April 25, 2011

Supreme Court, Queens County

Docket Number: 22090/08

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

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ROBERT COWARD III by his mother and  
natural guardian, RENEE GROGRAN and  
RENEE GROGRAN, individually,  
Plaintiffs,

Index No. 22090/08  
Motion  
Date March 29, 2011

-against-

LUCAS JASIEL and SHANEL BOISSEN,  
Defendants.

Motion  
Cal. No. 10 and 11  
Motion  
Sequence No. 3 and 4

PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that these motions by defendants for summary judgment dismissing the complaint of plaintiffs, Robert Coward III and Renee Grogran, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102(d) are decided as follows:

This action arises out of an automobile accident that occurred on October 9, 2006. Defendants have submitted proof in admissible form in support of the motions for summary judgment. Defendants submitted, inter alia, affirmed reports from an independent examining orthopedist, independent examining radiologist, and independent examining neurologist and plaintiffs' 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 plaintiffs did not suffer a "serious injury" as defined in Section 5102(d).**

The affirmed report of defendants' independent examining orthopedist, Robert Israel, M.D., indicates that an examination of plaintiff, Robert Coward III on December 2, 2009 revealed a diagnosis of: an entirely normal orthopedic examination with no positive findings. He opines that plaintiff is capable of scholastic/gym activities and activities of daily living. Dr. Israel concludes that there is no permanency and no residuals relative to the incident date.

The affirmed report of defendants' independent examining radiologist, David A. Fisher, M.D. indicates that an X-Ray of the plaintiff's left foot taken on October 9, 2006 revealed a normal study with no evidence of fracture or soft tissue abnormalities.

The affirmed report of defendants' independent examining orthopedist, Robert Israel, M.D., indicates that an examination of plaintiff, Renee Grogran on January 7, 2010 reveals: an entirely normal orthopedic examination with no positive findings. He opines that plaintiff is capable of work activities and

activities of daily living. Dr. Israel concludes that there is no permanency and no residuals relative to the incident date.

The affirmed report of defendants' independent examining neurologist, Edward M. Weiland, M.D., indicates that an examination of plaintiff, Renee Grogran conducted on January 7, 2010 revealed a normal neurologic examination. He opines that plaintiff is not in need of any treatment, transportation, or testing and plaintiff is not disabled. Dr. Weiland concludes that plaintiff is capable of performing normal activities of daily living, as well as occupational duties, without any restrictions and there is no permanency or residuals.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff, Robert Coward III's examination before trial transcript testimony indicates: said plaintiff missed only a day or two from school. The plaintiff, Renee Grogran's examination before trial transcript testimony indicates: said plaintiff did not miss any time from work as a result of the accident. Such evidence shows that the plaintiffs were 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 plaintiffs 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. Plaintiffs fail to raise a triable issue of fact***

### ***1. Plaintiff Robert Coward III***

In opposition to the motion, plaintiff Coward submitted: an attorney's affirmation, a sworn narrative report of plaintiff's orthopedist, Leonard R. Harrison, Jr., M.D., plaintiff's own affidavit, and an affirmation and sworn X-ray report of plaintiff's radiologist, Vidya Malhotra, M.D.

In his affirmation, Dr. Harrison states that he reviewed medical records (physiotherapy records) of other doctors and affirms that he determined his diagnosis in part based on such physiotherapy records, however, no physiotherapy records have been submitted to the court in competent and admissible form. The probative value of Dr. Harrison's affidavit is reduced by the

doctor's reliance on medical records that are not in the record before the court. Since Dr. Harrison's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (see, Constantinou v. Surinder, 8 AD3d 323 [2d Dept 2004]; Claude v. Clements, 301 AD2d 432 [2d Dept 2003]; Dominquez-Gionta v. Smith, 306 AD2d 432 [2d Dept 2003]; Codrington v. Ahmad, 40 AD3d 799 [2d Dept 2007]).

Plaintiff Coward 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]). Neither the affirmation of Dr. Harrison or the affirmation and X-ray report of Dr. Malhotra discuss causation.

## **2. Plaintiff Renee Grogran**

In opposition to the motion, plaintiff Grogran submitted: an attorney's affirmation, a sworn narrative report of plaintiff's orthopedist, Leonard R. Harrison, Jr., M.D., and plaintiff's own affidavit.

In his affirmation, Dr. Harrison states that he reviewed medical records and tests of other doctors and affirms that he determined that the plaintiff's permanent partial disabilities are caused by the accident, based in part on the medical records of other doctors, however, no medical records have been submitted to the court in competent and admissible form. The probative value of Dr. Harrison's affidavit is reduced by the doctor's reliance on medical records that are not in the record before the court. Since Dr. Harrison's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (see, Constantinou v. Surinder, 8 AD3d 323 [2d Dept 2004]; Claude v. Clements, 301 AD2d 432 [2d Dept 2003]; Dominquez-Gionta v. Smith, 306 AD2d 432 [2d Dept 2003]; Codrington v. Ahmad, 40 AD3d 799 [2d Dept 2007]).

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]). While the affirmation of Dr. Harrison addresses causation, the Court has already determined said affirmation is insufficient to raise a triable issue of fact and the affirmation and X-ray report of Vidya Malhotra do not discuss causation.

Also, the plaintiffs Coward and Grogran have failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiffs sustained a medically-determined injury which prevented them from performing substantially all of the material acts which constituted their 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 his 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 [1<sup>st</sup> Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiffs fail to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiffs for the 180-day period immediately following the accident. As such, plaintiffs' submissions were insufficient to establish a triable issue of fact as to whether plaintiffs suffered from a medically determined injury that curtailed them from performing their usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiffs' claims that their injuries prevented them from performing substantially all of the material acts constituting their 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, plaintiffs' attorney's affirmation is not admissible probative evidence on medical issues, as plaintiffs' attorney has failed to demonstrate personal knowledge of the plaintiffs' injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Furthermore, plaintiffs' self-serving affidavits are "entitled to little weight, and [are] certainly insufficient to raise a triable issue of fact" (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1<sup>st</sup> Dept 1985]).

Therefore, plaintiffs' submissions are insufficient to raise

a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motions for summary judgment are granted and the plaintiffs' Complaints are dismissed.

The clerk is directed to enter judgment accordingly.

Movants 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, movants are directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: April 25, 2011

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