

Filoseta v Jimenez

2011 NY Slip Op 31135(U)

March 24, 2011

Supreme Court, Queens County

Docket Number: 27555/08

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

MICHAEL FILOSETA and KIERA FILOSETA,

Plaintiffs,

-against-

ERIC EDGARDO JIMEMEZ and NEW YORK
SAND & STONE, INC.,

Defendants.

Index No. 27555/08

Motion
Date February 1, 2011

Motion
Cal. No. 17

Motion
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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiffs, pursuant to CPLR 3212, on the ground that plaintiffs have 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 July 15, 2008, whereby plaintiff Michael Filoseta was allegedly injured. It is undisputed that Kiera Filoseta's loss of services claim has been discontinued. Defendants have submitted proof in admissible form in support of the motion for summary judgment. The defendants submitted inter alia, affirmed reports from four independent examining and/or evaluating physicians (a neurologist, an orthopedist, a radiologist, and a hand specialist).

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 plaintiff, Michael Filoseta did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendants' independent examining neurologist, Frank D. Oliveto, M.D., indicates that an examination conducted on June 14, 2010 revealed a diagnosis of: no objective findings to indicate neurological injury, need for neurological healthcare, testing, or neurological disability. He concludes that sensory examination is nonphysiological.

The affirmed report of defendants' independent examining orthopedist, Alvin M. Bregman, M.D., indicates that an examination conducted on April 5, 2010 revealed a diagnosis of: normal examination of the cervical spine and left shoulder, internal derangement of the lumbar spine, and aggravation of pre-existing right hand derangement. He opines that there is no objective evidence of need to limit work status or activities of daily living. Dr. Bregman concludes that there is no need for further treatment.

The affirmed report of defendants' independent evaluating radiologist, Sheldon P. Feit, M.D., indicates that an MRI of the Cervical Spine dated September 16, 2008 indicates mild disc bulges at the C4-C5 levels and C6-C7 levels and no evidence of

focal herniation. He opines that there is pre-existing degenerative change and that the disc bulges are not posttraumatic but are degenerative. Dr. Feit concludes that no posttraumatic changes are identified and there are no abnormalities causally related to the accident.

The affirmed report of defendants' independent evaluating radiologist, Sheldon P. Feit, M.D., indicates that an MRI of the Lumbosacral Spine dated September 16, 2008 indicates mild disc bulge at L5-S1 and no evidence of focal herniation. He opines that there is pre-existing degenerative change and that the disc bulges are not posttraumatic but are degenerative. Dr. Feit concludes that no posttraumatic changes are identified and there are no abnormalities causally related to the accident.

The affirmed report of defendants' independent examining hand surgeon, Thomas Joseph Palmieri, M.D., indicates that an examination conducted on August 25, 2010 revealed that plaintiff has recovered well from the contusion he suffered to his right hand. He opines that there is very little loss of flexion in the right little finger, which loss of motion is a pre-existing condition. Dr. Palmieri concludes that there is no evidence of any continues problem with the right little finger.

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 raises a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, a sworn affirmation of plaintiff's physical medicine and rehabilitation physician, Ali E. Guy, M.D., plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, sworn records and reports of Ali E. Guy, M.D., sworn records and reports of Havery Orlin, M.D., unsworn narrative reports of Walter Rho, M.D., sworn MRI reports of plaintiff's radiologist, Robert Diamond, M.D., a sworn narrative report of Alvin M. Bregman, M.D., a sworn narrative report of Richard A. Pearl, M.D., and plaintiff's certified employment records from Best Buy.

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, 772 NYS2d 21 [1st Dept 2004]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges, herniations, and range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physical medicine and rehabilitation physician, Dr. Ali E. Guy, 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: herniations and bulges in plaintiff's lumbar spine and cervical spine. Dr. Guy's affirmation details plaintiff's symptoms, including pain in his back, neck, and right hand. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of July 15, 2008. Additionally, plaintiff's radiologist, Robert Diamond, M.D., interpreted MRI films of plaintiff's cervical and lumbar spines taken in September 2008 and found disc herniations and bulges of the cervical and lumbar spines. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Guy provides that a recent examination by Dr. Guy on October 12, 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: lumbar and cervical disc bulges and radiculopathy. He further opines that the injuries are permanent in nature, causally related to the motor vehicle accident of July 15, 2008, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiffs' 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]).

Furthermore, plaintiff rebuts defendants' experts findings that the injuries are degenerative in nature. Dr. Guy affirms: "[a]ny pre-existing degenerative changes, found in a scan review or otherwise, are irrelevant medically as Mr. Filoseta was asymptomatic prior to the trauma. The affirmed MRI reports of

Dr. Robert Diamond, a radiologist, do not indicate that the injuries were degenerative or pre-existing in nature. Furthermore, even if there was any pre-existing degenerative condition (a point which is heatedly debated among many competent professionals) the July 22, 2008 accident aggravated or exacerbated any such degenerative medical condition which had not manifested itself to Mr. Filoseta prior to the July 15, 2008 trauma. In my medical opinion, Mr. Filoseta's current pain, limitations and injuries were caused by the current accident of July 15, 2008 and not related to any pre-existing conditions or intervening medical problems."

Accordingly, the defendants' motion for summary is denied as to plaintiff Michael Filoseta and granted as to plaintiff Kiera Filoseta.

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 24, 2011

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Howard G. Lane, J.S.C.