

Brathwaite v Tabarovsky

2011 NY Slip Op 31579(U)

June 7, 2011

Supreme Court, Queens County

Docket Number: 6879/09

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

KENYA BRATHWAITE,

 Plaintiff,

 -against-

LILIA T. TABAROVSKY,
 Defendant.

Index No. 6879/09

Motion
Date May 17, 2011

Motion
Cal. No. 3

Motion
Sequence No. 1

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits...	1-4
Opposition.....	5-10
Reply.....	11-12

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Kenya Brathwaite 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 December 7, 2008. Defendant has submitted proof in admissible form in support of the motion for summary judgment. Defendant submitted inter alia, affirmed reports from an independent examining neurologist, independent examining orthopedist, and an independent examining radiologist and plaintiff's 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 (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 neurologist, Ravi Tikoo, M.D. indicates that an examination of plaintiff on June 9, 2010 revealed a diagnosis of: history of cervical strain, history of lumbosacral sprain, and history of soft tissue injuries of the left knee. He opines that the neurological exam was essentially normal and there is no need for any further treatment or diagnostic testing. He further opines that plaintiff is able to work in her normal capacity and plaintiff is not disabled from a neurological basis. Dr. Tikoo concludes that there is no significant evidence of neuropathy, radiculopathy, or disc herniation from the accident.

The affirmed report of defendant's independent examining orthopedist, Robert J. Orlandi, M.D., indicates that an examination of plaintiff on May 11, 2010 reveals an impression of: previously resolved cervical symptoms with a normal cervical spine examination, lumbar spine resolved, and no clinical residuals post left knee arthroscopy. He opines that plaintiff has a very excellent cervical range of motion and a normal lumbar range of motion and the plaintiff's left knee arthroscopy is not causally related to the minor motor vehicle accident of record, although there might have been incidental MRI changes on the left knee MRI scan, but even this is doubtful given her young age of thirty three. Dr. Orlandi concludes that plaintiff has no musculoskeletal disability or permanent residuals and the prognosis is excellent.

The affirmed report of defendant's independent examining radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Cervical Spine taken on January 22, 2009 revealed an impression of: cervical straightening, a nonspecific finding, frequently related to patient position and comfort for the examination and no post-traumatic changes are identified. The affirmed report of defendant's independent examining radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Left Knee taken on January 29, 2009 revealed an impression of: a normal MRI examination and no post-traumatic changes are identified. The affirmed report of defendant's independent examining radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Lumbar Spine taken on January 22, 2009 revealed an impression of: bulging L4-5 intervertebral disc level which bulging is degenerative in origin, and not 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 3 days following the accident, plaintiff was only confined to bed for one week following the surgery, plaintiff was only confined to home for 3 days following the accident, plaintiff was only confined to home for one week following the surgery, plaintiff was incapacitated from employment for 3 days and then periodically to attend medical appointments, and plaintiff was only incapacitated from household duties for 3 weeks. 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 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. Plaintiff raises a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own affidavit, an affirmation of plaintiff's physician, Sujit Bhattacharya, M.D., an affidavit of plaintiff's chiropractor, Scott H. Leist, D.C., an affirmation of plaintiff's orthopedic surgeon, Eric Senat, M.D., and unsworn MRI reports of plaintiff's radiologists, Richard J. Rizzuti, M.D.

and Harvey Lefkowitz, M.D.

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 (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 physician, Sujit Bhattacharya, M.D., 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 myofascial derangement; cervical sprain; shoulder sprain bilaterally, left greater than right; lumbar myofascial derangement; lumbar sprain; and left knee sprain". Dr. Bhattacharya's affirmation details plaintiff's symptoms, including: neck pain with radiation to the shoulder bilaterally, neck stiffness, back pain with radiation to the hips bilaterally, back stiffness, bilateral shoulder pain, bilateral hip pain, and left knee pain. He opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of December 2, 2008. 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 affidavit of Scott H. Leist, D.C. provides that a recent examination by Dr. Leist on December 1, 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: "post concussion syndrome caused by trauma; left L4-5 lumbar radiculopathy; left C5-6 radiculopathy; disc herniation at L4-5; and disc bulge at C4-5 as well as left knee tear caused by trauma with surgical intervention". He further opines that the injuries are permanent in nature, significant, and causally related to the motor vehicle accident of December 7, 2008. 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 [1st Dept 1998]).

Additionally, despite defendant's contentions that there is

an unexplained gap in treatment (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), the Court finds that the gap in treatment is explained by Dr. Bhattacharya in his affirmation wherein he states that plaintiff was discharged on June 20, 2009 because she had reached maximum medical improvement and therapy would be of no further benefit; and by Dr. Leist in his affidavit wherein he states that plaintiff stopped treating with his office on June 20, 2009 because she had reached maximum improvement as her condition was chronic.

Also, the plaintiff has 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 includes an expert's affidavit which renders an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident in that plaintiff's physician, Sujit Bhattacharya, M.D. indicates that "[i]t was [his] expert medical opinion that the limitations of motion . . . would affect her ability to carry out normal activities of daily living such as head and neck movement, sitting, standing, bending, lifting and other strenuous activities". As such, plaintiff's submissions were sufficient 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]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of this Court.

Dated: June 7, 2011

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Howard G. Lane, J.S.C.