Torres v Villanueva
2011 NY Slip Op 34048(U)
May 3, 2011
Sup Ct, Bronx County
Docket Number: 304045/09
Judge: Mary Ann Brigantti-Hughes
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[* 1] FILED May 12 2011 Bronx County Clerk

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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RICHARD TORRES,

Plaintiff,

-against-

JOSE VILLANUEVA and SHERIDAN, INC.,

Defendants.

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DECISION / ORDER
Index No. 304045/09

The following papers numbered 1 to read on the below motions noticed on and duly submitted on the Part IA15 Motion calendar o f :

Papers Submitted	Numbered
Defs. Notice of Motion, Exhibits	1,2
Pl. Affirmation in Opposition, Exhibits	3

In an action for personal injuries arising out of a motor vehicle versus pedestrian accident, the defendants, Jose Villanueva and Sheridan, Inc. (hereinafter the "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Richard Torres (hereinafter "Plaintiff") pursuant to *CPLR* 3212 on the grounds that he did not suffer a "serious injury" under New York Insurance Law §5102.

I. Factual History

On October 23, 2008, Plaintiff was a pedestrian walking across St. Ann's Avenue at the corner of 138th St. in the Bronx, when he was struck by a motor vehicle owned and operated by Defendants. The following day, he sought treatment at North Central Hospital, where he was treated and released the same day with a diagnosis of left thigh contusion. Plaintiff thereafter sought medical treatment and was diagnosed with a partial tear of his anterior cruciate ligament within the left knee. He underwent arthroscopic surgery to correct this condition, and physical therapy thereafter.

Defendants now move for summary judgment, alleging Plaintiff did not suffer a "serious injury" as a result of this accident, as contemplated by New York Insurance Law §5102. Plaintiff

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opposes the motion.

II. Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

III. Analysis

(i) Serious Injury under §5102(d)

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Where a plaintiff is claiming serious injury arising from "permanent consequential limitation of use of a body organ, member, function or system" or "significant limitation of use of a body function or system" the determination of whether the limitation is "significant" or "consequential" relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of the body part. *Pommells v. Perez*, 4 N.Y.3d 566 (2005); *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Thus, to establish a claim under either of these categories, a plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose, and use of the affected body organ, member, function or system. *Toure, supra.* See also *Guzman v. Paul Michael Management*, 266 A.D.2d 508 (2nd Dept. 1999). Expert medical evidence in the form of physician assessments must be supported by objective medical evidence such as MRI reports, CT scan reports and observations during examination. *Toure, supra.*

MRI findings must be accompanied by objective evidence of the extent of the resulting physical limitations. *See Onishi v. N&B Taxi, Inc.*, 51 *A.D.3d* 594 (1st Dept. 2008). In most cases, serious injury arising from a herniated disc is established through a quantitative comparison with a normal range of motion. *See Assael v. Marth,* 300 A.D.2d 329 (2nd Dept. 2002)(medical expert affidavit deemed sufficient where it discussed MRI films reviewed showing herniations and the range of motion testing performed during recent examinations, which indicated specific limitations to the plaintiff's cervical spine). The First Department has held that straight-leg raising tests, when coupled with positive MRI and nerve conduction test results, constitute objective evidence of serious injury resulting from spinal injury. *Brown v. Achy*, 9 A.D.3d 30 (1st Dept. 2004); *See Otero v. 971 Only U, Inc.*, 36 A.D.3d 430 (1st Dept. 2007).

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff's injuries are not serious. *Franchini v. Plameri*, 1 N.Y.3d 536 (2003); *Brown v. Achy*, 9 A.D.3d 30 (1st Dept. 2004). To meet their burden, defendants' medical evidence must not be

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conclusory and must be based on objective testing. *See Nix v. Xiang*, 19 A.D.3d 227 (1st Dept. 2005). With regard to range-of-motion issues, defendant's medical doctor is required to specify the degree of plaintiff's range of motion and what constitutes normal range of motion. *Webb v. Johnson*, 13 A.D.3d 54 (1st Dept. 2004). Where defendant's medical expert finds restricted range-of-motion, and a doctor believes they are self-imposed, the doctor must explain the reasons for the restricted range of motion and why the same are not related to the accident. *Style v. Joseph*, 32 A.D.3d 212 (1st Dept. 2006).

Once defendant meets the burden of prima facie entitlement to summary judgment, such relief is warranted unless plaintiff can establish the existence of a serious injury through competent evidence. Plaintiff must, of course, establish that the injuries alleged were the result of the accident claimed and that the limitations alleged are the result of those injuries. *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept. 1998). Plaintiff's evidence must be objective, contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with. *Blackmon v. Dinstuhl*, 27 A.D.3d 241 (1st Dept. 2006). A medical expert's opinion establishing a serious injury which is based solely on plaintiff's subjective complaints will not be credited and will not preclude summary judgment in favor of defendant. *Zoldas v. Louise Cab Corporation*, 108 A.D.2d 378 (1985). In order to be sufficient to establish a prima facie case of serious injury, the medical affirmation or affidavit proffered must contain medical findings, which are based on the phyisican's own examination,tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. *Bent v. Jackson*, 15 A.D.2d 46 (1st Dept. 2005); *Thompson v. Abassi*, 15 A.D.3d 95 (1st Dept. 2005).

If a defendant fails to carry the burden of rebutting prima facie a plaintiff's serious injury claim, the sufficiency of a plaintiff's opposition papers need not be considered. *See Pommells v. Perez*, 4 N.Y.3d 566 (2005), *see also Tchjevskaia v. Chase*, 15 A.D.3d 389 (2nd Dept. 2005)(plaintiff's opposition papers need not be considered where, despite its ultimate conclusion that plaintiff did not sustain serious injury, affidavit of defendant's examining orthopedist disclosed recorded limitations of plaintiff's range of motion).

(ii) Discussion

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In support of their motion, Defendants submit the sworn report of Dr. Peter Ross, who reviewed Plaintiff's 2008 MRI of the left knee. Dr. Ross opined that there was no evidence of Grade III signal meniscal tears, and any damage within the knee was a result of pre-existing degenerative changes.

Defendants submit the sworn report of Dr. Gregory Montalbano, who examined Plaintiff on December 18, 2009. Dr. Montalbano conducted an examination of the left knee and noted full range of motion upon extension and flexion, and all objective testing was negative. He did note patellofemoral clicking with range of motion. He did not examine Plaintiff's MRI films. Ultimately, Dr. Montalbano opined that Plaintiff only suffered a left thigh contusion as a result of this accident and no significant knee injury.

In response, Plaintiff submits the following sworn objective medical evidence of "serious injury".

Dr. Stanley Leibowitz noted that since being discharged from hospital on October 24, 2008 (one day following accident), Plaintiff had been complaining of difficulty with activities of daily life, such as standing, walking and climbing stairs. Examination of the left knee revealed mild effusion along with tenderness on the medial femoral condyle and medial posterior joint line. He diagnosed Plaintiff with post-traumatic tenosynovitis of the left knee and prescribed physical therapy and an MRI.

MRI of the left knee, performed on November 8, 2008, revealed a tear of the lateral collateral ligament with joint effusion, and a partial thickness tear of the anterior cruciate ligament. Dr. Jacob Lichy affirmed that these conditions were "traumatically induced and result in a restriction of motion".

In his affirmation, Dr. Leibowitz states that "a full range of left knee flexion is 135 degrees." He opined that the injuries sustained by Plaintiff were traumatically induced, permanent, and a direct result of the October 23, 2008 accident. He recommended surgery. On December 16, 2008, Plaintiff underwent arthroscopic surgery of the left knee. Upon completion, Dr. Leibowitz diagnosed Plaintiff with a partial interior cruciate ligament tear, traumatic chondromalacia medial femoral condyle, and extensive synovitis. He found the injuries a result of the October 23, 2008 accident.

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Plaintiff thereafter commenced physical therapy with Dr. Osruville Cabatu. Dr. Cabatu conducted range-of-motion tests on Plaintiff in February 2009, which revealed left knee flexion of 115 degrees, 135 being "normal".

Plaintiff provides an affirmation and report of Dr. Paul Post, who examined him on October 14, 2010. Examination revealed tenderness and thickness of the synovium of the left knee, with a 20 degree restriction upon flexion. He also noted straight-leg raising in the supine position is "guarded bilaterally at 70 degrees", 90 being normal. Dr. Post diagnosed plaintiff with internal derangement of the left knee with a partial tear of the anterior cruciate ligament which necessitated surgery, and permanent restriction in motion. He opined that the injuries were the result of Plaintiff's accident and permanent in nature.

Defendants' motion is denied. Plaintiff has submitted admissible, conflicting medical evidence to support his theory of significant consequential limitation of the left knee. At the very least, this creates an issue of fact as to whether Plaintiff sustained a serious injury. When the Court has competent, admissible, but conflicting medical evidence and or affidavits on the issue of serious injury, summary judgment is usually not warranted. *Cassagnol v. Williamsburg Plaza Taxi*, 234 A.D.2d 208 (1st Dept.1996). Conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrant denial of summary judgment. *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept.1998). A physician's affirmed statement, which is the equivalent of a sworn statement, is competent evidence. *CPLR* 2106.

"Where conflicting medical evidence is offered on the issue of whether a plaintiffs injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept. 1998), *LaMasa v. Bachman*, 56 A.D.3d 340 (1st Dept. 2008), *see also Martinez v. Pioneer Transp. Corp.*, 48 A.D.3d 306 (1st Dept. 2008) (defendant's submitted medical reports and opinions were contradictory as to whether the plaintiff sustained a serious injury pursuant New York Insurance Law § 5102(d) and therefore raised a triable issue of fact). See *Martin v. Schwartz*, 308 A.D.2d 318 (1st Dept. 2003)(Order entering summary judgment in favor of defendant reversed where conflicting medical evidence submitted as to Plaintiff's range-of-motion limitations in her lumbar and cervical spine.)

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In general, a finding that a plaintiff sustained an injury within any of the categories set forth in Insurance Law §5102(d) satisfies the no-fault threshold, thereby eliminating that issue from the case and permitting recovery of damages for *all injuries* proximately caused by the accident. *Obdulio v. Fabian*, 33 A.D.3d 418 (1st Dept. 2006)(emphasis added). The First Department has recently followed this position. *See Rubin v. SMS Taxi Corp., et al*, 71 A.D.3d 548 (1st Dept. 2010). As the objective, admissible medical evidence outlined above present an issue of fact as to whether Plaintiff has suffered a significant limitation to a bodily function or system, notably the left knee, summary judgment must be denied and assessment of all injuries must go before the jury in this matter.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the defendants Jose Villanueva and Sheridan, Inc.'s motion for summary judgment pursuant to *CPLR* 3212 is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: May 3, 2011

Mary Ann Brigantti-Hughes

Hon. Mary Ann Brigantti-Hughes, J.S.C.