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

JUL 21 2011

Present: Hon. Mary Ann Brigantti-Hughes

_____X

JUN ZHOU,

DECISION/ORDER

Plaintiffs,

-against- Index No.: 301872/09

ROGER A. BROWN, PORTEXIT CORP.,
MARY FREDA, and ANTHONY FREDA,

Defendants.

_____X

The following papers numbered 1 to read on the below motions noticed on **February 23, 2011** and duly submitted on the Part IA15 Motion calendar of _____, 2011:

Papers Submitted	Numbered
Def. Brown Affirmation in support of motion, exhibits	1,2
Def. Freda cross-motion, exhibits	3,4
Pl.'s Affirmation in Opposition, exhibits	5
Def. Brown Affirmation in Reply	6

In an action for damages for personal injuries arising out of a motor vehicle-versus-pedestrian accident, defendants Roger A. Brown ("R. Brown"), and Portexit Corp. ("Portexit"), move for summary judgment, dismissing the complaint of the plaintiff Jun Zhou (hereinafter "Plaintiff") for failure to prove "serious injury" as required by New York Insurance Law §§5102 and 5104. Defendants Mary Freda ("M. Freda") and Anthony Freda ("A. Freda") cross-move for the same relief. Plaintiff opposes the motions.

I. Factual History

Pedestrian Plaintiff was allegedly injured when he was struck by a motor vehicle owned by M. Freda and owned by A. Freda while walking on the sidewalk at the intersection of 108th Street and Horace Harding Expressway in Queens, New York. Prior thereto, the Freda vehicle

was allegedly struck by a vehicle operated by R. Brown and owned by Portexit. Defendants now move for summary judgment, alleging Plaintiff has not met the serious injury threshold contemplated by New York Insurance Law §5102(d).

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

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*.

Where, as here, a case involves a spinal injury, proof that plaintiff suffered a herniated disc is not *alone* sufficient to establish serious injury within the meaning of Insurance Law §5102(d). *Pommells, supra*. An MRI finding of a disc herniation 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). Importantly, 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

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).

Assuming 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. Further, the First Department has held that unsworn MRI reports, nerve conduction studies and other unsworn medical reports are properly before the court when they are specifically referred to in a physician's affirmation or chiropractor's affidavit. *Byong Yol Yi v. Canela*, 70 A.D.3d 584 (1st Dept. 2010).

In this matter, Defendants argue that Plaintiff has not suffered a "serious injury" so as to vault the threshold for recovery of non-economic damages pursuant to any of the categories enumerated by Insurance Law §5102(d). Defendants assert that due to this accident, Plaintiff only suffered non-permanent, soft-tissue injuries. In support of these arguments, Defendants include medical reports of Drs. Iqbal Merchant and Paul Miller. The Independent Medical Examination reports submitted are inadmissible in that they do not comply with *CPLR* 2106 and 2309(b). The physician "affirmations" of Drs. Merchant and Miller only affirm, in pertinent part, that "pursuant to the applicable provisions of the Civil Practice Law and Rules section 2106, hereby affirm that the claimant was examined according to the restricted rules concerning an independent medical examination..." This language does not comply with *CPLR* 2106 which requires physician's statement to be "affirmed to be true under penalties of perjury." *Offman v. Singh*, 27 A.D.3d 284 (1st Dept. 2006). Nor does the language "awaken the conscience and impress the mind" of the affirmants, as required by *CPLR* 2309(b). Accordingly, the reports are not admissible and thus Defendants have failed to establish *prima facie* entitlement to summary judgment.

Even assuming, *arguendo*, that Defendants had met their burden, Plaintiff has submitted evidence in admissible form that, at a minimum, creates an issue of fact as to whether he suffered a serious injury with physical limitations. Orthopedist Dov J. Berkowitz, M.D., treated Plaintiff and submitted an affirmation and medical records in opposition to the motions. He states that as a result of the accident, Plaintiff was admitted to the hospital for five (5) days with a bleeding spleen, along with neck and back pain. An MRI of the left shoulder revealed intra-substance

tearing of the rotator cuff. On August 29, 2008, he underwent arthroscopic surgery of the left shoulder. The sworn, final narrative report of Ki Y. Park, M.D., upon examination of Plaintiff on February 8, 2011, noted range-of-motions restrictions of 8.3-33% of his neck and torso upon flexion, extension, lateroflexion, and rotation. Testing on Plaintiff's left shoulder revealed restrictions of 29.4% upon flexion, 25% upon extension, and 32% upon abduction. An abodiminal ultrasound dated June 10, 2009, revealed the Plaintiff to have "borderline splenomegaly" which is not addressed by Defendants' medical experts. In light of the foregoing, there is clearly an issue of fact as to whether Plaintiff sustained a serious injury in accordance with New York Insurance Law §5102(d).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the motion and cross-motion of defendants Roger A. Brown, Protexit Corp., Mary Freda, and Anthony Freda for summary judgment pursuant to *CPLR* 3212 are DENIED.

The above constitutes the Decision and Order of this Court.

Dated: July 13, 2011

Mary Ann B Hughes

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