Chandler v Salem Truck Leasing
2012 NY Slip Op 33688(U)
January 27, 2012
Sup Ct, Bronx County
Docket Number: 301155/09
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

2-15-12

X

KIMBERLY CHANDLER,

DECISION/ORDER

Plaintiff,

Index No.: 301155/09

-against-

SALEM TRUCK LEASING, SOLCO PLUMBING SUPPLY, INC., and D.L. BONNER, III.

Defendants.

X

The following papers numbered 1 to read on the below motions noticed on **July 22, 2011** and duly submitted on the Part IA15 Motion calendar of **October 14, 2011**:

Papers Submitted	Numbered
Def's Affirmation in support of motion, exhibits	1,2
Pl.'s Affirmation in Opposition, exhibits	3,4
Def. Affirmation in Reply, exhibits	7,8

In an action seeking damages for personal injuries arising out of a motor vehicle accident, defendants Salem Truck Leasing, Solco Plumbing Supply, Inc., and D.L. Bonner, III (hereinafter collectively referred to as "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Kimberly Chandler (hereinafter "Plaintiff") for failure to prove "serious injury" as required by New York Insurance Law §§5102 and 5104. Plaintiff opposes the motion.

I. Factual History

On August 21, 2007, Plaintiff was allegedly injured as a result of a motor vehicle accident which occurred on the Broadway and East Houston Street, New York County, New York. Defendants now each 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 or bulging 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. Yiang*, 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 physician'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).

Plaintiff here alleges in her verified bill of particulars that as a result of the aforementioned motor vehicle accident she sustained the following injuries: (1) disc bulge at C4-5; (2). left C5 radiculopathy; (3) left shoulder rotator cuff tear; (4) cervical muscle spasm; (5) cervical sprain/strain; (6) post traumatic lumbar sprain/strain with radiculopathy; (7) thoracic strain/sprain; (8) left shoulder sprain; (9) post concussion syndrome; (10) cervical brachial radicular syndrome.

0 Defendant's Prima Facie Case

In support of his motion, Defendants include the following: the affirmed report of Dr. Michael T. Murray's independent medical examination (hereinafter "IME") of the plaintiff dated September 29, 2010; the affirmed left shoulder MRI report of Dr. Arthur Fruaff dated January 21, 2011; and Plaintiff's Examination Before Trial (hereinafter "EBT") transcript.

Plaintiff argues that the Court should not consider Dr. Murray's or Dr. Frauff's affirmations since the reports were exchanged on or about June 8, 2011, after the Note of Issue was filed. In the instant case there is no evidence that defendants exchanged Dr. Murray and Dr. Frauff's affirmation with the plaintiff after the note of issue was filed was done so intentionally or willfully, and further there is no evidence by the plaintiff that she was prejudiced by the defendants' post note of issue exchange. Furthermore, upon review of the Court's records, the defendant filed the instant motion on June 30, 2011 with a initial return date of July 22, 2011 with two subsequent adjournments, thereby giving the plaintiff ample time to respond. See *Acca v. Clemons Props., Inc.*, 30 Misc. 3d 1205A (NY Sup. Ct. Richmond County 2010). Thus, Dr. Murray's and Dr. Frauff's affirmations are admissible.

Dr. Murray's neurological examination of the plaintiff was normal. Dr. Murray's range of motion examination of the cervical spine revealed "forward flexion 45 degrees (45 normal).

extension 45 degrees (45 normal), rotation to the right 80 degrees (80 normal), rotation to the left 80 degrees (80 normal)...." In addition, there was negative Spurling's sign, no tenderness indicated and the cervical alignment strength and cervical stability were all normal.

Dr. Murray's range of motion examination of the left shoulder revealed "forward elevation 180 degrees (180 normal), abduction to 180 degrees (180 normal), external rotation is 65 degrees (65 normal), and internal rotation is to mid-thoracic (MT normal). [p]assive range of motion is forward elevation to 180 degrees (180 normal), abduction to 180 degrees (180 normal), external rotation to 90 degrees (90 normal) and internal rotation 60 degrees (60 normal." In addition, the impingement test, apprehension test, speed test and O'brien test were negative bilaterally and muscle strength was normal throughout.

Dr. Murray diagnosed Plaintiff with a cervical sprain/strain and left shoulder sprain/strain that were resolved. He added that the injuries sustained in the accident report are causally related but he added that "[a]fter a review of the medical records and my physical examination it is my opinion that the diagnosis is supported by the medical records provided and the syptomatology presented by the [plaintiff]." He goes on to state that the plaintiff "has reached an end point in orthopedic care at this time as she indicated she is feeling better, she is no longer treating and there are no objective findings on today's exam." He concludes by stating that there "is no objective evidence of orthopedic disability or residuals" and that this evaluation is based upon the history given by the [plaintiff], the objective medical findings during the examination and information obtained from the review of prior medical records presented..."

Defendants also submit Dr. Frauff's report dated January 21, 2011. Dr. Frauff's review finds " [e]valuation severely limited as only a single imaging plane and sequence is provided" and the image quality was "severely limited by the large field of view, poor resolution and poor signal to noise ratio of the images. However, not withstanding the above, Dr. Frauff found the MRI of the left shoulder "within normal limits". He goes on to state that "[n]o rotator cuff tear is seen...[nor] fracture, dislocation or laberal tear." He further states that he "disagree[s] with Dr. Leydon, as no rotator cuff tear is seen." Therefore, in his opinion, "there are no findings on this study, which are causally related to the accident on 8/21/07."

Defendants next submit Plaintiff's unsigned EBT transcript. Plaintiff objects, arguing

that the EBT transript is in inadmissible form under CPLR 3116(a). The transcript will nevertheless be considered in this matter, as "an unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion." *Morchik v. Trinity Sch.*, 257 AD2d 534, 536 (1st Dept. 1999).

Plaintiff testified that at the time of the accident, she was employed at Toucan Partners as a loan processor. Due to the accident she testified that she missed two weeks of work. When she returned to Toucan Partners after the accident she would leave her job at 4:30 instead of 6:00 so she could make it to physical therapy. She did this four days a week for seven months. She testified that she was fired from Toucan Partners in August 2008 because she was "not able to work the full amount of hours anymore." She also testified that at the time of the accident she was employed in Miss Love's Beauty World, but stopped working there in August 2007 because due to the accident, she "could no longer braid hair." She testified that a doctor advised her "[a]t the time around the accident" to stop working at the beauty salon since it would place a "strain on [her] shoulder but afterwards, I decided on my own not to go back because I knew I would have to keep stopping on somebody's hair."

(2) Plaintiff's Opposition

In opposition, the plaintiff submits an affidavit from chiropractor Dr. Michael Minick, D.C., an affirmation from radiologist Dr. Joseph Leadon certifying the plaintiff's left shoulder and cervical spine MRI, uncertified Beth Israel Hospital records, and plaintiff's EBT transcript.

In Dr. Minick's initial examination on August 24, 2007, Plaintiff's cervical spine range of motion revealed flexion 40 degrees (50 degrees normal), extension 20 degrees (60 degrees normal), right rotation 50 degrees (80 degrees normal), left rotation 30 degrees (80 degrees normal), left and right lateral flexion 20 degrees (45 degrees normal). He goes on to state that to "a reasonable degree of chiropractic certainty, this range of motion testing was objectively....by a computerized digital dual inclinometer...and the findings are consistent with cervical disc injuries causally related to the accident of August 21, 2007." Dr. Minick further states that the plaintiff had an MRI of her cervical spine conducted on September 30, 2007 that revealed a bulging disc

at C4-5 and a MRI of her left shoulder conducted the same day that revealed a tear of the rotator cuff. He also stated that the plaintiff underwent and EMG of the lower extremities at his office and it revealed "left C5 radiculopathy."

Dr. Minick's most recent examination of Plaintiff was on July 26, 2011. At the examination the plaintiff complained of pain to her neck and left shoulder. Dr. Minick's most recent range of motion testing on plaintiff's cervical spine revealed flexion 33 degrees (50 degrees normal), extension 36 degrees (60 degrees normal), left lateral flexion 34 degrees (45 degrees normal) and right lateral flexion 25 degrees (45 degrees normal). He opines that to "a reasonable degree of chiropractic certainty, this range of motion testing was objective in that movements were measured by a computerized digital dual inclinometer...and the findings are consistent with [plaintiff's] cervical bulging and radiculopathy which are causally related to the accident of August 21, 2007."

In further opposition to defendant's motion plaintiff submits plaintiff's uncertified Beth Israel Hospital records and the affirmation of radiologist Dr. Joseph Leadon certifying plaintiff's cervical spine and left shoulder MRI reports conducted on September 30, 2007. These MRI reports are admissible, since defendants' expert Dr. Murray affirmed that he reviewed plaintiff's left shoulder and cervical spine MRI report, discussed the results and relied on those reports, amongst others listed, to reach his diagnosis that plaintiff's "cervical sprain/strain" and "left shoulder sprain/strain" were "resolved" and that the plaintiff did not demonstrate "objective evidence of orthopedic disability or residuals. Thus, Dr. Leadon's cervical spine and left shoulder MRI reports are admissible "because they were reviewed by defendants' expert.....in reaching his opinion." *Engles v. Claude*, 39 A.D.3d 357 (1st Dept. 2007) citing *Thompson v. Abbasi*, 15 A.D.3d 95 (1st Dept. 2005). However, Plaintiff's uncertified Beth Israel Hospital records are inadmissible, since Defendants' experts did not submit those unsworn reports with their own reports or expressly rely on them in reaching their own conclusions. *Clemmer v. Drah Cab Corp.* 74 A.D.3d 660, 662 (1st Dept. 2010).

Dr. Leadon's impression of plaintiff's cervical spine MRI is "1. Straight cervical spine that may be due to muscle spasm" and "2. Bulging disc at C4-C5." As to plaintiff's left shoulder MRI Dr. Leadon states that his impression is "[a]bnormal signal in the lateral aspect of the

rotator cuff plus a small amount of fluid in the subdeltiod are consistent with a tear of the rotator cuff.

(3) Discussion

While Defendants may have satisfactorily carried their burden of proving entitlement to judgment as a matter of law, in light of the above admissible evidence, Plaintiff has demonstrated an issue of fact as to whether she suffered a permanent serious injury in accordance with New York Insurance Law §5102(d). "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). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment. *Bradley v. Soundview Healthcenter*, 4 A.D.3d 194 (1st Dept. 2004); *Lewis v. Capalbo*, 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 452 [2001]). In addition, although the Court recognizes that Plaintiff did not submit any evidence regarding her range of motion as to her left shoulder, "[s]ince plaintiff established that at least some of [her] injuries meet the 'no-fault' threshold, it is unnecessary to address whether [her] proof with respect to other injuries [s]he allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment." *Linton v Nawaz*, 14 N.Y.3d 821, 822 (2010). Defendants also contend that Plaintiff has not adequately explained her gap in treatment. Nevertheless, Dr. Miniek's affidavit adequately explained plaintiff's gap in treatment by stating that she "reached maximum medical improvement" and "further treatment would only provide temporary relief or palliative care." See, *Salman v Rosario*, 87 AD.3d 482 (1st Dept. 2010)

Plaintiff has failed, however, to create a triable issue of fact as to whether she suffered a "non-permanent" injury that prevented her from performing "substantially all" of her usual and customary activities for 90 of the first 180 days following the accident. Plaintiff failed to meet her burden by not submitting any contemporaneous medical evidence connecting her alleged inability to perform her daily activities with the alleged accident related injuries. *See Gorden v. Tibulcio*, 50 A.D.3d 460 (1st Dept. 2008). Moreover, the fact that Plaintiff missed more than 90

days of work is not determinative. See *Simpson v Montag*, 81 A.D.3d 547 (1st Dept. 2011); *Ortiz v. Ash Leasing, Inc* 63 A.D.3d 556 (1st Dept. 2009); *Uddin v. Cooper*, 32 A.D.3d 270 (1st Dept. 2006). Furthermore, "[w]ithout any substantiating documentation or affidavit from the employer, plaintiff's vague and self-serving deposition testimony, that [s]he did not return to work until after the accident, does not suffice to show a "serious injury" for purposes of the 90/180 day rule *Dembele v. Cambisaca*, 59 A.D.3d 352, 353 (1st Dept. 2009) quoting *Burke v Torres*, 8 AD3d 118, 119 (1st Dept. 2004). Dr. Minick's statements are "too general to constitute the requisite competent medical proof to substantiate the claim." *Mercado-Arif v. Garcia*, 74 A.D.3d 446, 447 (1st Dept. 2010).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch Defendant's motion for summary judgment, dismissing Plaintiff's "90/180" claim under New York Insurance Law §5102 is hereby GRANTED, and it is further,

ORDERED, that the remaining branches of Defendants' motion for summary judgment are hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: January 20, 2012

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