Rivera v Annan
2012 NY Slip Op 33691(U)
January 3, 2012
Sup Ct, Bronx County
Docket Number: 303931/09
Judge: Sharon A.M. Aarons
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 FILED Jan 05 2012 Bronx County Clerk

1-5-12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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NATASHA RIVERA,

Plaintiff,

-against-

OWUSU ANNAN and KINETIC TRANSIT LLC,

Defendants.

----------X

Index No. 303931/09
Submission Date 10/13/1

DECISION and ORDER

Present:
Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion/Order to Show Cause and Exhibits Annexed	1
Answering Affidavit and Exhibits	2
Reply Affidavit and Exhibits	3

Upon the foregoing papers the Decision and Order on this motion is as follows:

Defendants' motion for summary judgment pursuant to CPLR § 3212 dismissing the complaint on the grounds that the plaintiffs did not sustain a serious injury within the meaning of the no-fault law set forth in New York State Insurance Law § 5102(d) is decided in accordance with the annexed decision and order of the same date.

Dated: January 3, 2012

SHARON A. M. AARONS, J.S.C.

JAN 05 2012

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Upon the foregoing papers the Decision and Order on this motion is as follows:

Defendants moved for summary judgment pursuant to CPLR § 3212 dismissing the complaint on the grounds that the plaintiffs did not sustain a serious injury within the meaning of the no-fault law set forth in New York State Insurance Law § 5102(d). Defendants' motion is denied.

Plaintiff commenced this action seeking compensation for injuries sustained as a result of being struck by a yellow cab while crossing the street on March 30, 2009.

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. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316

(1985). In the present action, the burden rests on the defendant to establish, by the submission of evidentiary proof in admissible form, that the plaintiffs did not suffer a "serious injury." *Lowe v. Bennet*, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701, 512 N.Y.S.2d 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, in opposition to a defendant's motion, to submit proof of serious injury in admissible form. *Alvarez*, 68 N.Y.2d at 326; *Licari*, 57 N.Y.2d at 235, *Lopez v. Senatore*, 65 N.Y.2d 1017, 494 N.Y.S.2d 101 (1985); *Reid v. Wu*, 2003 WL 21087012, 2003 N.Y. Slip Op. 50816U, * 2 (Sup. Ct., Bronx County 2003).

In support of the motion, defendants submitted copies of the pleadings; reports from Dr. Edward Weiland, a physiatrist and neurologist, Dr. Gabriel Dassa, an orthopedist; and plaintiff's deposition transcript.

Dr. Edward Weiland performed an independent neurological of plaintiff's shoulders, cervical, thoracic and lumbar spine on July 14, 2011, qualifying normal range of motion to plaintiff's actual range of motion, with the use of a goniometer. He found all the aforementioned regions to be within normal limits. At the examination, plaintiff complained of migraine type headaches, pain to the neck, mild pain to the thoracic and lower back radiating to the right para-coccygeal region and right sciatic discomfort from time to time. She also complained of pain with light palpation over the mid and lumbar paraspinous regions which he opined was subjective. Dr. Weiland diagnosed her as having migraine headache disorder and cervical, thoracic and lumbar sprain/strain that had resolved. He concluded that she has no neurological residual or permanency and is able to work and perform all activities of daily living.

Dr. Gabriel Dassa conducted an orthopaedic examination of plaintiff on June 30, 2010, qualifying normal range of motion to plaintiff's actual range of motion in the cervical and lumbar spine, left shoulder, and left knee, with the use of a goniometer. Plaintiff complained that her "back is off," walks with a limp, chronic pain in the right thoracic and lumbar regions, left knee pain and neck pain into the right trapezius with weakness of the right arm. Dr.Dassa found plaintiff's cervical and thoracolumbosacral spine, shoulders, knees, elbows to be normal, except for tenderness in the coccyx to palpation. The neurological examination was normal. Dr. Dassa diagnosed plaintiff as having cervical and lumbar spine strain/sprain, and coccyxicodynia. He stated that coccyxicodynia is a palpable tenderness without orthopedic impairment.

Plaintiff testified at her deposition that she was treated and released at NYU and was thereafter treated by Dr. Elton Strauss who prescribed physical therapy. About two weeks after the accident she was able to take her dog out to relieve himself. She returned to work as an operating room nurse on a part-time basis in September and full-time in October 2009. Her co-workers assist her at work by lifting heavy objects. She discontinued physical therapy because she was too tired to go after work. She testified that there was nothing that she was unable to do at the time of the deposition that she could do prior to the accident. She experiences pain after walking for twenty to thirty minutes.

She stated in her bill of particulars that she was confined to bed and home for two weeks and was unable to attend to her regular duties as an operating nurse for five months.

Defendants met their burden of proof that plaintiff did not sustain serious injury as a result of the accident on March 30, 2009.

In opposition, plaintiff submitted her own affidavit; an certified copy of the police report; uncertified copy of medical records from Jacobi Hospital; certified medical record of Dr. Ilya Smuglin; affirmations by Dr. Elton Strauss, an orthopedist, Dr. Joseph Margulies, an orthopedist, Ji-Hye Choi, licensed acupuncturist, Ron Amidror, chiropractor, Osafradu Opam; unaffirmed MRI report; employment information from NYC Human Resources Administration; and plaintiff's deposition transcript.

Plaintiff stated in her affidavit that as a result of the accident, she could not do the physical requirements of her job, she cancelled her gym membership and could not perform many of her regular activities at home. She stated that for months she used a cane and only left her apartment for doctor's appointment and to tend to her dog. Since the accident she has been unable to lift heavy objects and to do her regular activities like laundry cleaning, carrying laundry and moving things in her apartment. She experiences right-side stiffness and pain to her neck, intermittent muscle spasms in her middle and lower back, traveling pain on her right leg which causes her to limp.

Dr. Joseph Margulies examined plaintiff on June 15, 2009, quantifying her range of motion in the cervical and lumbar spine, with normal range of motion. He found that she had limitations in the cervical spine from 10 to 15 degrees and in the lumbar spine from 15 to 40 degrees. He opined that the injuries were a result of the accident. He stated that while she was unable to return to work as a scrub nurse, she could continue with activities of daily living.

Dr. Elton Strauss stated in an affirmation dated September 23, 2011, that he first saw plaintiff on April 2, 2009, for the injuries she sustained as a result of being struck by the car. She complained of weakness in her neck, back, lower back, chest wall, right arm, and right leg;

nausea, headaches, dizziness and numbing sensation through the right side of her body. He conduct an examination in which he found that she had limitation in her cervical, thoracic and lumbar spine, he did not compare her range of motion with normal range of motion. He reported that she had spasm in her lumbar and sacral spine. He prescribed medication and physical therapy. Plaintiff showed slight improvement at the end of June 2009, however, she was unable to return to work. Dr. Strauss also reported that as a result of the accident plaintiff is unable to participate in household chores or physically activities that she was accustomed to.

Dr. Strauss re-examined plaintiff on July 7, 2011, quantifying her range of motion in the neck shoulder and thoraciclumbar spine, with normal range of motion with the use of a goniometer. He found that she had limitation in all the aforesaid regions from 15 to 25 degrees. He diagnosed her as having subluxation of the coccyx, cervical sprain, muscle spasms, chronic pain and disability in the cervical, thoracic and lumbar spine, left hip joint right upper extremities and coccyx region. He opined that all the injuries were causally related to the accident. Here, plaintiff raised a triable issue of fact as whether the limitation in the range of motion in her back constitutes serious injury.

Only exhibits in acceptable form will be considered by the court. *Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991); *Copeland v. Kasalica*, 6 A.D.3d 253, 775 N.Y.S.2d 276 (1st Dept. 2004); *Shinn v. Catanzaro*, 1 A.D.3d 195, 767 N.Y.S.2d 88 (1st Dept. 2003). A physician may not rely upon unsworn medical finding of other doctors. *Conception v. Walsh*, 38 A.D.3d 317, 831 N.Y.S.2d 402 (1st Dept. 2007); *Vallejo v. Builders for Family Youth, Diocese of Brooklyn*, 18 A.D.3d 741, 795 N.Y.S.2d 712 (2nd Dept. 2005) (Court held that plaintiff's

treating physician impermissibly relied upon unsworn medical findings). As such, the records from Ji-Hye Choi, licensed acupuncturist, Ron Amidror, chiropractor will not be considered.

Plaintiff has established a triable issue of fact as to whether she sustained serious injury. Her treating physician's, Dr. Strauss, opinion is entitled to equal weight as that of defendants' experts. *See Borja v. Delarosa*, 2011 NY Slip Op 8667 (1st Dept. December 1, 2011). Having found that plaintiff established that some of her injuries met the no-fault threshold, it is unnecessary to address whether her proof with respect to other injuries would have been sufficient to withstand defendants' summary judgment motion. *Linton v. Nawaz*, 14 N.Y.3d 821, 926 N.E.2d 593, 900 N.Y.S.2d 239 (2010).

Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: January 3, 2012

SHARON A. M. AARONS, J.S.C.