

Boateng v Ye Yiyan

2012 NY Slip Op 33883(U)

March 14, 2012

Supreme Court, Bronx County

Docket Number: 16620/07

Judge: Kenneth L. Thompson, Jr.

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CASEDISP 3/26/12
Serious Injury Threshold not met

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
IRENE BOATENG,

Index No. 16620/07

Plaintiff,

-against-

DECISION/ORDER

YE YIYAN, CHEN PING and JUAN DUME,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant's JUAN DUME motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff has not suffered a "serious injury" and on the grounds that Plaintiff cannot establish liability on his part and Defendants' YE YIYAN and CHEN PING cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff has not suffered a "serious injury" are consolidated for Decision herein.

Defendant's JUAN DUME motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff has not suffered a "serious injury" is GRANTED.

Defendant's JUAN DUME motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff cannot establish liability on his part is DENIED AS MOOT.

Defendants' YE YIYAN and CHEN PING cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff has not suffered a "serious injury" is GRANTED.

Plaintiff claims that as a result of a car accident involving Defendants, she suffered, among other things, a disc herniation at C5/C6, cervical radiculopathy and an oblique tear of the lateral meniscus of the left knee.

Serious Injury

'[S]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member' significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. Ins. Law § 5102(d).

The purpose of the statute is "to weed out frivolous claims and limit recovery to significant injuries." Dufel v. Green, 84 NY2d 795, 798. As such, the Court has determined that the phrases "permanent loss of use," "permanent consequential limitation" and "significant limitation of use" must be interpreted in terms of "total loss." Oberly v. Bangs Ambulance Inc., 96 NY2d 295, 299. Furthermore, the word "significant" as it relates to "limitation of use of a body function or system," refers to more than "a minor, mild or slight limitation of use." Licari v. Elliott, 57 NY2d 230, 236. Also, the phrase "substantially all" as it relates to the 90/180, should be "construed to mean that the person has been curtailed from performing his or her usual activities to a

great extent rather than some slight curtailment.” Id. Although no-fault insurance is meant to allow plaintiffs to recover for non-economic injuries in appropriate cases, the Legislature also “intended that the court first determine whether or not a *prima facie* case of serious injury has been established which would permit plaintiff to maintain a common-law cause of action in tort.” Id. at 237.

Summary Judgment

To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form... One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require trial of material questions of fact on which he rests his claims . . .

Zuckerman v. City of NY, 49 NY2d 557, 562 (citations omitted).

Defendants have met their *prima facie* burden of showing that neither Plaintiff sustained a “serious injury” with the affirmed reports of their neurologists, Dr. Ravi Tikoo and Dr. Edward M. Weiland; and orthopedists, Dr. Andrew B. Weiss and Dr. S. Farkas. See Meric v. Cancela, 275 AD2d 309 (affirmed reports of neurologist and orthopedist who examined plaintiff in automobile negligence action and found she had no disability established *prima facie* case that plaintiff had not sustained serious injury); Barry v. Valerio, 72 AD3d 996 (finding that defendant had met its *prima facie* burden where the neurologist “examined the plaintiff and concluded that he had a normal neurologic examination”); Turner v Benycol Transp. Corp., 78 AD3d 506 (finding that defendant had met its *prima facie* burden where its orthopedic surgeon “reported normal ranges of motion in all tested body areas and concluded that plaintiff’s injuries resolved without permanency”).

Although the Plaintiffs would bear the burden at trial of proving that they suffered a serious injury, in this motion for summary judgment the Defendant bears the initial burden of establishing that Plaintiff did not meet the serious injury threshold. Where defendant establishes a prima facie case that Plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), the burden is then shifted to the Plaintiff to overcome defendant's motion by demonstrating that she sustained a serious injury. Gaddy v. Eyer, 79 NY2d 955. The Court finds, however, that Plaintiff has failed to raise a triable issue of fact as to whether she suffered a serious injury for several reasons.

Bulge Alone is Insufficient

Although "[a] bulging or herniated disc may very well be a serious injury within the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition . . . a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury." Arjona v. Calcagno, 7 AD3d 279; see also Pommells v. Perez, 4 NY3d 566, 574 (holding that "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury"); Howell v. Reupke, 16 AD3d 377 (holding that "[t]he mere existence of a bulging or herniated disc is not conclusive evidence of a serious injury in the absence of any objective evidence of a related disability or restriction").

Inadmissible Reports

The Court may not consider Dr. Mitchell M. Zeren's Evaluations and Follow-ups, Dr. Arden M. Kaisman's Consultations and Reports, Dr. Jeffrey N. Lang's MRI Reports,

Dr. Jeffrey Chess's MRI Reports, the Jacobi Medical Center, the Concourse Chiropractic Bills, Hospital Records or Ronni Myers's September 26, 2011, Correspondence because none of these proffers are either affirmed, sworn to or certified. See Kramer v. Danalis, 62 AD3d 583 (holding that a physician's report that was unsworn and unsigned was insufficient to defeat summary judgment); Uribe-Zapata v. Capallan, 54 AD3d 936, 937 (holding that "[t]he magnetic resonance imaging reports concerning the plaintiff's lumbar spine and right knee lacked probative value since they were unaffirmed").

Nor, may Dr. Harold James rely on any of these Records or Reports as a basis for his finding of a "serious injury." See Merisca v. Alford, 243 AD2d 613, 614 (holding that "[c]onclusions, even of an examining doctor, which are unsupported by acceptable objective proof, are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury"); see also Dominquez-Gionta v. Smith, 306 AD2d 432; Philippe v. Ivory, 297 AD2d 666.

No limitations

Absent these inadmissible proffers, Plaintiff has failed to submit competent medical evidence, contemporaneous with the subject accident, that reveal that she suffered *any* injuries or limitations as a result of the subject accident. Compare Christian v. Waite, 61 AD3d 581; See Posa v Guerrero, 2010 NY Slip Op 7730, **2; Srebnick v Quinn, 75 AD3d 637; Catalano v Kopmann, 73 AD3d 963; Sirma v. Beach, 59 AD3d 611; Valentin v. Pomilla, 59 AD3d 184.

The earliest admissible record—proffered by Plaintiff—regarding this issue of "serious injury" is Dr. Ronald G. Lanfranchi's April 12, 2006, IME of Plaintiff. Although

the doctor opined that Plaintiff was partially disabled, the doctor found that the ranges of motion in her cervical and lumbar region were within normal limits. And concluded that she suffered from lumbosacral sprain/strain, which is not a "serious injury." See Washington v. Cross, 48 AD3d 457 (finding that neither "sprains and/or strains" are "serious injuries").

No causation

Assuming *arguendo* that the MRI Reports and the Operative Reports were admissible they are still unavailing to Plaintiff since the doctors who authored those Reports failed to connect their findings to the accident at issue. See Daisernia v. Thomas, 12 AD3d 998 (dismissing plaintiff's complaint because she "fail[ed] to causally connect her . . . injury to the accident"); Foley v. Karvelis, 276 AD2d 666, 667 (dismissing plaintiff's complaint because "[h]er doctor failed to causally connect that injury to the subject accident"); Ray v. Ficchi, 178 AD2d 988, 989 (dismissing plaintiff's complaint because "the affidavit of plaintiff's chiropractor failed to connect causally plaintiff's alleged injury to the motor vehicle accident").

Gap in treatment

Also, absent admissible proffers, there is no indication that Plaintiff underwent therapy or sought treatment between Dr. Lanfranchi's April 12, 2006, IME and Dr. Harold Jame's September 26, 2011, Examination of Plaintiff in response to the motions. "Where there is a lengthy gap in treatment, the gap must be explained to dispel the suggestion that any injury plaintiff sustained has resolved, thus eliminating any possibility that the plaintiff sustained a 'serious injury'." Lacen v. Copeland, 2011 NY Slip Op 31710U, *11 (citing to Pommells v. Perez, 4 NY3d 566); see also Ayala v.

Bassett, 57 AD3d 387, 389 (stating that “the unexplained gap in treatment . . . for each plaintiff undermined their respective claims of serious injury based on allegations of permanent injury”); Pitter v. Ceesay, 2009 NY Slip Op 51488U, **1 (stating that “[t]he failure of plaintiff . . . or her physicians to address or explain the gap in treatment is fatal to said plaintiff’s serious injury claims under the ‘significant limitation’ and ‘permanent consequential limitation’ categories of Insurance Law § 5102(d)”).

90/180

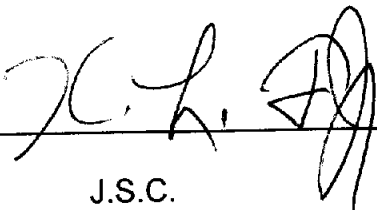
Plaintiff has also failed to proffer sufficient evidence to show that she was incapable of performing her normal activities for 90 out of the ensuing 180 days after the accident given that there is no indication in the record that a doctor, or any other health care professional, mandated that Plaintiff confine himself to her home for any period of time or that she refrain from any other activities. See Glover v. Capres Contr. Corp., 61 AD3d 549, 550 (holding that “[p]laintiff’s self-serving deposition testimony regarding her inability to work for a period of time is insufficient to establish that she was prevented from performing her usual and customary activities for at least 90 of the 180 days following the accident”); Ryan v. Xuda, 243 AD2d 457-58; Traugott v. Konig, 184 AD2d 765, 766.

Her subjective complaints of pain do not countenance a different result. See, e.g., Christian v. Waite, 61 AD3d 581, 582; Guadalupe v. Blondie Limo, Inc., 43 AD3d 669, 670; Park v. Champagne, 34 AD3d 274, 276; see also Arjona, supra at 280 (finding that “permanent problems in standing, sitting, bending and lifting” where “a minor, mild or slight limitation of use . . . insufficient to constitute a serious injury within the definition of the no-fault statute”); see also Alloway v. Rodriguez, 61 AD3d 591, 592

(holding that "plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities for at least 90 days of the 180 days following the accident"); Becerril v. Sol Cab Corp., 50 AD3d 261, 262; Nelson v. Distant, 308 AD2d 338, 339-40.

The foregoing shall constitute the decision and order of this Court.

Dated: MAR 14 2012



J.S.C.

KENNETH L THOMPSON, JR.