

Adeleke v Frederic

2013 NY Slip Op 30293(U)

January 24, 2013

Sup Ct, Queens County

Docket Number: 4710/11

Judge: Howard G. Lane

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tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 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 to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit 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. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law §

5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Defendants established a prima facie case that plaintiffs did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Adeleke Omatara's lumbar spine taken on September 24, 2010 revealed an impression of: disc degeneration at L2-L3 and L4-L5, disc bulge at L2-L3, left posterolateral disc herniation, L4-L5. He opines that the process of disc degeneration "indicates a chronic process of longstanding duration". Dr. Rothpearl concludes that it is unrelated to the accident and the disc bulges are related to the degenerative process.

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Adeleke Omatara's cervical spine taken on September 13, 2010 revealed an impression of: multilevel disc degeneration and disc bulges at C4-C5 and C5-C6 with spondylosis at C5-C6. He opines that the "presence of disc degeneration indicates a chronic process of longstanding duration". Dr. Rothpearl concludes that the disc degeneration is unrelated to the accident.

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Adeleke Omatara's right shoulder taken on September 13, 2010 revealed an impression of: "[d]egenerative

joint disease of the acromioclavicular joint with secondary encroachment on the supraspinatus muscle-tendon complex. Tendonitis supraspinatus tendon. Subcortical cyst humeral head." Dr. Rothpearl opines that the presence of disc degeneration indicates "a chronic process of longstanding duration". He concludes that the disc degeneration is unrelated to the accident and that the tendonitis and cyst are "unrelated to acute traumatic sequelae".

The affirmed report of defendants' independent examining orthopedist, Sanford R. Wert, M.D., indicates that an examination of Omatara O. Adeleke conducted on July 20, 2012 revealed an impression of: cervical spine sprain/strain, lumbar spine sprain/strain, and right shoulder sprain. He opines that there is no permanency. He opines that plaintiff may continue to work full duty at her usual occupation. Dr. Wert concludes that no further orthopedic treatment or testing are necessary.

The affirmed report of defendants' independent examining neurologist, Daniel J. Feuer, M.D., indicates that an examination conducted on July 9, 2012 revealed an impression of: a neurological examination within normal limits. He opines that there is no need for further diagnostic treatment or testing. Dr. Feuer concludes that plaintiff is neurologically stable to engage in full active employment and activities of daily living without restrictions.

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Janet Jones' lumbar spine taken on September 23, 2010 revealed an impression of: [m]inimal disc degeneration at L2-L3 with minimal disc bulging. No evidence of disc herniation or neural encroachment". He opines that the "presence of disc degeneration indicates a chronic process of longstanding duration". Dr. Rothpearl concludes that the disc bulges are related to the degenerative process.

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Janet Jones' cervical spine taken on September 14, 2010 revealed an impression of: straightening or lordosis, disc bulges at C2-C3 and C3-C4, and no evidence of disc herniation or neural encroachment. He opines that the "presence of disc degeneration indicates a chronic process of longstanding duration." He concludes that the disc degeneration is unrelated to the accident and the disc bulges are related to the degenerative process.

The affirmed report of defendants' independent evaluating radiologist, Allen Rothpearl, M.D., indicates that an evaluation of an MRI of plaintiff, Janet Jones' right shoulder taken on September 24, 2010 revealed an impression of: "[t]endonitis of the supraspinatus tendon". Dr. Rothpearl concludes that it is a nonspecific inflammatory condition which is not related to acute traumatic sequelae".

The affirmed report of defendants' independent examining orthopedist, Sanford Wert, M.D., indicates that an examination of plaintiff Janet Jones on July 6, 2012 revealed an impression of no accident related orthopedic permanency with a diagnosis of resolved cervical spine sprain, contusion sprain, right shoulder resolved, resolved lumbosacral spine sprain. He opines that plaintiff may continue working in her pre-accident occupation without restriction. Dr. Wert concludes that no further orthopedic treatment or testing is medically necessary.

The affirmed report of defendants' independent examining neurologist, Daniel J. Feuer, M.D., indicates that an examination of plaintiff, Janet Jones conducted on July 9, 2012 revealed an impression of: a neurological examination which is within normal limits. He opines that there is no need for physical therapy or further diagnostic testing. Dr. Feuer concludes that plaintiff can engage in full active employment as well as full activities of daily living without restriction.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff, Omotara O. Adeleke's examination before trial transcript indicates that plaintiff Adeleke returned to work on the Monday morning following the accident and the plaintiff, Janet Jones' examination before trial transcript indicates that she did not stay home from work for longer than a week. Such evidence shows that the plaintiffs were not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiffs did not sustain a "serious injury". Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

B. Plaintiffs fail to raise a triable issue of fact

In opposition to the motion, plaintiffs submitted: an attorney's affirmation, an affirmation of plaintiff, Omotara O. Adeleke's physician, Andrew Dowd, M.D., and an affirmation of plaintiff, Janet Jones', physician, Andrew Dowd, M.D.

In his affirmations of plaintiffs, Dr. Andrew Dowd states that he reviewed medical records and MRI films of other doctors and affirms that he determined his diagnoses in part based on the MRI films and medical records of other doctors, however, no MRI films or medical records have been submitted to the court in competent and admissible form. The probative value of Dr. Dowd's affirmations is reduced by the doctor's reliance on MRI's and medical records that are not in the record before the court. Since Dr. Dowd's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (see, Constantinou v. Surinder, 8 AD3d 323 [2d Dept 2004], Claude v. Clements, 301 AD2d 432 [2d Dept 2003]; Dominquez-Gionta v. Smith, 306 AD2d 432 [2d Dept 2003]; Codrington v. Ahmad, 40 AD3d 799 [2d Dept 2007]).

Furthermore, plaintiffs' attorney's affirmation is not admissible probative evidence on medical issues, as plaintiffs' attorney has failed to demonstrate personal knowledge of the plaintiffs' injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Therefore, plaintiffs' submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the plaintiffs' Complaint is dismissed as to all categories based upon a failure to satisfy the no-fault threshold.

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: January 24, 2013

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Howard G. Lane, J.S.C.