

Hoyos v EAN Holdings, LLC

2013 NY Slip Op 33036(U)

November 25, 2013

Supreme Court, Queens County

Docket Number: 11814/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

ANCIZAR HOYOS, LUZ MARINA GOMEZ
HOYOS and MARIA ALCARAZ,
Plaintiffs,

Index No. 11814/11
Motion
Date September 23, 2013
and October 21, 2013

-against-

EAN HOLDINGS, LLC and BYONG K. KIM,
Defendants.

Motion
Cal. Nos. 46 and 59
Motion
Sequence No. 2 and 3

Papers
Numbered

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Upon the foregoing papers it is ordered that this motion by defendant, Byong K. Kim for summary judgment dismissing the complaint of plaintiffs, Ancizar Hoyos, Luz Marina Gomez Hoyos, and Maria Alcaraz, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102(d); and Ancizar Hoyos' motion for an order pursuant to CPLR 3212 dismissing the counterclaim against him and dismissing plaintiffs' Luz Marina Gomez Hoyos and Maria Alcaraz's actions on the ground that plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102(d), are hereby joined solely for the purposes of disposition of the instant motions and are decided as follows:

Upon the foregoing papers it is ordered that this motion by defendant, Byong K. Kim for summary judgment dismissing the complaint of plaintiffs, Ancizar Hoyos, Luz Marina Gomez Hoyos, and Maria Alcaraz, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on May 30, 2010. Defendant has submitted proof in admissible form in support of the motion for summary judgment for all three plaintiffs for all categories except for the ninth category of "90/180 days." Defendant submitted for all three plaintiffs, inter alia, affirmed reports from three physicians (an independent examining orthopedist, an independent examining neurologist, and an independent evaluating radiologist).

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must 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. Defendant established a prima facie case that plaintiffs did not suffer a "serious injury" as defined in Section 5102(d) for all categories except for the ninth category of "90/180 days."

Maria Alcaraz

The affirmed report of defendant's independent examining orthopedist, Edward Toriello, M.D., indicates that an examination of plaintiff on January 22, 2013 revealed a diagnosis of: post resolved hyperextension injury, resolved low back strain, and resolved right shoulder/ arm strain and there is no objective evidence of an orthopedic disability. He opines that there is no permanency and concludes that plaintiff is capable of her activities of daily living and working without restrictions.

The affirmed report of defendant's independent examining neurologist, Jean-Robert Desrouleaux, M.D., indicates that an

examination of plaintiff on January 21, 2012 revealed a diagnosis of: post traumatic headaches per history and status post cervical and lumbar sprain/strain resolved. He opines that there is no neurologic disability or permanent impairment. Dr. Desroleaux concludes that the neurological examination is normal and the prognosis is good.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Lumbar Spine taken on July 23, 2010 revealed an impression of: multilevel mild disc dessication, no focal disc herniations or annular bulges identified, and no evidence of spinal stenosis. Dr. Lastig concludes that there are no findings which can be attributed to the subject accident.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Cervical Spine taken on July 19, 2010 revealed an impression of: straightening and multilevel degenerative disc disease and a small midline herniation at C5-6 without evidence of cord compression. A further MRI report of Dr. Lastig in which he reviewed an MRI study of the cervical spine from April 28, 2003 enables him to conclude that the herniation at C5-C6 is pre-existing and not causally related to the subject accident.

Luz Marina Gomez Hoyos

The affirmed report of defendant's independent examining orthopedist, Michael Baskies, M.D., indicates that an examination of plaintiff on January 25, 2013 revealed a diagnosis of: resolved cervical spine sprain, resolved right shoulder sprain, resolved lumbar spine sprain, and normal right wrist exam. He opines that there is no objective evidence of disability or permanency. Dr. Baskies concludes that the plaintiff's prognosis is good.

The affirmed report of defendant's independent examining neurologist, Jean-Robert Desrouleaux, M.D., indicates that an examination of plaintiff on November 19, 2012 revealed a diagnosis of: normal neurological examination. He opines that there is no neurological disability or impairment. Dr. Desroleaux concludes that prognosis is good and plaintiff can work and perform activities of daily living without restrictions.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Right Shoulder taken on July 15, 2010 revealed an impression of: rotator cuff tendonopathy, no evidence of an osseous injury, and possible mild subdeltoid bursitis. Dr. Lastig concludes that there are no findings which can be attributed to the subject

accident and he sees no evidence of fracture, bone contusion, rotator cuff tear, or labral tear.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Thoracic Spine taken on June 28, 2010 revealed an impression of: multilevel degenerative disc disease, no focal disc herniations or annular bulges, and no evidence of cord compression or spinal stenosis. Dr. Lastig concludes that there are no findings which can be attributed to the subject accident and he sees no evidence of fracture, subluxation, or focal disc herniation.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Lumbar Spine taken on July 26, 2010 revealed an impression of: degenerative disc disease with mild dessication at the L4-L5 and L5-S1 levels and mild disc bulging at the L4-L5 level. Dr. Lastig concludes that there are no findings which can be attributed to the subject accident.

Ancizar Hoyos

The affirmed report of defendant's independent examining orthopedist, Michael Baskies, M.D., indicates that an examination of plaintiff on January 25, 2013 revealed a diagnosis of: resolved cervical spine sprain, resolved right elbow sprain, and resolved lumbar spine sprain. He opines that there is no evidence of disability or permanency. Dr. Baskies concludes that the plaintiff's prognosis is good.

The affirmed report of defendant's independent examining neurologist, Jean-Robert Desrouleaux, M.D., indicates that an examination of plaintiff on November 19, 2012 revealed a diagnosis of: normal neurological examination and status post cervical and lumbar sprain/strain resolved and no evidence of radiculopathy. He concludes that there is no neurological disability or impairment due to the accident.

The affirmed report of defendant's independent evaluating radiologist, Steven Lastig, M.D., indicates that an MRI of the Lumbar Spine taken on July 19, 2010 revealed an impression of: multilevel degenerative disc disease and small shallow disc protrusions and no evidence of spinal stenosis.

Defendant has failed to raise a triable issue of fact as to the 90/180-day claim for all three plaintiffs. When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a

great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendant's experts failed to render an opinion on the effect the injuries claimed may have had on the plaintiffs for the 180 day period immediately following the accident. The reports of the IMEs relied upon by defendant fail to discuss this particular category of serious injury and further, the IME's took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendant has failed to meet its initial burden of proof and, therefore, has not shifted the burden to plaintiffs to lay bare their evidence with respect to this claim. As defendant has failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiffs; papers in opposition to defendant's motion on this issue were sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005])). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiffs did not sustain a "serious injury" for all categories except for the ninth category of "90/180 days."

Thus, the burden then shifted to plaintiffs 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, 57 NY2d 230, supra).

B. Plaintiff fails to raise a triable issue of fact as to plaintiff, Maria Alcaraz.

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affidavit of plaintiff's chiropractor, Kris H. Rusek, D.C., an unsworn MRI report, and an unsworn narrative report of plaintiff's physician, Deepika Bajaj, M.D.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (see, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]; McLoyrd v. Pennypacker, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiff's examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Plaintiff failed to submit a medical affirmation detailing a

recent examination of plaintiff, a necessary requirement to rebutting defendants' prima facie case (see, Sauer v. Marks, 278 AD2d 301 [2d Dept 2000]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]; Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The most recent medical evidence provided only dates back to 2010 and the instant motion was made on May 18, 2013.

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

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

Accordingly, the plaintiff, Maria Alcaraz's Complaint is dismissed as to all categories except for the ninth category of "90/180 days."

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.

C. Plaintiff raises a triable issue of fact as to plaintiff, Ancizar Hoyos.

In opposition to the motion, plaintiff submitted, inter alia: an attorney's affirmation and affidavit of plaintiff's chiropractor, Marcus R. Rusek, D.C.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations of the cervical and lumbar spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating chiropractor, Marcus R. Rusek, D.C. sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident

to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitations in the cervical and lumbar spines. Dr. Rusek's affidavit details plaintiff's symptoms, including, neck and lower back pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the subject motor vehicle accident. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affidavit of Dr. Rusek provides that a recent examination by Dr. Rusek on May 16, 2013 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the cervical and lumbar spines. He further opines that the plaintiff suffers from a moderate partial permanent disability and the injuries are causally related to the subject motor vehicle accident. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his cervical and lumbar spines, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

D. Plaintiff raises a triable issue of fact as to plaintiff, Luz Marina Gomez Hoyos.

In opposition to the motion, plaintiff submitted, inter alia: an attorney's affirmation and an affidavit of plaintiff's chiropractor, Ted Rusek, D.C.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations of the cervical spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating chiropractor, Marcus R. Rusek D.C. sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident

to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitations in the cervical spine. Dr. Rusek's affidavit details plaintiff's symptoms, including, neck and lower back pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the subject motor vehicle accident. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affidavit of Dr. Rusek provides that a recent examination by Dr. Rusek on May 16, 2013 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the cervical spine. He further opines that the plaintiff suffers from a moderate partial permanent disability and the injuries are causally related to the subject motor vehicle accident. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her cervical spine, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

E. Defendant Ancizar Hoyos' motion pursuant to CPLR 3212.

That branch of Ancizar Hoyos' motion for an order pursuant to CPLR 3212 dismissing plaintiffs' Luz Marina Gomez Hoyos and Maria Alcaraz's actions on the ground that plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102(d) is hereby decided as follows:

As movant relies on the same arguments submitted on the threshold motion of defendant Byong K. Kim and as plaintiff Maria Alcaraz relies on the same arguments submitted in opposition to the threshold motion of defendant Byong K. Kim, and as it has been determined in the above portion of this decision that plaintiff, Maria Alcaraz's Complaint is dismissed as to all categories except for the ninth category of "90/180 days," the instant motion of Ancizar Hoyos regarding plaintiff Maria Alcaraz is granted to the extent that Maria Alcaraz's Complaint is dismissed as to all categories except for the ninth category of "90/180 days".

As movant relies on the same arguments submitted on the threshold motion of defendant Byong K. Kim and as plaintiff Luz Marina Gomez Hoyos relies on the same arguments submitted in

opposition to the threshold motion of defendant Byong K. Kim, and as it has been determined in the above portion of this decision that there is a triable issue of fact regarding Luz Marina Gomez Hoyos as to all categories of serious injury asserted, the instant motion of Ancizar Hoyos regarding the serious injuries of plaintiff Luz Marina Gomez Hoyos is denied.

That branch of defendant on the counterclaim, Ancizar Hoyos' motion seeking to dismiss the counterclaim against him is denied as defendant on the counterclaim, Ancizar Hoyos has failed to set forth any facts, law, or arguments whatsoever in support of such relief in his initial moving papers, and has failed to even set forth the nature of the counterclaim against him.

This constitutes the decision and order of the Court.

Dated: November 25, 2013

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Howard G. Lane, J.S.C.