

**Stoian v Joseph**

2014 NY Slip Op 30399(U)

January 31, 2014

Supreme Court, Queens County

Docket Number: 13199/12

Judge: Howard G. Lane

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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 plaintiff did not suffer a "serious injury" as defined in Section 5102(d).***

The affirmed report of defendants' independent examining orthopedist, John H. Buckner, M.D., indicates that an examination of plaintiff on March 1, 2013 revealed a diagnosis of: a contusion of the right thigh with minimal residuals, an abrasion of the left knee superimposed on pre-existing tricompartmental gonarthrosis of the left knee, and an unrelated right wrist ganglion, spondylosis of the cervical spine which is pre-existing and unrelated which is superimposed on herniated discs from prior motor vehicle trauma, spondylosis of the lumbar spine which is pre-existing and unrelated without documented change with medical record documentation of prior spine complaints and prior spine complaints and reported herniated discs from prior motor vehicle trauma, fracture of the right humerus from motor vehicle accident of 1983 with residuals and no documented recent change, reported head strike superimposed on reported prior occipital nerve injury and surgery, pre-existing hypertension, preexisting hypocholesterolemia, and longstanding depression. Dr. Buckner opines that plaintiff did not sustain any serious injury as a result of the subject accident, her cervical examination is normal, her lumbar examination is normal, she has no-causally related knee condition, her shoulder examination is exaggerated and not consistent with a specific right shoulder condition as she portrays limitations in both shoulders, and her wrist examination is consistent with a pre-existing ganglion. Dr. Buckner concludes that plaintiff may perform all activities of daily living without restrictions and there is no permanency as a result of the accident.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Cervical Spine taken on December 24, 2011 revealed an impression of: widespread degenerative pre-existing degenerative disc disease.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Lumbar Spine taken on December 24, 2011 revealed an impression of: longstanding, pre-existing degenerative disc disease.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Right Wrist taken on February 7, 2012 revealed an impression of: no permanent post-traumatic abnormalities seen causally related to the subject accident and soft tissue swelling which should resolve without sequela or intervention.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Right Shoulder taken on February 7, 2012 revealed an impression of: extensive degenerative joint disease.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Left Knee taken on February 7, 2012 revealed an impression of: chronic, longstanding, degenerative changes.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates that she was only confined to her bed and home for approximately two weeks immediately after the accident and for an additional two weeks following surgery on March 20, 2012. Such evidence shows that the plaintiff was 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 plaintiff 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. Plaintiff raises a triable issue of fact.**

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own examination before trial transcript testimony, unsworn medical records and reports, an affidavit of plaintiff's chiropractor, Ron Lambert, D.C., an affirmation of plaintiff's neurologist, Paul Lerner, M.D., an affidavit of plaintiff's physical therapist, Kosta Kokolis, a sworn narrative report of plaintiff's orthopedic surgeon, Maxim Tyorkin, M.D., unsworn MRI reports, and an affirmation of plaintiff's physician, Kenneth McCulloch, M.D., and plaintiff's own affidavit.

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 (1<sup>st</sup> 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 a complex tear in the left knee (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the left knee injuries. The affirmation and narrative reports submitted by plaintiff's treating physician, Kenneth McCulloch, M.D., set 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: a complex tear of the left knee. Dr. McCulloch's affirmation details plaintiff's symptoms, including left knee pain. He further opines that the left knee injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of December 6, 2011. Furthermore, plaintiff has provided a recent medical examination detailing the status of her left knee injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. McCulloch provides that a recent examination by Dr. McCulloch on July 1, 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: decreased range of motion of the left knee and a complex tear of the left knee. He further opines that the left knee injuries are permanent in nature and causally related to the motor vehicle accident of December 6, 2011. Dr. McCulloch concludes that the findings regarding the left knee are **not degenerative**. Clearly, the plaintiffs' 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 [1<sup>st</sup> Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her left knee, 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]).

This constitutes the decision and order of the Court.

Dated: January 31, 2014

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**Howard G. Lane, J.S.C.**