Odamety v Acosta
2014 NY Slip Op 32653(U)
September 11, 2014
Supreme Court, Bronx County
Docket Number: 308053/11
Judge: Wilma Guzman

FILED Sep 19 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. **308053/11**
Motion Calendar No. 14
Motion Date: 7/7/14

GLADYS ODAMETY and JAMES NETTEY

Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

DAVID ACOSTA, DROSAS INC. and PABLO T. FERNANDEZ,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Defendants Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants Acosta and Drosas, Inc., (hereinafter referred to as movants) move for an Order granting summary judgment dismissing plaintiffs complaint on the grounds that neither plaintiff Odametey and Nettey meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Plaintiffs submitted written opposition. The Cross-motion by defendant Fernandez is denied for non-appearance by the moving party.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on October 29, 2010.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992)

Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

Plaintiff Odamety

Defendant has met the burden of prima facie entitlement to summary judgment through the submission of the affidavit of Dr. Alan Crystal, who reviewed the plaintiff's medical records and who after performing an independent orthopedic examination on the plaintiff on August 9, 2012 noted normal ranges of motion in the plaintiff's lumbar, cervical spine and bilateral shoulders. Dr. Crystal opined that there was no causal connection in the lumbar spine findings of Dr. Kaisman who first evaluated the plaintiff on June 23, 2011 and performed the disectomy. Dr. Michale Settan reviewed the plaintiff's December 9, 2010 MRI's of the cervical and lumbar spine MRI's and opined that the plaintiffs injuries were degenerative and not causally related to the subject accident.

Dr. Charles Demarco reviewed the plaintiff's MRI films and noted posterior disc herniation at L5-S1 and straightening of the cervical lordis and posterior disc herniations at C3-4 through C5-6. In the January 4, 2011 right shoulder MRI Dr. Demarco noted AC joint hypertrophy impinging on

the supraspinatus muscle tendon complex and partial tear or tendinosis of the supraspinatus tendon. In the February 8, 2011 MRI of the lumbar spine, he noted posterior herniations at L4-L5 and L5-S1 causing impingement of the anterior epidural space, impingement of the dural sac and encroachment of the neural foramina.

Dr. Arden Kaismen performed surgery on the plaintiffs lumbar spine on July 22, 2011 and based upon his prior examination and the review of her medical records, including MRI's , causally related the plaintiff's injuries to the subject accident. There was no relation form any prior accident.

Dr. Paul Lerner examined the plaintiff on October 13, 2013 and noted range of motion limitations as compared to the norms in the cervical spine and lumbar spine. Dr. Lerner opined that the plaintiffs injuries are causally related to the subject accident. Dr. Lerner further opined that plaintiff' Odamety's injuries are considered permanent as they have persisted with lack of resolution with conservative and surgical treatment.

Plaintiff has submitted medical records contemporaneous with the subject accident. Contra Camilo v. Villa Livery Corp., 118 A.D.3d 586 (1st Dept. 2014); Perl v. Meher, 18 N.Y.3d 208 (2011). These reports, although unsworn were nonetheless relied upon by movants doctor. Thompson v. Abassi, 15 A.D3d 95 (1st Dept. 2005). Plaintiff has submitted an affidavit adequatley explaining any cessation or gap in treatment. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013). However, Plaintiff Odamety has not submitted competent medical proof that he could not perform substantially all of his daily activities for the first 90 out of 180 days immediately following the accident. Coley v. DeLarosa, 105 A.D3d 527 (1st Dept. 2013); Uddin v. Cooper,, 32 A.D.3d 270 (1st Dept.2006).

Plaintiff Netty

Defendant has met the burden of prima facie entitlement to summary judgment through the submission of the affidavit of Dr. Alan Crystal, who reviewed the plaintiff Netty's medical records and who after performing an independent orthopedic examination on the plaintiff on August 9, 2012 noted normal ranges of motion in the plaintiff's lumbar and cervical spine. Dr. Crystal noted range of motion limitations in that plaintiff Netty was only able to bend "only a few degrees." Dr. Michale Settan reviewed the plaintiff's December 9, 2010 MRI of the cervical and February 8, 2011 of the

lumbar spine opined that the plaintiffs injuries were degenerative and not causally related to the subject accident.

Dr. Arden Kaismen performed surgery on the plaintiff Netty's lumbar spine on August 19, 2011 and based upon his prior examination and the review of her medical records, including MRI's, causally related the plaintiff's injuries to the subject accident.

Dr. Hank Ross examined plaintiff Nety on October 13, 2013 and noted range of motion limitations on the in the cervical spine and lumbar spine as compared to the norms. Dr. Ross causally related the injuries to the subject accident. Dr. Ross further opined that based upon his examination of the plaintiff and the plaintiff's records, Plaintiff's Netty's injuries are permanent in nature.

Plaintiff has submitted medical records contemporaneous with the subject accident. Perl v. Meher, 18 N.Y.3d 208 (2011); *contra* Camilo v. Villa Livery Corp., 118 A.D.3d 586 (1st Dept. 2014);. These reports, although unsworn were nonetheless relied upon by movants doctor. Thompson v. Abassi, 15 A.D3d 95 (1st Dept. 2005). Plaintiff has submitted an affidavit adequatley explaining any cessation or gap in treatment. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013). Plaintiff Netty has not submitted competent medical proof that he could not perform substantially all of his daily activities for the first 90 out of 180 days immediately following the accident. Coley v. DeLarosa, 105 A.D3d 527 (1st Dept. 2013); Uddin v. Cooper,, 32 A.D.3d 270 (1st Dept.2006).

This Court notes that defendant Fernandez' cross-motion to dismiss adopted and relied upon the arguments of the Acosta/Drosas motion and would have been denied on the merits.

Accordingly, it is

ORDERED that defendants Acosta and Drosas Inc.'s motion for summary judgment under Ins. Law 5102(d) is hereby granted to the extent that plaintiff has failed to raise a triable issue of fact as to whether she was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. All other aspects of defendants motion are hereby denied. It is further

ORDERED that Defendant Fernandez' cross-motion for summary judgment is denied. It is further

ORDERED that defendants Acosta and Drosas serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

SEP 11 2014

DATE

HON. WILMA GUZMAN, JSC.