

Defina v Daniel

2014 NY Slip Op 33750(U)

March 4, 2014

Supreme Court, Nassau County

Docket Number: 13784/12

Judge: Thomas Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

DANIELLE DEFINA,

Plaintiff,

- against -

KEVIN DANIEL,

Defendant.

TRIAL/IAS, PART 9
NASSAU COUNTY

INDEX NO. 13784/12

X X X

MOTION SUBMISSION
DATE: 1/29/14

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Relief Requested

The defendant moves, pursuant to CPLR §3212, for an order granting summary judgment in defendant's favor dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. The plaintiff cross-moves for summary judgment on the issue of liability and opposes the defendant's motion. The defendant submits opposition to the cross-motion and a reply to plaintiff's opposition.

Procedural Background

The plaintiff commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on June 27, 2012. The plaintiff alleges injuries including restriction of motion of the lumbar spine, central herniated disc at level L4 - L5, and reversal of the lumbar lordosis possibly due to muscular spasm.

On this threshold motion, the defendant submits the affirmed medical examination report of Dr. Richard A. Weiss, M.D., an orthopedist. Dr. Weiss conducted a physical examination of the plaintiff on October 10, 2013. Dr. Weiss concluded that his physical examination of the plaintiff revealed normal range of motion of the cervical and lumbar spine with no muscle spasm and the lumbar spine sprain/strain resolved.

Applicable Law

“Serious Injury” is defined in Insurance Law §5102(d) as:

“...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 constitutes such person’s usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a “plaintiff’s subjective claim of pain and limitation of motion must be supported by verified objective medical findings”. (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eycler*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member”, or “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,” in order to prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

The Court in *Pommells v. Perez*, 4 NY3d 566, in stating that proof of a herniated disc, without additional more medical evidence, is not alone sufficient to establish a serious injury, provides that once the defendants make a *prima facie* showing that the plaintiff's injuries do not satisfy no-fault's serious injury threshold, the plaintiff has the burden to present objective medical proof of a serious injury causally related to the accident in order to survive summary judgment dismissal. (*Id.*) The Court in *Pommells* stated that in "the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a 'serious injury' can be particularly vexing". The Court in *Pommells* concluded that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury - such as a gap in treatment, an intervening medical problem or a pre-existing condition - summary dismissal of the complaint may be appropriate".

Discussion

Here, the defendant has met his burden in establishing that the plaintiff has not sustained a serious injury. The plaintiff, in opposition, has failed to raise an issue of fact to warrant denial of the defendant's motion.

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). 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). 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). 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; *Feintuch v. Grella*, 209 AD2d 377).

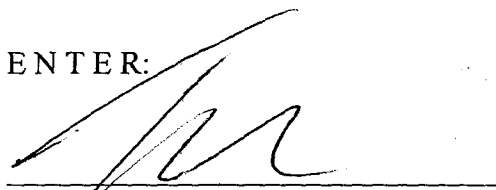
Here, the plaintiff submits an affirmation of Brian A. Aberger, D.C., a chiropractor, which is not notarized. The plaintiff, in opposition to the motion, has failed to present objective medical proof of a serious injury causally related to the subject accident in order to survive summary judgment dismissal. Additionally, the plaintiff failed to submit competent medical evidence that she was unable to perform substantially all the daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. (*D'Alba v. Yong-Ae Choi*, 33 AD3d 650).

Conclusion

The defendant has met his initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law. As the plaintiff has failed to shift the burden by presenting objective medical proof of a serious injury causally related to the subject accident, the defendants' motion is granted, and therefore, the plaintiff's action is dismissed.

In light of the foregoing, plaintiff's cross-motion on the issue of liability is moot.

ENTER:



J.S.C.

Dated: March 4, 2014

cc: Sacco & Fillas, LLP
Russo, Apoznanski & Tambasco

ORIGINAL

ENTERED

MAR 11 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

DANIELLE DEFINA,

Plaintiff,

- against -

KEVIN DANIEL,

Defendant.

TRIAL/IAS, PART 9
NASSAU COUNTY

INDEX NO. 13784/12

X X X

MOTION SUBMISSION
DATE: 1/29/14

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Relief Requested

The defendant moves, pursuant to CPLR §3212, for an order granting summary judgment in defendant's favor dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. The plaintiff cross-moves for summary judgment on the issue of liability and opposes the defendant's motion. The defendant submits opposition to the cross-motion and a reply to plaintiff's opposition.

Procedural Background

The plaintiff commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on June 27, 2012. The plaintiff alleges injuries including restriction of motion of the lumbar spine, central herniated disc at level L4 - L5, and reversal of the lumbar lordosis possibly due to muscular spasm.

On this threshold motion, the defendant submits the affirmed medical examination report of Dr. Richard A. Weiss, M.D., an orthopedist. Dr. Weiss conducted a physical examination of the plaintiff on October 10, 2013. Dr. Weiss concluded that his physical examination of the plaintiff revealed normal range of motion of the cervical and lumbar spine with no muscle spasm and the lumbar spine sprain/strain resolved.

Applicable Law

“Serious Injury” is defined in Insurance Law §5102(d) as:

“...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 constitutes such person’s usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a “plaintiff’s subjective claim of pain and limitation of motion must be supported by verified objective medical findings”. (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eyer*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member”, or “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,” in order to prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

The Court in *Pommells v. Perez*, 4 NY3d 566, in stating that proof of a herniated disc, without additional more medical evidence, is not alone sufficient to establish a serious injury, provides that once the defendants make a *prima facie* showing that the plaintiff's injuries do not satisfy no-fault's serious injury threshold, the plaintiff has the burden to present objective medical proof of a serious injury causally related to the accident in order to survive summary judgment dismissal. (*Id.*) The Court in *Pommells* stated that in "the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a 'serious injury' can be particularly vexing". The Court in *Pommells* concluded that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury - such as a gap in treatment, an intervening medical problem or a pre-existing condition - summary dismissal of the complaint may be appropriate".

Discussion

Here, the defendant has met his burden in establishing that the plaintiff has not sustained a serious injury. The plaintiff, in opposition, has failed to raise an issue of fact to warrant denial of the defendant's motion.

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). 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). 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). 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; *Feintuch v. Grella*, 209 AD2d 377).

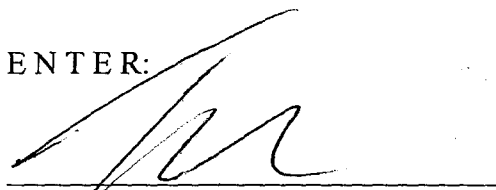
Here, the plaintiff submits an affirmation of Brian A. Aberger, D.C., a chiropractor, which is not notarized. The plaintiff, in opposition to the motion, has failed to present objective medical proof of a serious injury causally related to the subject accident in order to survive summary judgment dismissal. Additionally, the plaintiff failed to submit competent medical evidence that she was unable to perform substantially all the daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. (*D'Alba v. Yong-Ae Choi*, 33 AD3d 650).

Conclusion

The defendant has met his initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law. As the plaintiff has failed to shift the burden by presenting objective medical proof of a serious injury causally related to the subject accident, the defendants' motion is granted, and therefore, the plaintiff's action is dismissed.

In light of the foregoing, plaintiff's cross-motion on the issue of liability is moot.

ENTER:



J.S.C.

Dated: March 4, 2014

cc: Sacco & Fillas, LLP
Russo, Apoznanski & Tambasco

ORIGINAL

ENTERED

MAR 11 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE