Avezova v Frasca
2015 NY Slip Op 30665(U)
April 14, 2015
Supreme Court, Queens County
Docket Number: 9293/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

BELLA AVEZOVA,

Plaintiff,

-against-

MARIA I. FRASCA, et al.,

Defendants.

Index No. 9293/12

Motion
Date March 6, 2015

Motion
Cal. No. 7

Motion
Sequence No. 3

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Upon the foregoing papers it is ordered that this motion by defendants, New York Hospital Medical Center of Queens and New York Medical Center of Queens Independent Practice Association for summary judgment dismissing the complaint of plaintiff, Bella Avezova, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)is decided as follows:

This action arises out of an automobile accident that occurred on December 31, 2009. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the ninth category of "90/180" days. Defendants submitted inter alia, an affirmed report from an independent examining orthopedist.

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 been 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. Defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.

The affirmed report of defendants' independent examining orthopedist, Leon Sultan, M.D., indicates that an examination conducted on August 18, 2014 revealed a diagnosis of: orthopedically stable and neurologically intact. He opines that there is no ongoing causally related orthopedic impairment regarding the accident. Dr. Sultan concludes that there is no permanency and no need for further treatment or testing.

Defendants have failed to establish a prima facie case with respect to the 90/180 category

Defendants have failed to raise a triable issue of fact as to 90/180-day claim. 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. Elliot, 57 NY2d 23, supra; Berk v. Lopez, 278 AD2d 156 [2000], *lv denied* 96 NY2d 708 [2001]). Defendants' expert 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. With respect to the 90/180-day serious injury category, defendants have failed to meet its initial

burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. The report of the IME relied upon by defendants fail to discuss this particular category of serious injury, and further, the IME took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). As defendants have failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendants' motion on this issue, are sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

The burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the remaining categories of the Insurance Law (see, Gaddy v. Eyler, 79 N.Y.2d 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 N.Y.2d 230, *supra*).

B. Plaintiff raises a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, unsworn medical records, a notarized affidavit and notarized narrative report of plaintiff's chiropractor, Jeffrey Herzlich, D.C., an unsigned affirmation and narrative report of plaintiff's physician, Mehran Manouel, M.D., an affirmation and sworn MRI reports of plaintiff's physician, Ayoob Khodadadi, M.D., an affirmation and sworn narrative report of plaintiff's neurologist, Vladimir Zlatnik, M.D., and a sworn narrative report of plaintiff's physician, Mehran Manouel, M.D.

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 regrading 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 inter alia, lumbar spine sprain and bulging disks of the lumbar spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the lumbar spine injuries. The affirmation submitted by plaintiff's neurologist,

Vladimir Zlatnik, M.D., 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: lumbar spine sprain and bulging disks of the lumbar spine. Dr. Zlatnik's affirmation details plaintiff's symptoms, including upper back pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of December 31, 2009. 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 affirmation of plaintiff's orthopedic surgeon, Dr. Mehran Manouel, provides that a recent examination by Dr. Manouel on January 27, 2015 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 lumbar spine. He further opines that the injuries are permanent in nature and causally related to the motor vehicle accident of December 31, 2009. 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 lumbar 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]).

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

Accordingly, the moving defendants' motion for summary judgment is denied.

The clerk is directed to enter judgment accordingly.

Dated: April 14, 2015

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Howard G. Lane, J.S.C.