Robinson v Abbot
2015 NY Slip Op 31308(U)
April 9, 2015
Supreme Court, Queens County
Docket Number: 2336/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

DIQUAN ROBINSON and KELLY TYEISHA,

Plaintiffs,

-against-

MARIAN A. ABBOT and JOY MARSHALL,

Defendants.

Index No. 2336/12

Motion
Date February 4, 2014

Motion
Sequence Nos. 2, 3, 4

After re-calendaring the motions and cross motion on the Part 6 General Calendar on November 18, 2014, the following is the decision and order of the Court:

Upon the foregoing papers it is ordered that defendants', Joy Marshall and Marian A. Abbot's motions for summary judgment pursuant to CPLR 3212 on the ground that plaintiffs, Diquan Robinson and Kelly Tyeisha have not sustained a serious injury within the meaning of Insurance Law § 5102(d); and defendant, Marian Abbott's cross motion for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims against her on the basis that the defendant did not breach any duty owed, are hereby joined solely for the purpose of disposition of the instant motions and cross motion and are hereby decided as follows:

Defendants', Joy Marshall and Marian A. Abbot's motions for summary judgment pursuant to CPLR 3212 on the ground that plaintiffs, Diquan Robinson and Kelly Tyeisha have not sustained a serious injury within the meaning of Insurance Law § 5102(d) are hereby decided as follows:

This action arises out of an automobile accident that occurred on July 27, 2010. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. Defendants submitted, inter alia, an affirmed report from an independent examining

orthopedic surgeon and plaintiffs' own verified bill of particulars.

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 plaintiffs did not suffer a "serious injury" as defined in Section 5102(d), for all categories.*

The affirmed report of defendants' independent examining orthopedist, Frank Hudak, M.D., indicates that an examination of plaintiff, Diquan Robinson conducted on July 31, 2013 revealed a diagnosis of: resolved status post cervical strain, resolved status post left shoulder sprain, resolved status post lumbosacral sprain. He opines that plaintiff is not disabled and had no permanency regarding the injuries sustained in the accident. He further opines that he needs no further orthopedic care, physical therapy or diagnostic testing. Finally, Dr. Hudak concludes that plaintiff can perform his activities of daily living without restrictions.

The affirmed report of defendants' independent examining orthopedist, Frank Hudak, M.D., indicates that an examination of

plaintiff, Kelly Tyeisha conducted on July 31, 2013 revealed a diagnosis of: resolved status post cervical sprain, resolved status post left shoulder sprain, resolved status post lumbosacral sprain, resolved status post sprain of the right ankle resolved, and the claimant did not recall that the injury was to the right ankle rather than the left. He opines that plaintiff is not disabled and had no permanency regarding the injuries sustained in the accident. He further opines that he needs no further orthopedic care, physical therapy or diagnostic testing. Finally, Dr. Hudak concludes that plaintiff can perform her activities of daily living without restrictions.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiffs' verified bill of particulars indicates that: plaintiff Diquan Robinson states that he was not confined to bed and only confined to home for two to three days and unable to perform household duties for two weeks and wherein plaintiff Kelly Tyeisha states that she was only confined to bed for three to four weeks and home for four to six weeks and unemployed but only unable to perform household duties for two weeks. Such evidence shows that the plaintiffs were 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 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, supra).

B. Plaintiffs fail to raise a triable issue of fact

In opposition to the motion, plaintiffs submitted: an attorney's affirmation, narrative reports of plaintiffs' physician, Mark Rybstein, M.D., plaintiffs' own affidavits, and sworn narrative reports of plaintiffs' physician, Paul Beck, M.D.

Plaintiffs submitted no proof of objective findings contemporaneous with the accident which establish causality. Plaintiffs have failed to establish a causal connection between the accident and the injuries. 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]). None of the submitted reports opine on

causality.

Also, the plaintiffs have failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiffs sustained a medically-determined injury which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiffs' claims that the injury prevented plaintiffs from performing substantially all of their customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). 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 her usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955, Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1st Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiffs fail to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiffs for the 180-day period immediately following the accident. As such, plaintiffs' submissions were insufficient to establish a triable issue of fact as to whether plaintiffs suffered from a medically determined injury that curtailed them from performing their usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiffs' claims that their injuries prevented them from performing substantially all of the material acts constituting their customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

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

Moreover, plaintiffs' self-serving affidavits and deposition statements are "entitled to little weight" and are insufficient to raise triable issues of fact (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

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

Accordingly, the defendants' motions for summary judgment on threshold grounds are granted in their entirety and the plaintiffs' Complaint is dismissed as to all categories.

The clerk is directed to enter judgment accordingly.

As the action has been dismissed on threshold grounds, the cross motion by defendant, Marian Abbott for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims against her on the basis that the defendant did not breach any duty owed, is hereby rendered moot.

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.

The foregoing constitutes the decision and order of this Court.

Dated: April 9, 2015

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Howard G. Lane, J.S.C.