Donahue v Park
2015 NY Slip Op 32595(U)
June 25, 2015
Supreme Court, Queens County
Docket Number: 704653/2013
Judge: Rudolph E. Greco, Jr.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IAS PART 32
Justice

----------X

ERIN DONAHUE, Index. No.: 704653/2013

Plaintiff, Motion Dated: May 7, 2015
Seq. No. 1
-against- Cal. No. 177

GRACE PARK AND JUNG SOON LIM,

Defendants.

----------X

The following papers numbered 1 to 7 read on defendants' motion pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	1-4
Opposition, Exhibits	5-6
Reply	7

Upon the foregoing papers, it is ordered that this motion is determined as follows:

FACTUAL BACKGROUND

This is an action to recover for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on August 5, 2013 at approximately 8:00 a.m. at the intersection of the entrance ramp to the Grand Central Parkway and the Cross Island Parkway in Queens County, New York. In the verified bill of particulars, plaintiff alleges, *inter alia*, injuries to her cervical spine and lumbar spine.

Defendants argue that the alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

APPLICABLE LAW

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (*see* CPLR §3212[b]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985], Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment, (*see* Licari v Elliot, 57 NY2d 230, 237-38 [1982]), and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those enumerated in such statute, (*see* Gaddy v Eyler, 79 NY2d 955, 956-57 [1992]). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim, (*see* Grossman v Wright, 268 AD2d 79, 84 [2nd Dept. 2000]; *see also* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002], Gaddy at 956, Batista v Olivia, 17 AD3d 494 [2nd Dept. 2005]).

With this established, the burden shifts to the plaintiff to come forward with evidence demonstrating a material issue of fact with respect to their injuries being serious within the meaning of section 5102(d), (*see* Gaddy at 957). What is required of plaintiff in this endeavor is evidence of the injury by quantitative objective findings (*see* Toure at 350, Grossman at 84), free of mere conclusory assertions tailored to meet the statutory requirements, (*see* Lopez v Senatore, 65 NY2d 1017, 1020-21 [1985]; *see also* Powell v Hurdle, 214 AD2d 720 [2nd Dept. 1995]), and based on a recent examination, (*see* Murray v Hartford, 23 AD3d 629 [2nd Dept. 2005], Mohamed v Dhanasar, 273 AD2d 451 [2nd Dept. 2000], Kauderer v Penta, 261 AD2d 365 [2nd Dept. 1999]). Subjective complaints of pain and limitation are insufficient (*see* Gaddy at 957-58, Scheer v Koubek, 70 NY2d 678, 679 [1987], Licari at 239).

As to the categories of injuries, there are nine in total, generally those in dispute are subsections six through nine; more specifically, "6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; and 9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment", (Insurance Law §5102[d]). As to subsection six, the injury must be a total loss (*see* Oberly v Bangs Ambulance, Inc., 96 NY2d 295, 299 [2001]), and continue for the duration of the injured person's life. As to subsections seven and eight, there is much overlap in that the words consequential and significant have been held to mean something more than minor, mild or slight (*see* Gaddy at 957, Scheer at 679, Licari at 236). As opposed to a loss, these sections deal with a limitation, the extent and degree of which must be quantified by objective testing (*see* Barrett v Howland, 202 AD2d 383 [2nd Dept. 1994]; *see also* Micelson v Padang, 237 AD2d 495, 496 [2nd Dept. 1997]), that must be noted within the report, (*see* Mobley

v Riportella, 241 AD2d 443, 444 [2nd Dept. 1997], Lincoln v Johnson, 225 AD2d 593, 593-94 [2nd Dept. 1996]). In the latter there is an element of duration (*see* Partlow v Meehan, 155 AD2d 647, 648 [2nd Dept. 1997]), while the former requires permanency. Mere repetition of the word "permanent" in a report is insufficient to meet this requirement, (*see* Lopez at 1019). Finally, with respect to these two subsections the objective findings must be the result of a recent examination and any lapse in time between the cessation of medical treatment after the accident and the physical examination conducted by plaintiff's expert must be adequately explained, (*see* Grossman at 84; *see also* Smith v Askew, 264 AD2d 834 [2nd Dept. 1999]). With respect to the final category commonly referred to as 90/180, it must be shown by more than self-serving testimony, (*see* Phillips v Costa, 160 AD2d 855, 856 [2nd Dept. 1990]), that substantially all of the plaintiff's activities were curtailed to a great extent rather than slightly, (*see* Licari at 236) by a medically determined injury or impairment of a non-permanent nature, (*see* Toure at 357).

ANALYSIS

Defendants present admissible proof by way of plaintiff's deposition testimony of July 30, 2014 and the affirmation of Arnold T. Berman, M.D. dated September 25, 2014. Plaintiff affirms that she drove her vehicle away from the accident scene, she sought medical treatment later on that day at Lynbrook Premier Care, she visited Ultimate Physical Therapy two days after the accident and she began visiting Action Sports as well. Plaintiff also states that she only missed a day and a half from her full time job as a result of this accident.

Dr. Berman reviewed plaintiff's medical records and conducted range of motion testing by use of a goniometer. The results of such testing as compared to normal are documented and demonstrate all normal ranges of motion in plaintiff's cervical spine, thoracolumbar spine, right and left shoulders. Dr. Berman found that the cervical spine strain/sprain was resolved with no residuals and the thoracolumbar spine strain/sprain was also resolved, but there was a prior lumbar spine injury in 2012 with ongoing symptoms. Dr. Berman opines that plaintiff can participate in all activities of daily living, she may work at her regular employment without restrictions, she did not sustain a permanent injury, and she has no functional loss, permanency or disability due to the subject accident.

This showing is sufficient to meet defendants' *prima facie* burden.

In light of the above, plaintiff must come forward to show that his injuries are serious under the law or, that there is, at least a material issue of fact with respect thereto, (*see* Grossman at 84; *see also* Toure at 352, Gaddy at 956). Plaintiff has submitted the following: her own affidavit; the affirmation of Sunil Butani, M.D.; and the affirmation of David Kasow, M.D.

Dr. Butani initially examined plaintiff on August 27, 2015 and then most recently on February 16, 2015. Dr. Butani states that he is aware that plaintiff was in a prior accident of June 2012 in which she hurt her neck and lower back. Dr. Butani further states that the subject accident has aggravated her neck and lower back pain. However, Dr. Butani fails to indicate that he reviewed or attempted to review any of the medical records from plaintiff's past accident. As

such, he failed to adequately account for the prior accident and resulting injuries. Thus, Dr. Butani's finding that the subject accident caused plaintiff's injuries was speculative, (*see* Vidor v. Davila, 37 A.D.3d 826 [2d Dept. 2007]; Moore v. Sarwar, 29 A.D.3d 752 [2d Dept. 2006]).

Moreover, at the first examination on August 27, 2013, Dr. Butani found limited ranges of motion in plaintiff's cervical spine and lumbar spine, but he failed to set forth the objective medical tests utilized to determine that plaintiff sustained limitations of motion in her cervical spine and solely states that he used a goniometer to measure plaintiff's range of motion in her lumbar spine. Therefore, plaintiff failed to raise a triable issue of fact, (*see* Porto v. Blum, 39 A.D.3d 614 [2d Dept. 2007]).

Generally, when the plaintiff presents contradictory doctors' reports an issue of fact and credibility is created thus defeating a request for summary judgment, (*see* Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]; *see also* Garcia v Long Island MTA, 2 AD3d 675 [2nd Dept. 2003]). However, in light of the purpose of Insurance Law §5102(d), (*see* Licari at 236-37), such affidavits must be carefully scrutinized and cannot appear conclusory or tailored to meet the statutory requirements (*see* Lopez at 1020-21).

Lastly, plaintiff failed to submit any competent medical evidence indicating that her injuries prevented her from performing substantially all of the material acts which constituted her usual and customary activities for not less than 90 days during the 180 days immediately following the accident, (*see* Sainte-Aime v. Ho, 274 A.D.2d 569 [2d Dept. 2000]).

CONCLUSION

Defendants' motion to dismiss plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement is granted.

Dated: ~~July~~ June 25, 2015

Rudolph E. Greco, Jr., J.S.C.