

Okyere v Cotungo
2016 NY Slip Op 30898(U)
April 8, 2016
Supreme Court, Bronx County
Docket Number: 311266/2011
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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Agyapong Okyere and Belinda Aikins-Anim

Plaintiffs,

-against-

Frank A. Cotungo

Defendant.

DECISION and ORDER
Index No. 311266/2011

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Upon the foregoing papers, the Decision/Order on this Motion is as follows:

In this personal injury action, defendant Frank A. Cotungo (hereinafter Cotungo) moves to dismiss plaintiffs Agyapong Okyere (Okyere) and Belinda Aikins-Anim (Aikins) complaints on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102 (d). Plaintiffs opposed the motion.

Plaintiffs claim arises out of an alleged automobile accident that occurred on November 16, 2011.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas* 29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendants to establish by the submission of proof in admissible form that plaintiffs did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot*, 57 NY2d 230 [1982]; *Lopez v Senatore*, 65 NY2d 1017[1985].) Defendant contends that plaintiffs' injuries do not meet the statutory mandate of a serious injury. In support of the motion to dismiss defendant submits a copy of the pleadings, plaintiffs' deposition transcripts, plaintiffs' bill of

particulars, discovery orders, and the affirmed medical report of Dr. Jay Nathan.

Dr. Nathan, orthopedist retained by the defendant, examined plaintiff Okyere on July 15, 2013. He performed range of motion tests using a goniometer on the plaintiff's cervical and lumbar spine that revealed no restrictions. There was no tenderness or spasm noted. He opined that the plaintiff's alleged injury of sprains to the cervical and lumbar spine were resolved. Dr. Nathan concludes that plaintiff demonstrates no disability or permanence of his claimed injuries and is able to continue to work without limitations. Dr. Nathan next examined plaintiff Aikins on February 4, 2013. His findings were that plaintiff had normal range in motion on the shoulders, elbows, wrists, hands, knees, cervical and lumbar spine. There was no tenderness or spasm noted. His impression was cervical, lumbar and bilateral knee sprain. Dr. Nathan concludes that plaintiff demonstrates no signs of permanency or disability and no limitation of her claimed injuries. Defendant also points to plaintiffs' deposition transcript to demonstrate that plaintiffs only missed five weeks (Okyere) and two days (Aikins) from work. Based on the foregoing, defendant has met his burden of proof through the submission of admissible evidence thus shifting the burden of proof to the plaintiffs to support their claim of serious injury.

Plaintiffs' opposition consists of Okyere and Aikin's affidavits, and the affirmed reports of Dr. David H. Delman of DHD Medical, PC., Dr. Steven Winter and Dr. Gautam Khakhar. At the outset with respect to plaintiff Okyere's claim, Gabriela Jano of DHD Medical, PC., examined the plaintiff on November 23, 2011 and January 11, 2012 and found decreased range of motion in the cervical and lumbar spine. She directed plaintiff to continue with physical therapy and to seek a spine specialist if pain persisted in his back. The next time that plaintiff was treated was on January 16, 2013 at which time, Jano's findings were that plaintiff had normal range of motion in the cervical spine and slightly decrease range of motion in the lumbar spine. She diagnosed plaintiff with herniation at L4-5 and bulges at L2-3 and L3-4 as per MRI dated January 11, 2012. Jano stated that plaintiff's

injuries were permanent and causally related to the accident. Plaintiff must establish evidence of the extent of his purported physical limitations and its duration. *Arjona v Calcano*, 7 AD3d 279 (1st Dept. 2004). Therefore, it is also incumbent upon Plaintiff to explain an extended gap in treatment for those injuries sustained as a result of the alleged accident. While a cessation of treatment is not dispositive - the law surely does not require a record of needless treatment in order to survive summary judgment - a plaintiff who terminates therapeutic measures following the accident, while claiming serious injury must offer some reasonable explanation for having done so. See *Pommells v Perez*, 4 NY3d 566 (2005). In the instant case neither the plaintiff, therapist nor physician offers an explanation for plaintiff's gap in treatment between January 2012 and January 16, 2013. Plaintiff Okyere failed to adequately address his complete cessation of all treatment, which interrupts the chain of causation and renders the finding of permanency speculative and seemingly tailored to meet the statutory definition of serious injury. *Merrick v Lopez-Garcia*, 954 NYS2d 25 (1st Dept. 2012) citing *Arjona v Calcano*, 776 NYS2d 49 (1st Dept. 2004). Thus, plaintiff Okyere's complaint is dismissed.

With respect to plaintiff Aikins, she has failed to present sufficient objective medical evidence to establish a genuine issue of fact sufficient to defeat summary judgment (see *Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]). To the extent that plaintiff Aikins alleges a serious injury based on cervical, thoracic or lumbar sprains/strains, such injuries do not, as a matter of law, constitute a serious injury (see *Maenza v Letkajornsook*, 172 AD2d 500 [2d Dept 1991] [allegations of sprains and contusions are insufficient to establish that the plaintiff sustained a serious injury as defined in the statute]). Here Dr. Gautam Khakhar points to his colleagues, Rafael Abramov examination held on January 12, 2012 who found that plaintiff Aikins had reached maximum medical improvements; however, Abramov also found minimal losses in range of motion in the cervical and lumbar spines and advised the plaintiff to continue therapy via a home exercise program and that if condition worsens plaintiff to return to clinic for revaluation. Diagnostic tests could not be performed at the

time of the examination since plaintiff was pregnant. As to whether the symptoms he found were caused by the accident in question, Abramov vaguely concluded that the above statements are true and accurate, [which statements are not identified] causality is established between the above stated accident and today's pathological findings. There is no evidence that plaintiff as her condition worsens sought any treatment until her next visit on October 16, 2013 before Dr. Khakhar. This court notes that Dr. Khakhar did not treat the plaintiff contemporaneous to the accident and plaintiff failed to explain what steps were taken to secure Abramov's affidavit. Plaintiff's affidavit does not suffice, nor does the explanation of a physician [Khakhar] who did not treat her during that period. Moreover, the statement that she reached maximum medical improvement is entirely inconsistent with his findings and recommendation that she continues home therapy. Even where such explanation has been proffered by a doctor, it has been deemed insufficient where it is contrary to the medical records. Further, where as here when a doctor's reports seem tailored to meet the statutory requirements such report is not capable of raising a triable issue of fact. *Castano v Synergy Gas Corp.*, 250 AD2d 640 (2nd Dept 1998). Accordingly, the defendant's motion for summary judgment to dismiss Aikins' complaint is granted.

In addition, the plaintiffs do not fall under the 90/180 day category wherein serious injury is defined as a plaintiff's inability to perform "substantially all of the material acts which constitute[d][her] usual and customary activities" for not less than 90 of the 180 days immediately following the date of the accident. (Insurance Law § 5102[d].) To prevail under this category, a plaintiff must demonstrate through competent, objective proof that he sustained a "medically determined injury or impairment of a nonpermanent nature" (Insurance Law § 5102[d]) which would have caused the alleged limitations on the plaintiff's daily activities, and a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment." (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000]; *Licari v Elliott*, 57 NY2d 230 [1982].) Here, the evidence submitted by defendant, which includes plaintiffs' deposition transcripts, bill of particulars and medical records, demonstrates that plaintiffs

cannot establish an inability to perform the requisite acts within the prescribed period. Thus, defendant's motion for summary judgment on threshold ground to dismiss plaintiffs' complaints is granted.

This is the Decision and Order of the Court.

Dated: Bronx, New York
April 8, 2016

A handwritten signature in dark ink, appearing to read 'S.A.A.', is written above a horizontal line.

Hon. Sharon A.M. Aarons
Justice, Supreme Court