

Rivers v Guardado

2016 NY Slip Op 31125(U)

May 17, 2016

Supreme Court, Bronx County

Docket Number: 309346/2012

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

ANNIE L. RIVERS,

INDEX NUMBER: 309346/2012

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

EVELIN L. GUARDADO,

Defendants.

The following papers numbered 1 to 3

Read on this Defendant's Motion for Summary Judgment

On Calendar of 8/17/15

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is granted for the reasons set forth herein.

The within action arises from a motor vehicle accident on May 2, 2011 in which plaintiff alleges to have sustained serious injuries to her neck and back. Defendant moves for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,

49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (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, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 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., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

Toure, supra.¹

In the instant action, defendant moves for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. Plaintiff alleges to have sustained central herniation at L5-S1; disc bulge at L4-5; disc herniation at C3-4 midline to left; and, straightening of the cervical lordosis. Defendant's motion for summary judgment is granted because plaintiff fails to raise any issues regarding serious injury. Plaintiff testified at her deposition that she treated for three to five months after the accident and stopped treatment because she was starting to feel better. Plaintiff had a prior accident where she sustained a back injury, but could not recall the date. Plaintiff did not miss any time from work as a result of the accident. Currently, she only had occasional episodes of back pain. The June 16, 2011 initial consultation report from Healthy Physique Physical Therapy prepared approximately one and a half months after the accident shows that plaintiff had full quantified range of motion of the cervical and lumbar spine. Dr. Alexios Apazidis examined plaintiff on April 24, 2014 on behalf of defendant and found that plaintiff had full range of motion of the shoulders and cervical and lumbar spine, as well as negative straight leg raising test and negative impingement sign. Dr. Apazidis concluded that plaintiff sustained sprain injuries to the cervical spine, lumbar spine and shoulders that had resolved.

In opposition, plaintiff only submits the affirmed report of Dr. Gabriel Dassa who examined plaintiff on April 27, 2015. Plaintiff submissions fail to raise any issues of fact regarding serious injury. Plaintiff fails to submit admissible, objective, contemporaneous and qualitative medical evidence regarding the injury. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). Although plaintiff states that she began treatment the day after the accident, she fails to submit any medical records in admissible form to substantiate his claims. Plaintiff claims that she received physical therapy for three to five months, but submits no records in admissible form establishing that she received this treatment. Dr. Dassa states in his report that he reviewed plaintiff's medical records, but those records are not provided to the Court. Plaintiff must show contemporaneous objective proof of the limitations sustained as a result of the

¹The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

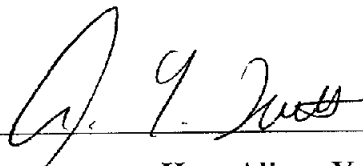
injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation. Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y. 3d 536 (2003). Here, there is no admissible objective evidence supporting plaintiff's claims contemporaneous with the accident. See also Vargas v. Ahmed, 837 N.Y.S.2d 654 (1st Dept. 2007)(First Department reversing this Court's denial of summary judgment on the issue of serious injury, where plaintiff's physician's affirmation did not indicate that he conducted a physical examination of plaintiff, or any objective tests, contemporaneous with the accident.). Dr. Dassa's report merely provides that he reviewed "May 4, 2011 to September 28, 2011 multiple physical therapy notes", "Medical records Community Health Center Medical Services" and "Medical records from Metro Psychological Services", but does not provide what plaintiff's limitations, if any, were contemporaneous with the accident. Dr. Dassa was not plaintiff's treating physician, and his evaluation of plaintiff took place four years after the accident. Therefore, Dr. Dassa's opinion as to permanency, significance, and causation is speculative and seemingly tailored to meet the statutory definition of serious injury. Merrick v. Lopez-Garcia, 954 N.Y.S.2d 25 (1st Dept. 2012) citing Arjona v. Calcano, 776 N.Y.S.2d 49 (1st Dept. 2004).

Plaintiff must submit affirmed medical records and/or reports of treating physicians and/or medical providers in order to defeat a "well-supported summary judgment motion." Hernandez v. Almanzar, 821 N.Y.S.2d 30 (1st Dept. 2006); Lora v. Calle, 793 N.Y.S.2d 19 (1st Dept. 2005); ; Black v. Regalado, 828 N.Y.S.2d 29 (1st Dept. 2007); Hernandez v. Ramirez, 796 N.Y.S.2d 605 (1st Dept. 2005). Plaintiff failed to do so.

Plaintiff also fails to raise an issue of fact as to whether she was unable to perform substantially all of her usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted). Here, there is no admissible proof that plaintiff could not perform her usual and customary activities for 90 out of the 180 days. In fact, she testified that she did not miss any work as a result of the accident.

Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated: 5/17/16



Hon. Alison Y. Tuitt