Frias v Yazidi
2016 NY Slip Op 31469(U)
July 29, 2016
Supreme Court, New York County
Docket Number: 154566/13
Judge: Leticia M. Ramirez

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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JUANA FRIAS,

Plaintiff,

Index #: 154566/13
Motion Seq. 01

-against-

DECISION/ORDER

ABDUL M. YAZIDI and DORSAINVIL FRANCOIS,

Defendants.

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Defendants' motion, pursuant to CPLR §3212, seeking summary judgment on the basis that plaintiff did not sustain a "serious injury" in accordance with Insurance Law §5102(d) is decided as follows:

Summary judgment is appropriate where there is no genuine triable issue of fact and where the papers submitted warrant that the court directs judgment in favor of the moving party as a matter of law. *Andre v Pomeroy, 35 N.Y.2d 361 (1974)*. While plaintiff has the burden of proof, at trial, of establishing a *prima facie* case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a *prima facie* showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact that require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. If defendants meet their burden, plaintiff must then present admissible evidence demonstrating that she sustained a "serious injury" within the meaning of Insurance Law §5102(d). *Licari v Elliot, 57 N.Y.2d 230 (1982)*.

In this action, plaintiff is alleging, *inter alia*, the following injuries as a result of the subject accident on March 20, 2011: loose and chipped teeth; disc bulges at L3-4 and L4-5; cervical and lumbar radiculopathy; cervical strain; left shoulder joint arthrosis; left shoulder conjoined tendon tenosynovitis/bursitis; left knee grade II ACL sprain; and left knee joint effusion.

Defendants met their burden of establishing that plaintiff did not sustain a "serious injury" based upon the "fracture" and/or "permanent loss of use" categories due to her claim of sustaining loose and/or chipped teeth, given plaintiff's deposition testimony that she did not undergo any dental treatment as a result of her claimed injuries. As the Court held in *Torres v Dwyer*, "[a]ny injury to a tooth can only meet the statutory threshold of "serious" where it requires dental treatment." *Torres v Dwyer, 84 A.D.3d 626 (1st Dept. 2011). See also, Epstein v Butera, 155 A.D.2d 513 (2nd Dept. 1989).* As such, plaintiff's claims of sustaining a "serious injury" based upon the "fracture" and/or "permanent loss of use" categories are dismissed.

Defendants also met their burden of establishing the absence of a "serious injury" based upon the "permanent consequential limitation" and "significant limitation" categories with, *inter alia*, the affirmed reports of orthopedist Dr. Lisa Nason, who opined that plaintiff had full ranges of motion of her cervical and lumbar spine, neurologist Dr. Jean-Robert Desrouleau, who opined that plaintiff had full ranges of motion of cervical spine, lumbar spine, left shoulder and left knee, and radiologist Dr. Audrey Eisenstadt, who opined that plaintiff's lumbar spine MRI conducted on August 8, 2011 was normal, necessitating plaintiff to come forward with competent objective medical evidence demonstrating a "serious injury" under those categories. *Licari v Elliot, supra.* Plaintiff failed to do so.

In opposition to defendants' motion, plaintiff submitted, *inter alia*, affirmations from radiologist Dr. Jack Lyons regarding plaintiff's lumbar spine MRI conducted on August 9, 2011, left knee MRI conducted on October 17, 2011and left shoulder MRI conducted on July 18, 2011. However, said affirmations are not properly affirmed pursuant to CPLR §2106, as Dr. Lyons does not affirm the contents to be true under the penalties of perjury. Instead, the affirmations state that Dr. Lyons "being duly sworn, deposes and says..." However, the "affirmations" are not notarized and, therefore, cannot constitute affidavits. Plaintiff also submitted unsworn medical records from Throggs Neck Physical Therapy. As the medical records are unsworn, they are not in admissible form and, thus, were not considered. *Quinones v Ksieniewicz, 80 A.D.3d 506 (1st Dept. 2011).*

Next, plaintiff submitted the medical records and office notes of Dr. Louis Rose and the medical records from Dr. Susan DiStasio of Multi-Specialty Pain Management PC as business

records. As said records contain medical opinions and/or diagnoses, they cannot be admitted as business records under CPLR §4518. Although Dr. Rose submitted the certification for his medical records and office notes, in the certification he did not affirm, under CPLR §2106, that the contents of his medical records and office notes were true under the penalties of perjury. Therefore, the medical records and office notes of Dr. Louis Rose and the medical records from Dr. Susan DiStasio of Multi-Specialty Pain Management PC have no probative value. *Rickert v Diaz, 112 A.D.3d 451 (1st Dept. 2013).*

Notably, the only affirmed report submitted by plaintiff was an affirmed report from Dr. Michael Katz, who conducted a Workers' Compensation IME of plaintiff on October 24, 2012. However, Dr. Katz opined that the plaintiff was no longer disabled and needed no further physical therapy or orthopedic care, which serves to defeat plaintiff's claim of sustaining a "permanent consequential limitation" and/or a "significant limitation" as a result of the subject accident.

Plaintiff's failure to submit proof of a recent physical examination further warrants dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "permanent consequential limitation." To demonstrate a "serious injury" under the "permanent consequential limitation" category, plaintiff must submit competent objective medical evidence of a contemporaneous physical examination and a recent physical examination, in which a doctor either specifies plaintiff's actual limitations compared to normal ranges of motion and identifies the objective tests used to measure said limitations or provides a qualitative assessment of plaintiff's limitation, including an objective basis and a comparison of plaintiff's limitations to the normal function, purpose and use of the affected body function or system during the relevant time period. *Toure v Avis Rent-A-Car Systems, Inc., 98 N.Y.2d 345 (2002); Soho v Konate, 85 A.D.3d 522 (1st Dept. 2011); Rosa v Mejia, 95 A.D.3d 402 (1st Dept. 2012);Feliz v Fragosa, 85 A.D.3d 417 (1st Dept. 2011); Nagbe v Minigreen Hacking Group, 22 A.D.23d 326 (1st Dept. 2005).*

The only evidence submitted by plaintiff of a recent physical examination is the examination by Dr. Susan DiStasio on August 2014 contained within the above-referenced Multi-Specialty Pain Management PC records. This evidence, even if in admissible form, does

not constitute a recent physical examination sufficient to defeat defendants' motion, since the examination was conducted before the examinations of defendants' experts. *Feliz v Fragosa, 85 A.D.3d 417 (1st Dept. 2011); Nagbe v Minigreen Hacking Group, 22 A.D.23d 326 (1st Dept. 2005).*

Accordingly, plaintiff's claims of sustaining a "serious injury" based upon the "permanent consequential limitation" and the "significant limitation" categories of the Insurance Law are dismissed.

Lastly, plaintiff also failed to raise a triable issue of fact as to whether she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident in accordance with the Insurance Law. During her deposition, plaintiff testified that she was not confined to bed or home as a result of the subject accident and that she was able to return to work within a couple of weeks after the subject accident and perform her usual duties. Furthermore, no competent objective medical evidence was submitted to support a claim under the "90/180" category of the Insurance Law. *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999).* As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

Based upon the foregoing, the defendants' summary judgment motion is granted and the plaintiff's Complaint is hereby dismissed.

Defendants are directed to serve a copy of this Decision, with Notice of Entry, upon plaintiff within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: July 29, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.