Shephard v Perkins
2017 NY Slip Op 30378(U)
January 19, 2017
Supreme Court, Bronx County
Docket Number: 301118/14
Judge: Donald A. Miles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 29

Index No.: **301118/14**
Motion Calendar No.
Motion Date: 9/20/16

KIARA SHEPHARD

Plaintiffs,

-against-

TY PERKINS and VIVB WHOLESALERS, LLC

Defendants.

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion and Cross Motion for Summary Judgment.

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits (A through J) in Support	**1**
Notice of Cross Motion, Affirmation in Support and Exhibits (A through F) in support	**2**
Reply Affirmation and Affirmation in Opposition to Plaintiff's Cross Motion	**3**

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

The motion by the defendants for summary judgment dismissing the complaint of the plaintiff, for failure to meet the serious injury threshold under the New York State Insurance Law Section 5102, and plaintiff's cross motion for an order granting plaintiff summary judgment on threshold, based upon the claim that plaintiff has satisfied the 90/180 day rule for establishing a serious injury, are denied.

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. *see*, *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985).

Under the no-fault law, a plaintiff can maintain an action for non-economic loss, including pain and suffering, arising from a motor vehicle accident, only if the accident caused a serious injury. *see*, *Licari v Elliot*, 57 N.Y.2d 230 (NY 1982). In the present action, the burden

rests upon the defendants to establish, by the submission of evidentiary proof in admissible form, that the plaintiff has not sustained a serious injury. *see*, *Lowe v. Bennett*, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st Dept. 1986), affirmed, 69 N.Y.2d 701, 512 N.Y.S.2d 364 (NY 1986). In the instant case the defendants allege and make a *prima facie* case that the plaintiff fails to meet the statutory standard to establish a serious injury pursuant to the New York State Insurance Law Section 5102. When the defendant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *see*, *Licari*, supra, and *Lopez v. Senatore*, 65 N.Y.2d 1017, 494 N.Y.S.2d 101 (NY 1985).

In opposition to the defendants' motion, the plaintiff relies on the affirmations of Rafael Abramov, M.D., and Tamer Elbaz, M.D., plaintiff's treating physicians, who both found significant restrictions in range of motion in plaintiff's neck and back on their initial evaluations on February 8, 2013 and May 19, 2014, respectively. Again, up to her most recent evaluation on February 10, 2016, Dr. Elbaz found significant restrictions in range of motion in plaintiff's neck and back. Dr. Elbaz's affirmation ascribes specific percentages to plaintiff's restrictions of motions from his initial examination of plaintiff on May 19, 2014 and the recent examination held on February 10, 2016. Based upon Dr. Elbaz's review of plaintiff's medical records, her complaints of pain and limitation and following his examination, he opined that the injuries to plaintiff's cervical and lumbar spine as well as the injuries to the right shoulder and right knee were all medically significant and causally related to the motor vehicle accident of January 12, 2013.

Crediting the view of the clinical findings and testing most favorable to the plaintiff, her doctors' conclusions of significant, consequential, and permanent injuries, raise a triable issue of fact that precludes summary judgment. There remain material issues of fact with respect to whether the plaintiff sustained, at minimum, a significant limitation of use of a body function or system. Moreover, the findings made by the plaintiff's expert are drawn from examinations and tests conducted contemporaneously with the subject accident and, therefore, are sufficient to causally connect the alleged injuries to the subject accident. *see*, *Vaughan v. Baez*, 305 A.D.2d 101, 758 N.Y.S.2d 648 (1st Dept. 2003) . The plaintiff has met her burden by providing medical

affirmations which raise an issue of fact concerning the plaintiff's injuries which preclude the granting of defendants' motion. *Toure v Avis Rent A Car*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002).

However, plaintiff has failed to establish the absence of a triable issue of fact, that the injuries she sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the accident. Plaintiff testified that at the time of the accident on January 12, 2013, she was working as a teller for New York Community Bank and that she was out of work for approximately eight months. Plaintiff claims that she was unable to work from February 8, 2013 through August 20, 2013, which is over the 90 days of the one hundred and eighty (180) days immediately following the subject motor vehicle accident.

In this regard, plaintiff relies on the affirmation of her treating physician Rafael Abramov, M.D., coupled with his medical records, stating that plaintiff was disabled from working on the aforesaid dates. Dr. Abramov noted that plaintiff was disabled from work in his initial report dated February 8, 2013, and in his follow-up reports dated March 15, 2013, April 26, 2013 and June 28, 2013. Plaintiff further relies on her employment attendance records from New York Community Bank to confirm that plaintiff missed 1 week immediately following the accident from January 14, 2013 to January 18, 2013; that plaintiff then returned to work for 3 weeks from January 21, 2013 to February 8, 2013 and then was continuously out of work from February 10, 2013 through August 16, 2013. Plaintiff argues that defendants do not, and cannot present any evidence to overcome plaintiff's *prima facie* showing of entitlement on the 90/180 prong of the serious injury threshold as defendants' doctor, Marianna Golden's examination of plaintiff was conducted on September 22, 2015, over 2 ½ years after the subject accident, and therefore fails to offer any opinion as to when plaintiff's injuries were resolved within the statutory period.

However, defendants point to the medical records of plaintiff's own physician, Dr. Abramov, dated June 28, 2013 which indicates that plaintiff was unemployed and looking for work. Defendants argue that if plaintiff was looking for work in June, then it should be viewed that plaintiff was no longer allegedly disabled from working and that she had already been terminated from her prior employment, a clear contradiction between Dr. Abramov's affirmation

and his medical records, creating a triable issue of fact for the jury.

In order to establish a serious injury under the 90/180 rule, the plaintiff must demonstrate proof of the extent that she was unable to do her job, objective medical evidence of any disability, and how same was related to the subject accident, and/or objective proof of the duration of the disability. It is also well settled that a plaintiff's affidavit or deposition testimony, detailing her inability to perform her usual and customary daily activities or consisting of merely subjective complaints of pain, should be disregarded as self-serving and is insufficient to raise a triable issue of fact. For this reason, the branch of plaintiff's cross motion for summary judgment on the 90/180 rule must be denied.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment dismissing the complaint for plaintiff's failure to meet the statutory threshold of serious injury is denied, and it further

ORDERED that the plaintiff's cross motion for an order granting plaintiff summary judgment on the issue of serious injury is denied.

This constitutes the decision and Order of the Court.

JAN 19 2017

DATE

HON. DONALD MILES
Justice Supreme Court