

Adyemo v Walker

2020 NY Slip Op 35686(U)

December 4, 2020

Supreme Court, Queens County

Docket Number: Index No. 713669/2017

Judge: Lourdes M. Ventura

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SHORT FORM ORDER

FILED

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

**12/4/2020
3:42 PM**

Present: HONORABLE LOURDES M. VENTURA, J.S.C.
-----X

IAS Part 37

**COUNTY CLERK
QUEENS COUNTY**

VERONICA ADYEMO and ATANDA ADYEMO,
Plaintiffs,

Index

Number: 713669/2017

-against-

Motion

Date: August 24, 2020

EBONY J. WALKER and NYUHEA V. JONES,
Defendants.

Motion

Seq. No.: 2

The following electronically filed (EF) papers read on this motion by defendants Ebony J. Walker and Nyuheha V. Jones (hereinafter "defendants") for an Order: pursuant to CPLR 3212, for summary judgment due to plaintiffs failure to meet the threshold limits set by New York State Insurance Law §§ 5102 and 5104.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 20-29
Opposition to Motion - Affirmation - Exhibits.....	EF 31-37
Affirmation in Reply - Exhibits.....	EF 38

Upon the foregoing papers, it is Ordered that defendants' motion is determined as follows:

Plaintiffs commenced this action to recover for damages arising from injuries allegedly sustained in a motor vehicle collision that occurred on or about June 6, 2015, at or near the Southern State Parkway at or near the intersection of Eagle Avenue, in the County of Nassau, State of New York.

Defendants' filed the instant motion seeking an order granting them summary judgment pursuant to CPLR 3212. Defendants' aver that plaintiff Veronica Adeyemo's injuries fail to meet the threshold limits set by New York State Insurance Law §§ 5102 and 5104.

Plaintiff Veronica Adeyemo opposes defendants' motion and avers that she has suffered a significant limitation of use of a body function or system and was unable to perform her usual and customary daily activities for ninety out of the one hundred and eighty days immediately following the accident and therefore, the motion for summary judgment should be denied.

“It is well settled that ‘the proponent of a summary judgment motions must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ ”(see *Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such prima facie “showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

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 (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). 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*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [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 (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott*, 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (see *Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]). Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to New York Insurance Law § 5102(d), “ ‘serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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.”

The Court of Appeals has long recognized that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (see *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002] citing (*Dufel v Green*, 84 NY2d 795 [1995]; see also *Licari v Elliott*, 57 NY2d 230, 234-235 [1982]). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (see e.g. *Dufel*, 84 NY2d at 798; *Lopez v Senatore*, 65 NY2d 1017 [1985]); subjective complaints alone

are not sufficient (*see e.g. Gaddy v Eyler*, 79 NY2d 955 [1992]; *Scheer v Koubek*, 70 NY2d 678 [1987]).

“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 can be used to substantiate a claim of serious injury *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002] citing (*see e.g. Dufel*, 84 NY2d at 798; *Lopez*, 65 NY2d at 1020). “An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350-51 [2002] citing *Dufel v Green*, 84 NY2d 795 [1995]).

In the instant case, defendants submit a report dated July 24, 2019, affirmed by Doctor Mariana Golden, M.D. (hereinafter “Dr. Golden”), who examined plaintiff Veronica Adeyemo on July 24, 2019. The report in relevant part states:

“ DISABILITY:

Today's examination was normal with no objective signs of neurologic dysfunction or impairment. The claimant was neurologically intact with no objective signs of lumbar radiculopathy. She exhibited full range of motion of the lumbar spine on examination. Also, the MRI and X-ray of the lumbar spine documents degenerative findings.

Ms. Adeyemo is not disabled at this time from a neurologic point of view. She was not employed at the time of the accident of June 6, 2015; however, she may work at any job for which she is qualified for and may perform all activities of daily living without any restrictions. There was no objective evidence of permanency or residuals.”

In opposition, plaintiff submits an affirmation dated March 10, 2020, affirmed by Doctor Jamil M. Abraham, M.D. (hereinafter “Dr. Abraham”), who examined plaintiff several times including August 5, 2019. The affirmation in relevant part states:

“8. On August 5, 2019, Ms. Adeyemo once again sought medical attention at my office. At this visit, Ms. Adeyemo complained of pain in her lower back, right hip and left hip.

9. I conducted a physical examination of Ms. Adeyemo and noted decreased ranges of motion of Ms. Adeyemo's lumbar spine, right hip and left hip. These range of motion tests were conducted using a goniometer. The range of motion test on Ms. Adeyemo's lumbar spine revealed the following reductions in the range of motion:

Lumbar Spine:	Normal	Examination
Lumbar Flexion	60 degrees	30 degrees
Lumbar Extension	25 degrees	5 degrees
Lumbar Lateral Left	25 degrees	15 degrees
Lumbar Lateral Right	25 degrees	15 degrees

This examination represents a loss of Flexion of 50%, a loss of Extension of 80%, a loss of Lumbar Lateral Left of 40%, and a loss of Lumbar Lateral Right of 40%...

14. The history being correct it is my opinion to a degree of medical certainty that the injuries listed herein and within the attached medical records were causally related to the accident of June 6, 2015. Ms. Adeyemo's complaints are consistent with the injuries she sustained in this accident. These injuries are permanent."

Here, Dr. Golden conducted an examination of the plaintiff Veronica Adeyemo was done one month prior to Dr. Abraham examination of the plaintiff Veronica Adeyemo. Notably, Dr. Golden concluded that plaintiff Veronica Adeyemo exhibited full range of motion of the lumbar spine on examination. In contrast, Dr. Abraham concluded decreased ranges of motion of Ms. Adeyemo's lumbar spine, right hip and left hip as outlined in Dr. Abraham's affirmation cited above. Most significant, Dr. Abraham concluded, that the injuries sustained by Plaintiff Veronica Adeyemo were causally related to the June 6, 2015 collision and that said injuries are permanent.

The Court finds that the conflicting medical reports submitted by the parties raise triable issues of fact as to whether the plaintiffs sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (see *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]).

Accordingly, defendants' motions for an Order pursuant to CPLR 3212 on the issue of "serious injury" pursuant to of Insurance Law § 5102 is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: December 4, 2020



LOURDES M. VENTURA, J.S.C.

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